LL.B. I Term

LB-103-Law of Torts Including Motor Vehicles Accidents and Consumer Protection Laws

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The Law of Torts is primarily concerned with redressal of wrongful civil actions by awarding compensation. In a society where men live together, conflicts of interests are bound to occur and they may from time to time cause damage to one or the other. In addition, with the rapid industrialization, tortious liability has come to be used against manufacturers and industrial units. The Law of Torts had originated from Common Law and by and large this branch of law continues to be uncodified. Tortious liability has been codified only to a very limited extent such as workmen's compensation, motor vehicle accidents, environmental degradation, consumer protection and the like.

As the Law of Torts is basically a judge made law, students are required to study it in the light of judicial pronouncements. They are required to equip themselves with the latest developments extending to the entire course.

Prescribed Books:

1. W.V.H. Rogers, **Winfield & Jolowicz on *Tort*** (Sweet & Maxwell, 19th edn., 2016).
2. R.F.V.Heuston and R.A. Buckley, **Salmond & Heuston** o**n *The Law of Torts*** (Sweet & Maxwell, 21st edn., 1996).
3. G.P.Singh and Akshay Sapre , **Ratanlal & Dhirajlal *The Law of Torts*** (Lexis Nexis, 28th edn., 2019).
4. Avtar Singh (Rev.), **P.S. Atchuthen Pillai *Law of Torts*** (Eastern Book Company, 9th edn., 2008).
5. Tony Weir, ***A Casebook on Tort*** (Sweet & Maxwell, 10th edn., 2004).

PART A: LAW OF TORTS

Topic 1 : Introduction : Definition, Nature and Scope

(a) Origin and Development of Law of Torts in England – Forms of action; specific remedies from case to case.
(b) Evolution of Law of Torts in India- uncodified and judge-made; advantages and disadvantages.
(c) Meaning and function of Law of Torts- Prescribing standards of human conduct, redressal of wrongs by payment of compensation, injunction.
(d) Definition of tort
(e) Constituents of tort – wrongful act, legal damage and remedy – *injuria sine damno* and *damnum sine injuria ;ubi jus ibi remedium*
(f) Tort *vis-a-vis* other wrongs e.g. crime, breach of contract, etc.

(g) Relevance of intention, motive and malice in Law of Torts

Topic 2: Defences against Tortious Liability

(a) Consent as defence – *volenti non fit injuria* – Essentials for the application of the defence;
Exceptions to the defence – Rescue cases and Unfair Contract Terms Act, 1977 (U K)
(b) Statutory authority
(c) Act of God/vis major

Topic 3: Negligence – Liability at Common Law and Statutory Law

(a) Theories of Negligence
(b) Meaning and Definition
(c) Essential Ingredients – duty to take care, breach of duty, consequent damage
(d) Proof of Negligence- *Res ipsa loquitor*
(e) Manufacturer's Negligence
(f) Medical Negligence

Topic 4: Nervous Shock

(a) Meaning
(b) Impact theory- From personal injury, from property damage
(c) Foreseeability of psychiatric illness
(d) Immediate aftermath test
(e) Primary victims, secondary victims

Topic 5: Remoteness of Damage

(a) Causation- But for test, concurrent causes, consecutive causes, proof of causation
(b) *Novus actus interveniens*
(c) Tests of Remoteness of Damage- Natural and proximate consequence, directness and foreseeability
(d) Eggshell Skull Rule

Topic 6 : No Fault Liability– Strict and Absolute Liability

(a) Meaning and rationale of no fault liability
(b) Rule of Strict Liability- Rule in *Rylands* v. *Fletcher*- origin, scope and exceptions,

Topic 7: Vicarious Liability of the State

Topic 8: Defamation

Part B: Consumer Protection Laws

(a) Evolution of Consumer Protection Movement, Aim and objectives of the Consumer Protection Act, 1986

(b) The objectives and reasons for enactment of the Consumer Protection Act, 2019

(c) New dimensions of the CPA, 2019 as compared to the CPA, 1986:

1. Definitions of consumer, service, defect, deficiency, complaint, complainant, goods, manufacturer, misleading advertisement, restrictive trade practice, unfair contract, unfair trade practice

2. Three-tier Consumer Dispute Redressal Mechanism and enhancement of pecuniary jurisdiction. Provisions in the CPA, 2019

3. Establishment of Consumer Protection Councils

4. Establishment of Central Consumer Protection Authority (CCPA)

5. The inclusion of e-commerce transactions

6. Specific recognition of six rights of consumers

7. Introduction of the concept of product liability

8. Stringent penalties for misleading advertisements

9. Introduction of mediation as an Alternate Dispute Resolution mechanism

10. Remedies for unfair contracts

11. Expansion of the definition of Unfair Trade Practices

(d) Cases:

IMPORTANT NOTE:

1. Topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.

2. The students are required to study the legislations as amended up-to-date and consult the latest editions of books.

INTRODUCTION : DEFINITION, NATURE AND SCOPE

White v. *John Warrick & Co. Ltd.*

(1953) 2 All ER 1021

SINGLETON, L.J. – The plaintiff, a news agent and tobacconist carrying on business at Canonbury, entered into an arrangement with the defendants that they should supply him with a tradesman's tricycle, a tricycle with a large carrier in front, for use in the delivery of newspaper. The arrangement was embraced in a written contract dated Apr. 13, 1948. The contract was on a printed form used by the defendants, on which their name appears in print, and the agreement is stated to be made between them (described as the owners) and the plaintiff, who is described as the hirer.

> *By cl. 1:* "The owners agree to let, and the hirer agrees to hire, Carrier Cycles Nos. 13409 for the term of three years from the date hereof (and thereafter from year to year) at the weekly rent of 5s each payable quarterly in advance at the owners above address, the first payment being due on delivery of the machines."
>
> *By cl. 2:* "In consideration of such sum the owners agree to maintain the machines in working order and condition (punctures excepted) and to supply spare carriers as soon as possible when the hirer's machines are being repaired without any charge beyond the agreed amount as above…."

The owners also agree to supply lamps and accessories and the like, and to repair damage in certain cases.

On that the owners supplied a machine which was used by the plaintiff for a considerable period, and which, so far as we know, was kept in order until towards the end of May, 1950, when the machine, which was in the plaintiff's possession under the contract, was in need of repair, and the owners were so informed. On Saturday, June 3, a representative of the owners went to the plaintiff's shop and left a spare tricycle instead of that which was out of order, which he took away. In so doing, the owners were purporting to perform their obligation under cl. 2 of the contract. The plaintiff did not examine the tricycle, but very soon mounted it to go about his work. When he had gone about a quarter of a mile the saddle went forward in such a manner that he was thrown off the tricycle on the ground, and was injured. He said he got up and pushed the tricycle back to his shop, the saddle then sloping down on to the crossbar, and when he examined the tricycle he found that the saddle was loose. He was not thought, at first to be badly hurt, but unfortunately he had suffered an injury to his knee. He was in hospital for some considerable time suffering form synovitis. PARKER. J. who heard the plaintiff's claim, said that, if he had found the plaintiff entitled to damages, he would have awarded £505. That was a provisional assessment and no more.

The evidence given by the plaintiff and by his wife, and by a young man named Anthony employed by the plaintiff, seemed to show that the tricycle was out of order in that some nuts under the seat were rusty and could not be moved. Anthony, the chief witness, whose evidence impressed the judge on that point was not employed by the plaintiff at the time of

the trial, but was engaged on delivering newspapers and the like for the plaintiff in June, 1950. He told the judge that after hearing of the accident, he saw the tricycle, and the saddle had been tilted back. He said that on several occasions thereafter he used the tricycle, and the saddle used to slip backwards and cause him to lose control. He tried to tighten the nut, but it was too rusty to move. There was other evidence on that on both sides.

The plaintiff set up two causes of action against the owners. The first was that the owners were responsible to him in damages for breach of warranty. It was said that they were under a duty under the contract to supply a tricycle which was reasonably fit for the purpose for which it was required, that they did not do so, and that the plaintiff was entitled to damages.

The second claim of the plaintiff was: You, the persons from whom I had this tricycle, owed a duty to take reasonable care, i. e. to take that care which a reasonably careful tricycle owner would take on the hiring to another of a tricycle for his use, and you failed in that duty. If you had examined the tricycle, you would have found that the nuts were rusty and that the saddle was loose. I used the tricycle in the way in which it was intended that I should use it, and I sustained an accident because you had not fulfilled your duty. You had not taken reasonable care, you were negligent, and I am entitled to damages.

In reply to both those claims the owners denied negligence and breach of duty and breach of contract. They added a plea in para 4 of the defence:

> By cl. 11 of the written agreement between the parties the (owners) are not liable for any personal injuries to the plaintiff when riding a machine provided for him.

Clause 11 of the agreement is:

> Nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machines hired nor for any third party claims nor loss of any goods, belonging to the hirer, in the machines.

It is conceded by counsel for the plaintiff that that clause would prevent the plaintiff from succeeding on a claim based on breach of contract, but his submission is that, in the circumstances proved, there was negligence on the part of the defendants, and that that clause is no bar to an action for damages for negligence.

The plaintiff submitted that, though cl. 11 relieves the owners in respect of a claim for breach of contract arising from the agreement, it does not absolve them if there is a cause of action established on the ground of negligence. Counsel for the owners submits that, if there was negligence, it was negligence in connection with the performance of the contract, that the machine which was supplied was supplied in performance of the obligation arising under the contract and that what was done was under the agreement. He contended that the cause of action, if there was one, arose out of the agreement, and that, whether there was negligence or not. Cl. 11 prevents the plaintiff from succeeding in an action of this nature.

That gives rise to a question of some nicety. I am inclined to think for this purpose to the speech of Lord Macmillan in ***M' Alister (or Donoghue*) v. *Stevenson*** [(1932) AC 609].

> On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is equally well established doctrine that negligence apart from contract gives a right of

> action to the party injured by that negligence – and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject. It appears, say Sir Frederick Pollock, ***Law of Torts.*** 13th ed. p. 570. "that there has been (though perhaps there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect."

It is clear from those words of Lord Macmillan that an action for damages for breach of contract and an action for a tort may arise from the same set of facts. It is said that that position arises in this case, and that, though an action for damages for breach of contract may be said to be barred by cl. 11 of the contract, it cannot be said that the words of that clause shut out the hirer from what he would normally have, an action for damages for the tort of negligence.

In ***Taylor*** v. ***Manchester, Sheffield & Lincolnshire Ry. Co.*** [(1895) 1 Q.B. 140], A. L. Smith, L.J., said:

> It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not.

In the circumstances of the present case the primary object of the clause, one would think, is to relieve the owners from liability for breach of contract, or for breach of warranty. Unless, then, there be clear words which would also exempt from liability for negligence, the clause ought not to be construed as giving absolute exemption to the owners if negligence is proved against them. The result is that cl. 11 ought not I think, to be read as absolving the owners from liability for negligence if it is proved that the injury which the plaintiff sustained was due to lack of that care which one in the owners' position ought to take when supplying a tricycle for the use of a hirer. If that is proved, then the owners do not escape liability by reason of cl. 11.

DENNING, L.J. - In this case the owners supplied a tricycle on hire to the plaintiff, who was a news vendor, intending that he and his servants should ride it. The tricycle was defective, and, in consequence of the defect, the plaintiff was thrown off and injured. He now claims damages for breach of contract or negligence. The owners claim to be protected by the printed clause which my Lord has read. In this type of case, two principles are well settled. The first is that, if a person desires to exempt himself from a liability which the common law imposes on him, he can only do so by a contract freely and deliberately entered into by the

injured party in words that are clear beyond the possibility of misunderstanding. The second is that, if there are two possible heads of liability on the defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence.

In the present case, there are two possible heads of liability on the owners, one for negligence, the other for breach of contract. The liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying a defective machine, even though they were not negligent. In these circumstances, the exemption clause must, I think, be construed as exempting the owners only from their liability in contract, and not from their liability for negligence. Counsel for the owners admitted that, if the negligence was a completely independent tort, the exemption clause would not avail, but he said that the negligence here alleged was a breach of contract, not an independent tort. The facts which give rise to the tort are, he said, the same as those which give rise to the breach of contract and the plaintiff should not be allowed to recover merely by framing his action in tort instead of contract.

In my opinion the claim for negligence in this case is founded on tort and not on contract. That can be seen by considering what would be the position if, instead of the plaintiff himself, it was his servant who had been riding the tricycle and had been injured. If the servant could show that the owners had negligently sent out a defective machine for immediate use, he would have had a cause of action in negligence on the principle stated in ***M' Alister (or Donoghue)* v. *Stevenson*** and, as against the servant, the exemption clause would be not defence. That shows that the owners owed a duty of care to the servant. A fortiori they owed a like duty to the hirer himself. In either case, a breach of that duty is a tort which can be established without relying on any contract at all. It is true that the hirer could also rely on a contract, if he had wished, but he is not bound to do so, and if he can avoid the exemption clause by framing his claim in tort he is, in my judgment, entitled to do so.

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Town Area Committee v. *Prabhu Dayal*

AIR 1975 All 132

HARI SWARUP, J. – Plaintiff's case was that he had made construction of 16 shops on the old foundations of the building known as Garhi and the defendant Town Area Committee acting through its Chairman and Vice-Chairman, who are defendants 2 and 3 illegally demolished these constructions. By this demolition plaintiff suffered a loss of Rs. 1,000. According to him the notice under Section 186 of the U.P. Municipal Act was bad as it gave to the plaintiff only two hours' time to demolish the constructions and not a reasonable time as contemplated in Section 302 of the Act. It was also asserted that demolition, after this notice was bad as the notice was served at a time when the plaintiff was out of station. The action was said to be mala fide.

2. The plea of the defendants was that the constructions had been made by the plaintiff without giving the notice of intention to erect the building under Section 178 and without obtaining the necessary sanction under Section 180 of the Act. It was denied that the action was mala fide and it was asserted that the notice to demolish the constructions had been given earlier on 18th December requiring the stoppage of further construction and removal of constructions already made and when it was not complied with an order had been passed by the District Magistrate directing the Town Area Committee to take action under Section 186. Thereafter another notice was given on December 21, which also was not complied with and only then the building was demolished in accordance with law. On these grounds it was alleged that the plaintiff was not entitled to claim any damages.

6. Coming to the merits of the case, it appears that the lower appellate Court has completely misdirected itself. The claim was on the basis of damages caused to the plaintiff by an act of the defendants. The plaintiff can get compensation only if he proves to have suffered injury because of an illegal act of the defendant and not otherwise. Malice does not enter the scene at all. A legal act, though motivated by malice, will not make the actor liable to pay damages. This proposition finds support from Salmond's observations "So too a landlord who serves a valid notice to quit cannot be held liable in tort because his motive was the vindictive one of punishing the tenant for having given evidence against him in other proceedings" [Salmond on the Law of Torts, Fifteenth Edition, p.18] …. Merely because some officer has malice against a citizen who has committed a wrong will not render the action of the authority invalid if it is otherwise in accordance with law. Mere malice cannot disentitle a person from taking recourse to law for getting the wrong undone. It is, therefore, not necessary to investigate whether the action was motivated by malice or not.

7. Before the plaintiff can get any damages he must prove that he had suffered an injury. Law does not take into account all harms suffered by a person which caused no legal injury. Damage so done is called *damnum sine injuria*. Such a damage does not give the sufferer any right to get compensation. The term 'injuria' is to be understood in its original and proper sense of wrong [in jus contrary to law Salmond on the Law of Torts, p. 17]. In the present case there is no doubt that the plaintiff was himself guilty of committing the wrong. As found by the trial Court, the plaintiff had not given any notice under Section 178 of the U.P. Municipalities Act and had not obtained the sanction contemplated by Section 180. According to the findings of the trial Court the building abuts a public street and prior notice

and sanction were necessary. These findings have not been reversed by the appellate Court. Section 185 of the Act says:

> Whoever begins, continues or completes the erection or re-erection of, or any material alteration in a building or part of building or construction or enlargement of a well, without giving the notice required by S. 178, or in contravention of the provisions of Section 180, sub-section (5) or of any order of the Board refusing sanction or any written directions made by the Board under Section 180 or any bye-law, shall be liable upon conviction to a fine which may extend to one thousand rupees but which, in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court shall not be less than two hundred and fifty rupees.

Section 186 of the Act gives the Board a power to demolish a construction the making of which amounts to an offence under Section 185.

8. According to learned counsel for the plaintiff, the demolition was not done in accordance with law as the notice did not give reasonable time and hence the Municipal Board will be liable to pay damages. The notice though of an earlier date, was served on the 18th and it required demolition before the 18th. Of course such a notice could not be complied with in its terms, but that would not authorise the plaintiff to maintain the constructions illegally made. The plaintiffs did not appear before the authority to show cause why the building should not be demolished. Again after three days another notice was given and the building was thereafter demolished. There was no objection made that the two hours' time given in the notice of the 21st was insufficient. Had the plaintiff made a complaint that he had suffered a loss because the demolition was done the same day and he would not have suffered loss if greater time had been granted for demolishing the illegal constructions, that would have been a different matter. The case of the plaintiff, however, was that he had a right to maintain the building and the action of Board was bad because it was mala fide. In this plea the time factor ceases to be of any importance. The notice cannot in these circumstances be said to be such as to make the consequential action illegal.

9. There is also no merit in the contention of the learned counsel that the plaintiff had suffered injuria by the act of the demolition of the building because he had a fundamental right to hold and enjoy the property even though it was constructed without prior sanction from the Municipal authorities. There is no right to enjoy property not legally obtained or constructed. A person has been given by law a right to construct a building, but that right is restricted by various enactments, one of which is the U.P. Municipalities Act. If a person constructs a building illegally, the demolition of such building by the municipal authorities would not amount to causing "injuria" to the owner of the property. No person has the right to enjoy the fruits of an act which is an offence under law.

10. As the plaintiff has failed to prove that he had suffered injuria in the legal sense, he is not entitled to get any compensation. The decree of the Court below cannot, even though the plaintiff may have suffered damages, be sustained.

11. In the result, the appeal is allowed, the degree of the lower appellate Court is set aside and that of the trial Court restored.

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P. Seetharamayya v. *G. Mahalakshmamma*

AIR 1958 AP 103

MOHAMMED AHMED ANSARI, J. – 2. The parties to the appeals are owners of adjacent lands. The appellants own S. Nos. 86 and 87/2, which have been shown in Ex. A-4, the plan prepared by the Commissioner in the case, as A and A-1. Between the plot marked A and the vagu described as a stream in the aforesaid plan are lands belonging to the defendants. These have been shown in Exs. A-4 as B and B-1. The former belongs to the fifth defendant in the case, who is the sole respondent in S.A. No. 1933 of 1953; and the plot marked B-1 is owned by defendants Nos. 1 to 4. The vagu forms the western boundary of the three plots, B, B-1 and A-1.

It may be taken as established that the fifth defendant had constructed a bund on her land to preserve part of it from damage by flow of water through a breach in the embankment of the vagu. Ex. A-4 shows the breach to be in plot B, and marks the bund as T. It is equally clear that defendants Nos. 1 to 4 have dug a trench to ward off water entering into their plot B/1; which trench is marked as C in the Commissioner's plan. These defendants have further constructed another bund to the north of their land as additional safeguard.

Ex. A-4 also shows in plot B yet another bund as XZ, which has been built to prevent water stopped by the trench and the bund, from entering other parts of the fifth defendants' land. Finally, there is a bund in the appellant's plot A, which runs parallel to the boundary between plots A and B, and has several breaches in it.

3. The appellants' case is that the fifth defendant on account of bitter enmity between her and the other defendants, put up bunds in her plot, and defendants Nos. 1 to 4 dug the trench as well as put up a bund to the north and west of their plots; that thereby rain water falling on the plots flowed into plot A, completely washing variga and groundnut crops raised therein; and that the appellants twice put up bunds along a length of 150 feet to the west of their plot A to prevent the flow of rain water, but each time the bunds were washed away.

The appellants have, therefore, asked for mandatory injunction to demolish the bunds and to fill in the trench on the defendants' lands, for permanent injunction against these defendants against putting up bunds or digging a trench, and for Rs. 300 as damages for the loss caused by the flow of water.

7. The leading case on the point is ***Nield* v. *N.W. Rly*** [(1874) 10 Ex. 4], which has been followed both in England and in this country. There, a flood had occurred in a canal from the bursting of the banks of an adjoining river, and the defendants, the canal company, placed a barricade across the canal above their premises, and thereby flooded the plaintiff's premises. It was held that they were not liable for the damages. Lord Bramwell, B. says:

> The flood is a common enemy against which every man has a right to defend himself, and it would be mischievous if the law were otherwise, for a man must then stand by and see his property destroyed, out of fear lest some neighbour might say 'you have caused me an injury.' The law allows, I may say, a kind of reasonable selfishness in such matters; it says 'Let every one

> look out for himself, and protect his own interest,' and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it 'why did not you do the same'? I think what is said in *Mensies* v. *Earl of Breadalbane*, [(1828) 3 Bligh (NS) 414] is an authority for this, and the rule so laid down is quite consistent with what one would understand to be the natural rule .....

8. Before giving the other authorities, English and Indian, wherein the aforesaid observations of Bramwell, B. have been followed, I would cite at this stage a passage from Beven on ***Negligence*** (4th Edition) at p. 599, which runs as follows:

> The distinction, then, is between water coming on land in the normal way and water coming on abnormally. The former is an incident to property from which a man may not relieve himself at the expense of his neighbour; the latter is a common enemy, against the advent of which each may take precautionary measures without regarding his neighbour; though when the evil has once befallen him, he may not shift it from his own shoulders to those of his neighbours; he may protect his land but may not relieve his land from actual injury at the expense of his neighbour.

9. The aforesaid quotation neatly summarises the several authorities covering the position of the land owner, who finds his land threatened with rain water or by flood. But to continue with the authorities, the next case I would refer to is ***Gerrard* v. *Crowe*** [AIR 1920 PC 111]. The parties to the case owned lands upon opposite sides of a river, which in flood, rose higher than its bank, and some of the flood water used to flow over the respondents' land, ultimately finding its way back to the river. The respondents erected an embankment from a point on their land about half a mile from the river diagonally to its bank, with the object of protecting their lands behind the embankment, and the water-flow over the appellant's land in time of heavy floods was thereby increased.

The appellant sued the respondents for damage and an injunction. It was not proved that any flood channel was obstructed or existed or that there was any ancient or rightful course for the flood waters across the respondent's land. In these circumstances, the Privy Council held that the action could not be maintained, and Viscount Cave observed:

> The general rule as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In ***Farquharson* v. *Farquharson*** [1741 Mor 1277], the rule was stated as follows: 'It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground; but it was found not lawful to use any operation in the alveus.

11. These authorities have been followed in this country as laying down the correct proposition of law, and the earliest of such cases is ***Gopal Reddi* v. *Chenna Reddi*** [ILR 18 Mad 158]. The defendants of the case were owners of land on the banks of a jungle stream and had raised embankments which prevented their lands from being flooded, but caused the

stream to overflow the land of the plaintiff situated lower down the stream. It appears that it was not reasonably practicable for the defendants to protect their lands from inundation by any other means than those adopted. A Division Bench held that no actionable wrong had been committed and the suit was not, therefore, maintainable. Shephard J. says at p. 161:

> There is a great distinction between protecting oneself from an apprehended danger and getting rid of the consequences of an injury which has actually occurred. The distinction was clearly marked in ***Whalley* v. *Lancashire and Yorkshire Ry. Co.*** [(1884) 13 QBD 131], where it was held that the defendants were liable because, a misfortune having happened they had transferred it from their own land to that of the plaintiffs.

In ***M. and S.M. Rly. Co., Ltd.* v. *Maharaja of Pithapuram*** [AIR 1937 Mad 703], the appellants were made liable because an opening was made in the northern bank of the stream for the purpose of averting imminent danger to the appellant's property. It was held therein that if flood water comes on to a land the landholder must not take active steps to turn it on to his neighbour's property since such an act would not amount to a protective measure in anticipation of apprehended danger.

Again in ***Shankar* v. *Laxman*** [AIR 1938 Nag 289], Niyogi J. had held that where a riparian proprietor for his own purposes, viz. to rid his land of the mischief diverts the watercourse to his neighbour's land and the accumulation of water there was not made as a voluntary act by the neighbour for his own benefit but by that riparian proprietor for ridding his land of the calamity, it is the duty of that neighbour to protect himself from the threatened danger irrespective of the consequences to his another neighbour. Finally, there is an unreported decision by a learned Judge of this Court in S.A. No. 24 of 1949. In this case of ***Venkayya* v. *Budrayya***, all the English and Indian authorities on the point have been collected and considered. The defendants had erected a bund in their S. No. 158, which was near the boundary between their and plaintiff's lands. There was also a trench parallel to the bund. The plaintiffs complained that flood water coming from the southern side used to flow into theirs, and then to other lands through the defendant's land, and this was stopped by the construction. The defendants claimed that they were entitled to erect the bund to prevent the flood water from coming on their land.

The Lower Courts had given the plaintiff mandatory injunction, failing to distinguishing between natural drainage and flood water. The learned Judge of this Court allowing the appeal, held firstly that the plaintiffs had failed to establish having suffered substantial damage, and then proceeded to decide whether the defendants were entitled to erect the bund with a view to prevent the flood water from reaching their field. On the latter question, he has held as follows:

> In a case where the heavy flood was an unforeseen one, it is the right of the owner to protect himself from inundation and the upper owner cannot complain if the lower owner protects himself.

12. By way of contrast to the aforesaid right of protecting one's land against flood, it would be useful to give an authority on what the owner of the adjacent land should not do when, as Beven calls it, water comes on the land in the normal way. The Full Bench of the Madras High Court in ***Sheik Hussain Sahib* v. *Subbayya*** [AIR 1926 Mad. 449], has held that

an owner of land on a lower level, to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land.

Again the right of protection against flood water should not be confused with the customary right of an agriculturist in this country. In ***Kasia Pillai* v. *Kumaraswami Pillai*** [AIR 1929 Mad 337], an agriculturist has been held entitled to drain off into the neighbouring lower lands water brought into his land for agricultural operations. Madhavan Nair J. has observed in the aforesaid case (at p. 339):

> It appears to us that in India, the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations is a customary right. He is entitled to do so by custom; otherwise, it will be impossible to carry on agricultural operations successfully.

13. Having stated the legal position, it is clear that the judgment of the trial Court fails to draw a distinction between normal rain and flood water. Had the damage been caused by normal rain water having been forced towards the appellants' land, one would expect the loss to be annual, but there is no such evidence. Moreover, the sifting of evidence by the trial Court is not satisfactory. For example, it says there is no regular vagu to the west, but a mere channel so that the water from the north may flow in a defined course towards the tank in the south; yet, the Commissioner's plan describes the same vagu as a stream.

P.W. 1 also states that the ryots had put bunds on all the lands adjoining the vagu except at point of the breach. The precaution would have been unnecessary had not the stream been turbulent. The Lower appellate Court in the middle of paragraph 7 of its judgment states that it is on account of vagu water during flood seasons, that is coming through the breach into the fifth defendant's land first, the flow of which into the lands of defendant, Nos. 1-4 was prevented by them, and again the flow of which into the fifth defendant's land is prevented by her that is now flowing into the plaintiff's land causing damage. These are the proved facts on which the judgment is based, and those facts are not in dispute.

Such are the conclusions of fact in these second appeals. It was urged before me that there was no stream on the west of the defendant's lands and, therefore, they have not the right of riparian owners in times of flood. But the finding of the Lower Appellate Court about there being a stream, is supported by the description given to the channel in the Commissioner's plan, and the finding must, therefore, stand.

14. The next point in the case is whether the damage was caused by flood water, and the passage from the judgment of the lower appellate Court already referred to clearly shows that. Indeed, the court says that the water during the flood season having caused the damage, was not disputed before it. In these circumstances, it cannot be held that the defendants were not entitled to protect their lands from the flood water. I had first considerable doubt as to why the fifth defendant should not be compelled to close the breach through which the water had come on the land.

But it appears to me that once the right to protect the land from flood is ceded to the landholder, the owner should further enjoy the power of reasonably selecting how to protect the land. There is no evidence in the case that the fifth defendant in putting the bunds, has negligently chosen the means of protecting her land. Nor is there any data for holding that the

water having accumulated on the land, the fifth defendant had diverted the accumulation from plot B. Again, the deposition of P.W. 1 shows that there has been no obstruction of the vagu. Therefore, this case is a clear one of *damnum sine injuria*, and the plaintiffs must adopt their own protective measures against the flood water.

15. In these circumstances, both the appeals fail, and are dismissed with costs throughout.

* * * * *

Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum & ors.

1997 (9) SCC 552

Justice K Ramaswamy : This appeal by special leave arising from the judgment of the Division Bench of the Gujarat High Court, dated March 20, 1991 in First Appeal No.259 of 1980, gives rise to an important question of law of liability for negligence in causing the death of one Jayantilal, the husband of the respondent No.1 and father of the respondents Nos. 2 to 4 due to sudden fall of a tree while he was passing on the road in Kothi compound of Collectorate on his way to attend to his duties as a Clerk in the office of the Director of Industries, Rajkot.

The admitted facts are that the deceased Jayantilal was residing in Padadhri. He used to daily come on a railway season ticket to Rajkot to attend to his office work. On March 25, 1975, while he was walking on footpath on way to his office, a road-side tree suddenly fell on him as a result of which he sustained injuries on his head and other parts of body and later died in the hospital. The respondents filed the suit for damages in a sum of Rs.1 lakh from the appellant-Corporation. The trial Court decreed the suit for a sum of Rs.45,000/- finding that the appellant had failed in its statutory duty to check the healthy condition of trees and to protect the deceased from the tree falling on him resulting in his death. On appeal, the Division Bench has held that the appellant has statutory duty to plant trees on the road-sides as also the corresponding duty to maintain trees in proper condition. While the tree was in still condition, it had suddenly fallen on the deceased Jayantilal who was passing on the footpath. The statutory duty gives rise to tortious liability on the State and as its agent, the appellant-Corporation being a statutory authority was guilty of negligence on its part in not taking care to protect the life of the deceased. The respondents cannot be called upon to prove that the tree had fallen due to appellant's negligence. Statutory obligation to maintain trees being absolute, and since the tree had fallen due to its decay, the appellant has failed to prove that the occurrence had taken place without negligence on its part. The appellant failed to make periodical inspection whether the trees were in good and healthy condition subjecting them to seasonal and periodical treatment and examination. Therefore, the appellant had not taken care to foresee the risk of the tree's falling and causing damage to the passers-by. Thus the appellant is liable to pay damages for the death of Jayantilal. The Division Bench accordingly confirmed the decree of the trial Court. Thus this appeal by special leave.

Shri T.U. Mehta, learned senior counsel for the Corporation, contended that the High Court is not right in its conclusion that the appellant is having unqualified and absolute duty to maintain the trees and was guilty to take reasonable care in maintaining the trees in healthy condition. The burden of proof is on the respondents to prove that there was breach of duty on its part that the occurrence had taken place for not taking reasonable care. In the nature of the things, it is difficult for the Corporation to inspect every tree to find out whether it is in a healthy or decaying condition. The standard of care is not as high as in the case of breach f a statutory duty as the case where by positive act, the Corporation created a thing which is dangerous and failed to prevent such danger which caused damage to others. It is not enough for the respondents to establish that the appellant was remises in its periodical treatment to the plants but was careless in the breach of

specific legal duty of care towards the deceased Jayantilal. The Corporation could not foresee that a tree would fall all of a sudden when Jayantilal was passing on the footpath. There is no reasonable proximity between the duty of care and the doctrine of neighbourhood laid by the House of Lords in Donoghue v/s. Stevenson [(1932) AC 562]. The Common Law liability on the part of a statutory Corporation is now authoritatively settled in Murphy v/s. Brentwood District Council (1991) 1 AC 398] over-ruling the two tier test laid down in Anns. v/s. Merton London Burough Council [(1978) AC 728]. A breach of statutory duty, therefore, does not ipso facto entail Corporation's liability for its failure or of its staff to comply with the statutory duty to protect Jayantilal or class of persons to which the deceased is a member. There is no liability for negligence unless a legal duty to take care exists towards the deceased Jayantilal or class of persons, i.e. pedestrians and that duty should be one which the Corporation owed to the plaintiff himself. This should be pleaded and proved which is lacking in the present case, Knowledge of harm likely to occur to the deceased is a pre- requisite of liability which must in some sense be foreseeable.

It was further contended that though Corporation has a statutory duty to plant trees, no action will lie against it for damages since the indemnity extends not merely to act itself but also to its necessary consequences. The High Court, it was argued, has also committed serious error in its conclusion that the statutory duty of the Corporation to maintain trees carries with it the duty to take care by regular examination of the health of the trees ad felling of decaying trees; it lost sight of the fact that it is only a discretionary duty. The legislature did not intend to confer any cause of action for breach of the statutory duty and none was provided for its breach. The conclusion of the High Court that because of the breach of absolute statutory duty the Corporation was negligent, is not correct proposition of law.

In determining the legislative intent, the Court is required to consider three factors, viz., the context and the object of the statute, the nature and precise scope of the relevant provisions and the damage suffered not of the kind to be guarded against. The object of the Act is to promote facilities of general benefit to the public as a whole in getting the trees planted on road-sides, the discharge of which is towards the public at large and not towards an individual, even though the individual may suffer some harm. The Act does not provide for any sanctions for omission to take action; i.e., planting trees or their periodical check up when planted. By process of interpretation, the Court would not readily infer creation of individual liability to a named person or cause of action to an individual, unless the Act expressly says so. While considering the question whether or not civil liability is imposed by a statute, the court is required to examine all the provisions to find out the precise purpose of the Act, scope and content of the duty and the consequential cause of action for omission thereof. According to the learned counsel, the liability in tort which arose in Common Law has been evolved by the courts in England but law has not been well developed in our jurisdiction. In Common Law, there existed duty of foreseeability, proximity, just and reasonable cause and policy. Attempts have been made to identify general theory of liability in tort consistent with causation, fairness, reciprocity and justice, balancing conflicting interests as

well as economic efficiency. The tortious liability falls into one of the three categories, viz., (a) some intentional wrong doing (b) negligence ad (c) strict liability. In this case, we are concerned with negligence on the part of the appellant-Corporation in maintaining the trees on the road-sides. The principle evolved by the courts in England is that a reasonable foresight of harm to persons whom it is foreseeable or is likely to harm by one's carelessness is essential. For the plaintiff to succeed in an action for negligence the plaintiff requires to prove that (i) the defendant is under a duty to take care; (ii) the burden of proof owed by the plaintiff has been discharged by the proof of breach of duty and (iii) the breach of the duty of care is the cause for damage suffered by the plaintiff. Breach of duty raises factual question whether the required standard of conduct has been reached. It is only relevant if a duty of care has been held to exist in law. Damage similarly is also confined to the enquire of facts. Duty of care, on the other hand, is far more crucial concept as it fixes the boundaries of tort of negligence. The regulation of duty of care envisaged in Donoghue's principle, in its widest terms, has a reasonable foresight of harm to persons whom it is foreseeable or is likely to be harmed by one's carelessness and has in turn made it easy to hold in subsequent cases that there should be liability for negligently inflicting damage in new situations not covered by previous case law because damage was foreseeable. If want of duty of care is established, there comes to exist foreseeability of the damage and sufficient proximate relationship between the parties and it must be just and reasonable to impose such a duty. The legal duty to prove proximity is not physical proximity. Proximity is used to describe a relationship between the parties by virtue of which the defendant can reasonably foresee that his action or omission is likely to cause damage to the plaintiff of the relevant type. The relationship refers to no more than the relevant situations of the parties as a consequence of which such foreseeability of damage may exist. The English principles of common law are approved and adopted by the courts in India on the principles of justice, equity and good conscience.

Appellant-Corporation owes a duty of care in common law. The trees and streets vest in the Corporation. It was its responsibility, therefore, to maintain the trees. The Corporation should have the foresight that trees, if neglected to be maintained properly, could cause injury to passers-by. The findings recorded by the courts below that the appellant has committed breach of duty of care is a finding of fact. From the breach of the duty of care, the entitlement to damages arises to the respondents due to the death of Jayantilal. The learned counsel also relied upon K. Ramadas Shenoy v/s. The Chief Officer, Town Municipal Council, Udipi & Ors. [AIR 1974 SC 2177] and contended that answer to the question whether an individual] who is one of the class for whose benefit an obligation has been imposed, whether or not enforced in action for omission to perform the duty, depends upon the language used in the statute. The injury may be caused either by fulfillment of the duty or omission to carry it out or by negligence in its performance. In the light of the above principles, he submitted that though the duty of the appellant to plant trees is discretionary nonetheless it has a statutory duty to plant the trees and to maintain them under Section 66 of the Bombay Provincial Municipal Corporation Act, 1949 (for short, the "Act") and the discretion must be construed to be mandatory duty. By the omission to perform the duty to

maintain the trees in healthy condition or to cut off the trees in decaying condition, the Corporation entails with liability to make good the loss/damages caused to the respondents. The High Court, therefore, has not committed any error of law warranting interference.

The diverse contentions give rise to the questions: whether the appellant-Corporation owes a duty of care to maintain the trees as a statutory duty and whether the cause of death of Jayantilal has proximate relationship with the negligence giving rise to tortious liability, entailing payment of compensation to the respondents? The marginal note of Section 66 of the Act indicates "Matters which may be provided for by the Corporation at its discretion". It envisages that the Corporation may in its discretion, provide from time to time, wholly or partly for all or any of the following matters, viz, (viii) "the planting and maintenance of trees of road-sides and elsewhere". Under Section 202 of the Act, all streets within the city vest in the Corporation and are under the control of the Corporation. The Act does not provide machinery for enforcement of obligations cast under Section 66, nor in the event of failure to discharge those obligations any remedy is provided. By operation of Section 202 read with Section 66, since the trees vest in the Corporation, the Corporation is statutorily obligated to plant and maintain trees on the road-sides and elsewhere as a public amenity to ensure eco- friendly environment. An attempt had been made in 1965 to codify the law of tort in a statutory form. The Bill in that behalf, reintroduced in the Parliament in 1967, died as still born. Therefore, there is no statutory law in India, unlike in England, regulating damages for tortious liability. In the absence of statutory law or established principles of law laid by this Court or High Courts consistent with Indian conditions and circumstances, this Court selectedly applied the common law principles evolved by the courts in England on grounds of justice, equity and good conscience (vide Ramanbhai Prabhatbhai's case). Common law principles of tort evolved by the courts in England may be applied in India to the extent of suitability and applicability to the Indian conditions. Let us consider and evolve our principles in tune with the march of law in their jurisprudence of liability on tort. It is necessary to recapitulate the development of the principles and law of tort developed by evolutionary process by applying them from case to case and in some cases the statement of law laid by House of Lords, as guiding principles of law on tortious liability. In the formative stage of the development of tortious liability, the Corporation being a Corporation aggregate of persons, could not be held liable where liability involved some specific state of mind as was held in Stevens vs. Midland Counties Railway [1854 (10) Ex.352]. However, it is now well settled that a Corporation can be held liable and accordingly it may be sued for wrongs involving fraud, malice, as well as for wrong in which intention is immaterial as was held in Barwick vs. English Joint Stock Bank [(1867) LR 2 Ex.259]; Cornford vs. Carlton Bank [(1900) 1 Queen's Bench 22]; and Glasgow Corporation vs. Loremer [(1911) AC 209].

In Sir Percy Winfield's in his "Province of the Law of Tort" page 32 referred in "Clerk and Lindsell on Torts" (Common Law Library Series No.3) (12th Edn.) Chapter I, page 1, page 1 it is stated that "tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages".

Duty primarily is fixed by law which on violation, fastens liability to pay damages. It is personal to the injured. Tort and contract are distinguishable. In tort, liability is primarily fixed by law while in contract they are fixed by the parties themselves. In tort, the duty is towards the persons generally while in contract it is towards specific persons or persons. If the claim depends upon proof of proof of the contract, action does not lie in tort. If the claim arises, from the relationship between the parties, independent of the contract, an action would lie in tort at the election of the plaintiff, although the might alternatively have pleaded in contract. The law of tort prevents hurting one another. All torts consist of violation of a right in the plaintiff. Tort law, therefore, is primarily evolved to compensate the injured by compelling the wrong-doer to pay for the damage done. Since distributive losses are an inevitable by-product of modern living in allocating the risk, the law of tort makes less and less allowance to punishment, admonition and deterrence found in criminal law. The purpose of the law of tort is to adjust these losses and offer compensation for injuries by one person as a result of the conduct of another. The law could not attempt to compensate all losses. Such an aim would not only be over-ambitious but might conflict with basic notions of social policy. Society has no interest in mere shifting of loss between individuals for its own sake. The loss, by hypothesis, may have already occurred, and whatever benefit might be derived from repairing, the fortunes of one person is exactly offset by the harm caused through taking that amount away from another. The economic assets of the community do not increase and expense is incurred in the process of realisation, as stated by Oliver Lindel Holmes in his "Common Law" at page 96 (1881 Edn.). The security and stability are generally accepted as worthwhile social objects, but thee is no inherent reason for preferring the security and stability of plaintiffs to those of defendants. Hence, shifting of loss is justified only when there exists special reason for requiring the defendant to bear it rather than the plaintiff on whom it happens to have fallen. (vide "Common Law" of Holmes).

In "Blacks Law Dictionary" (6th Edn.) at page 1489, `tort' is defined as violation of duty imposed by general law or otherwise upon all persons occupying the relation to each other involved in a given transaction. There must always be a violation of some duty owed to plaintiff and generally such a duty must arise by operation of law and not by mere agreement of the parties. "A legal wrong is committed upon the person or property, independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual". Negligence is failure to use such care as a reasonable prudent and careful person would use, under similar circumstances. It is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances.

The question emerges: as to when would the breach of statutory duty under a particular enactment give rise to tortious liability? The statutory duty gives rise to civil action. The statutory negligence is surgeries and independent of any other form of tortious liability. It would, therefore,

be of necessity to find out from the construction of each statutory duty whether the particular duty is general duty in public law or private law duty towards the plaintiff. The plaintiff must show that (a) the injury suffered is within the ambit of statute; (b) statutory duty imposes a liability for civil action; (c) the statutory duty was not fulfilled; and (d) the breach of duty has caused him injury. These essentials are required to be considered in each case. The action for breach of statutory duty may belong to the category of either strict or absolute inability which is required, therefore, to be considered in the nature of statutory duty the defendant owes to the plaintiff; whether or not the duty is absolute; and the public policy underlying the duty. In most cases, the statute may not give rise to cause of action unless it is breached and it has caused damage to the plaintiff, though occasionally the statute may make breach of duty actionable per se. The burden, therefore, is on the plaintiff to prove on balance of probabilities that the defendant owes that duty of care to the plaintiff or class of persons to whom he belongs, that defendant was negligent in the performance or omission of that duty and breach of duty caused or materially contributed to his injury and that duty of care is owed on the defendant. If the statute requires certain protection on the principle of volenti non fit injuria, the liability stands excluded. The breach of duty created by a statute, if it results in damage to an individual prima facie, is tort for which the action for damages will lie in the suit. On would often take the Act, as a whole, to find out the object f the law and to find out whether one has right and remedy provided for breach of duty. It would, therefore, be of necessity in every case to find the intention of legislature in creating duty and the resultant consequences suffered from the action or omission thereof, which are required to be considered. No action for damages lies if on proper construction of statute, the intention is that some other remedy is available. One of the tests in determining the intention of the statute is to ascertain whether the duty s owed primarily to the general public or community and only incidentally to an individual or primarily to the individual or class of individuals and only incidentally to the general public or the community. If the statute aims at duty to protection a particular citizen or particular class of citizens to which the plaintiff belongs, it prima facie creates at the same time co-relative right vested in those citizens of which plaintiff is one; he has remedy for reinforcement, namely, the action for damages for any loss occasioned due to negligence or for failure of it. But this test is not always conclusive.

In "The Modern Law of Tort, Landon, Sweet & Maxwell (1994 Edn.), K.M. Stanton has discussed the breach of statutory duty, express or inferential. He has stated at page 42 that the statutory tort takes a number of different forms. A number of modern statutes expressly create a detailed scheme of tortious liability. The conditions for the existence of a duty; the standard of conduct required and the available defences are all defined. The law created is part of the mainstream of tort liability. On inferential breach of statutory duty, he has stated that beach of statutory duty denotes a common law tortious liability created by courts to allow an individual to claim compensation for damages suffered as a result of another breaking the provisions of a statute which does not, on its face provide a remedy in tort. A tortious remedy is obviously available if a statute says that remedy may or may not be implied; if it is implied, it is said that the defendant is liable under the tort for breach of statutory duty. The most familiar example of this

arises in relation to those areas of industrial safety legislation which have traditionally imposed criminal penalties upon an employer for breach of safety provisions, but have given no express tortious remedy to an employee injured by such a breach. Groves v. Lord Wilborne [(1884) 2 Q.B. 402] is a leading authority in support of that liability. At page 45, he has stated on "Inferring the tort of breach of statutory duty: presumptions and principles of construction" that breach of duty is of considerable practical importance in view of the volume of legislation made by Parliament and there are obvious advantages to be gained from any technique which assists in the prediction of results. The criticism of the presumptions must be set against the fact that they are of considerable antiquity and were approved in Lord Diplock's seminal speech in Lonrho Ltd. v. Shell Petroleum Co. Ltd. [(1982) AC 173].

The duty of care must, therefore, be with reference to the kind of damage that the plaintiff has suffered and in deference to the plaintiff or class to which the plaintiff is a member. These cases relate to private law tort.

The proper approach, therefore, is to consider whether a duty of care situation exists in public law tort which the law ought to recognise and whether in that situation the defendant's conduct was such that he should have foreseen the damage that would be inflicted on the plaintiff. As a general rule of law, one man is under no duty to control another so as to prevent the latter from doing damage to a third. The first question to be considered is: whether the plaintiff has established necessary relationship giving rise to the duty of care? The next question is whether there is any negligence at the time when the act in question was committed? The act complained of must have rational relationship to the damage caused. The tort of negligence does not depend simply on the question of foreseeability. Foreseeability is not the sole criteria nor does the fact that the damage is foreseeable creates any onus. What the court would ask or look at is the operational structure of the Act. Is this a situation where a duty does exist towards the plaintiff or class of persons to which he belongs keeping in mind the nature of the functions and the interest of the community. The further question would be: whether the damage to the plaintiff is so foreseeable? In that behalf it must be further seen whether there was sufficiently proximate relationship between the plaintiff and the defendant. In Hedley v. Baxendale [(1854) 9 Ex. 341], the celebrated judgment, the accident can be said to have been the natural and probable result of the breach of duty. That principle was accepted in Haynes v. Harwood [(1935 1 K.B. 146] wherein Greer, L.J. had laid thus: "If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, Hadley v. Baxendala [(1854) 9 Ex. 341], the accident can be said to be the `natural and probable result' of the breach of duty". This principle was further approved by House of Lords in Dorset Yacht Co. v. Home Office [(1970) AC 1004 at 1028]. The facts there were that seven Borstal boys were taken by the officers, in charge of the hostel to an island under the control and supervision of three officers. The boys left the island at night and boarded, cast adrift and damaged the plaintiffs' yacht which was moored offshore. The respondents brought

action for damages against the Home Office alleging negligence on the part of the officers incharge. The defence was that the officers had no control over the boys. There was no carelessness on their part and that the damage was too remote. Lord Reid while negativing the defence had held that where negligence is involved the Donoghue principle laid down by Lord Atkin generally applied. Therein the question was of remoteness of causation between the three agencies involved, viz., the controlling officers, the boys who caused the damage and the plaintiff who suffered the damage. The argument of the Attorney General on behalf of the Home Office was that the officers had no control over the boys. In dealing with that question, Lord Reid in his speech had held at page 1027 that "there is an obvious difference between a case where all the links between the carelessness and the damage are inanimate so that, looking back after the event, it can be seen that the damage was in fact the inevitable result of the careless act of omission and a case where one of the links is some human action. In the former case, the damage was in fact caused by the careless conduct, however unforeseeable it might have been at the time that anything like that would happen. At one time the law was that unforeseeability was no defence...But the law now is that there is no liability unless the damage was of a kind which was foreseeable. On the other hand, if human action (other than an instinctive reaction) is one of the links in the chain, it cannot be said that, looking back, the damage was the inevitable result of the careless conduct. No one in practice accepts the possible philosophic view that everything that happens was predetermined. yet it has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness. The convenient phrase novus actus interveniens denotes those cases where such action is regarded as breaking the chain and preventing the damage from being held to be caused by the careless conduct. But every day there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty in holding that the defendant's conduct caused the plaintiff loss. At page 1030, Lord Reid held that "...I would agree, but there is very good authority for the proposition that if a person performs a statutory duty carelessly so that the causes damage to a member of the public which would not have happened, if he had performed his duty properly he may be liable". Accordingly it was held that Home office was liable for damages on account of negligence of the officers.

Let us consider the cases relating to duty of care in planting and maintenance of the trees. In England, every owner of a house or the Corporation, has statutory duty to plant trees and of their upkeep. In that behalf the case law is as under:

In Noble vs. Harrison [(1926) 2 King's Bench Division 332], a branch of a beech tree growing on the defendant's land overhung a highway at a height of 30 feet above the ground. In fine whether the branch suddenly broke, fell upon the plaintiff's vehicle, and damaged it. In an action by the plaintiff claiming in respect of damage to his vehicle, the county court found that neither the defendant nor his servants knew that the branch was dangerous on that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. Reversing the judgment of the country court, it was held that the Ryland's case, principle had not application inasmuch as a

tree was not in itself a dangerous thing and to grow trees was one of the natural uses of the soil. Mere fact that the branch overhung the tree passage of the highway and although the branch proved to be a danger the defendant was not liable, inasmuch as he had not created the danger and had no knowledge, actual or imputed, of its existence. The principle laid down in Barket vs. Herbert [(1911) 2 K.B. 633] was applied. At page 338, Rowlatt J. held that I see no ground for holding that the owner is to become an insurer of nature, or that default is to be imputed to him until it appears, or would appear upon proper inspection, that nature can no longer be relied upon. In Cunliffe vs. Bankes [(1945) 1 All E.L.R. 459], a tree growing on the defendant's estate fell, owing to its diseased condition, across a highway running besides the estate. The plaintiff's husband was ridding a motor-cycle along the highway when without any negligence on his part, he collided with the tree and died of his injuries. The plaintiff's action based on negligence was brought under the Fatal Accidents Act, 1846 and the Law Reform (Miscellaneous Provisions) Act, 1934. The trial Judge found the defendant liable. On appeal, reversing the judgment, the court of Appeal, House of Lords held that a person is not liable for nuisance constituted by the state of his property unless (a) he caused it or by the neglect o some duly he allows it to arise or when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he became or ought to have become aware of it. Therefore, the defendant was not liable. In Gaminer & Anr vs. Northern & London Investment Trust, Ltd. [(1950) 2 ALL ELR 486], the respondents were lessees of a block of flats in London street which they were occupied by the tenants. In the forecourt of the flats, there was a row of elm trees. On April 7, 1947, the appellants were driving past the flats when one of the trees fell on their car, wrecking it and injuring the appellants. The tree that was fallen was proved to have been due to a disease of the roots, which as of long standing but the disease had not taken a normal course and there was no indication from the condition of the tree above ground that it was affected by the disease. The tree was about 130 years old and according to the evidence it was of the middle age. It was never lopped, topped or pollarded. The action was laid for damages for omission to take proper care of the trees. The House of Lords, after a detailed examination of the evidence, held that when there has no evidence that the tree was affected with a disease mere possibility of the taking protection was not sufficient as spoken by the expert witnesses. It was, therefore, held that the respondents were not liable for damages. Lord Normand at page 494 held that what would a reasonable and prudent landlord have done about the tree? There is more than enough evidence of what scientific experts would have thought or done, but there is a paucity of evidence about what a reasonable and prudent landlord would have done. It was held that there was no evidence to conclude that a reasonable prudent landlord would inspect or cause to be inspected any good sized tree growing in a place where unsuspecting person may lawfully approach it and to take any protection since there is no external evidence of any injury. Lord Radcliffe at page 501 had held that the accepted test that liability only begins when there is apparent in the tree a sign of danger has the advantage that it seems to ignore, or to a large extent to ignore, the distinction between the spot that is much and the spot that it little frequented but, on the other hand, I think that it does end by making the standard of the expert the test of liability. Even anyone can own a tree, there is no qualifying

examination, but to how many people in this country can be credited as much as general knowledge as will warn them that a tree's top is unusually large, or that it is, in fact, diseased, dangerously or otherwise?"

It would thus be seen that each case requires to be examined in the light of the special circumstances, viz., whether the defendant owed a duty of care to the plaintiff, whether the plaintiff is a person or a class of persons to which the defendant owed a duty of care, whether the defendant was negligent in performing that duty or omitted to take such reasonable care in the performance of the duty, whether damage must have resulted from that particular duty of care which the defendant owed to the particular plaintiff or class of persons. Public authorities discharge public obligations to the public at large. Therefore, it owes duty of care at common law to avoid causing present or imminent danger to the safety of the plaintiff or a class of persons to which the plaintiff belongs. It is a statutory duty of care under common law which could give rise to actionable claim in the suit of the individual and it is capable of co- existence along side a statutory duty. The duty of care imposed on a local authority by law may not be put beyond what the statute expects of the local authority or Corporation to perform the duty. The tort of insuperable negligence would emerge from imminent danger created by positive act. But the duty of care imposed on local authority by law may be gauged from the circumstances in which and the conditions subject to which the duty of care has been imposed on the statutory authority. The imminent danger theory must be viewed keeping at the back of mind the act or conduct creating the danger to the plaintiff or the class of persons to which he belongs and that by negligent conduct the defendant causes damage to the property or person of the plaintiff, though the defendant is not in know of the danger. The defendant also in given circumstances, must owe special responsibility or proximity imposing foreseeable duty to care, to safeguard the plaintiff from the danger or to prevent it from happening.

But when the defendant was not in know of the discoverable defect or danger and it caused the damage by accident like sudden fall of the tree, it would be difficult to visualise that the defendant had knowledge of the danger and he omitted to perform the duty of care to prevent its fault. There would be no special relationship between the statutory authority and the plaintiff who is a remote user of the foot-path or the street by the side of which the trees were planted, unless the defendant is aware of the condition of the tree that it is likely to fall on the footpath on which the plaintiff/class of persons to which he belongs frequents it. The defendant by his non-feasance is not responsible for the accident or cause of the death since admittedly there was no visible sign that the tree was affected by decease. It had fallen in a still condition of weather.

Therefore, there must exist some proximity of relationship, foreseeability of danger and duty of care to be performed by the defendant to avoid the accident or to prevent danger to person of the deceased Jayantilal. The requisite degree of proximity requires to be established by the plaintiff in the circumstances in which the plaintiff was injured. The plaintiff would not succeed by establishing that the accident had occurred due to negligence, i. ., the defendant's failure to take reasonable care as ordinary prudent man, under the circumstances, would have taken and the

liability in tort to pay damages had arisen. If the defendant had become aware of the decayed condition or that the tree was affected by decease and taken no action to prevent the accident, it would be actionable, though for non-feasance. Here appearance of danger gives rise to no liability. Actual damage had occurred before tortious liability for negligence arose. When the defendant is under statutory duty to take care not to create latent source of physical danger to the property or the person who in the circumstances is considered to be reasonably foreseeable as likely to be affected thereby, the defendant would be liable for tort of negligence. If the latent defect causes actual physical damages to the person, the defendant is liable to damages for tortious liability. The negligent act or omission of the statutory authority must be examined with reference to the statutory provisions, creating the duty and the resultant consequences. The negligent act or omission must be specifically directed to safeguard the public or some sections of the public to which the plaintiff was a member, from the particular danger which has resulted.

The exercise of power/omission must have been such that duty of care had arisen to avoid danger. Foreseeability of the danger or injury alone is not sufficient to conclude that duty of care exists. The fact that one could foresee that a failure of the authority to exercise a reasonable care would cause loss to the passers-by itself does not mean that such a duty of care should be imposed on the statutory authority. The statutory authority exercises its public law duty or function. It would be wrong to think that the local authority always owes responsibility and continues to have the same state of affairs. It would be an intolerable burden of duty of care on the authority; otherwise it would detract the authority from performing its normal duties. If he were to gauge the risk of litigation, he would avoid doing public duty of planting and nurturing the trees thinking that it would be a have burden on the local authority. It would always cause heavy financial burden on the statutory authority. If the duty of maintaining constant vigil or verifying or testing the healthy condition of trees at public places with so many other functions to be performed, is cast on it, the effect would be that the authority would omit to perform statutory duty. Duty of care, therefore, must be carefully examined and the foreseeability of damage or danger to the person or property must be co-related to the public duty of care to infer that the omission/non- feasance gives rise to actionable claim for damages against the defendant.

It is seen that when a person uses a road or highway, under common law one has a right to passage over the public way. When the defendant creates by positive action any danger and no signal or warnings are given and consequently damage is done, the proximate relationship gets established between the plaintiff and the defendant and the causation is not too remote. Equally, when the defendant omits to perform a particular duty enjoined by the statute or does that duty carelessly, there is proximity between the plaintiff-injured person and the defendant in performance of the duty and when injury occurs or damage is suffered to person or property, cause of action arises to enable the plaintiff to claim damages from the defendant. But when the causation is too remote, it is difficult to anticipate with any reasonable certainty as ordinary reasonable prudent man, to foresee damage or injury to the plaintiff due to causation or omission on the part of the defendant in the performance or negligence in the performance of the duty.

The question, therefore, is: whether the respondents in the present case have established the three essential ingredients? Statute enjoins a power to plant trees on the roadsides or in public places. There is no statutory sanction for negligence in that behalf. But the question is: whether the statutory function to plant trees gives rise to duty of maintaining the trees? In a developing society it is but obligatory on every householder, when he constructs house and equally for a public authority to plant trees and properly nurture them up in a healthy condition so as to protect and maintain the eco-friendly environment. But the question is: whether the public authority owes a statutory duty toward that class of person who frequent and pass and repass on the public highway or road or the public places? If the local authority/statutory body has neglected to perform the duty of maintaining trees in a healthy condition and when damage, due to fall of the tree occurs, the question emerges whether the neighbor relationship and proximity of the causation and negligence and the duty of care towards the plaintiff have been satisfactorily proved to have existed so as to fasten the defendant with the liability due to tort of negligence. It depends on a variety of facts and circumstances. It is difficult to lay down any set standards for proof thereof. Take for instance, where a hanging branch of a tree/tree is gradually falling on the ground. The statutory/local authority fails to take timely action to have it cut and removed and one of the passers-by dies when the branch/tree falls on him. Though the injured or the deceased has contributed to the negligence for the injury or death, the local authority etc. is equally liable for its negligence/omission in the performance of the duty because the proximity is anticipated. Suppose a boy not suspecting the danger climbs or reaches the falling tree and gets hurt, the defendant would be liable for tort of negligent. The defect is apparent. Negligence is obvious, proximity and neighborhood anticipated and lack of duty of care stands established. The plaintiff, in common law action, is entitled to sue for tort of negligence. The authority will be liable to pay the damages for omission or negligence in the performance of the duty. Take another instance, where while `A' is passing on the road, there is sudden lightning and thunder and `A' takes shelter under a tree and the lighting falls on the tree and consequently `A' dies. In this illustration, there is no corresponding obligation or a duty of care on the part of the Corporation or the statutory authority to warn that `A' should not take shelter under the tree to avoid harm to him. Take yet another instance, where road is being laid and there is no warning or signal and a cyclist or a most cyclist during night falls in the ditch, i.e. place of repair due to negligence on the part of the defendant. The injury is caused to the victim/vehicle. The plaintiff is entitled to lay suit for tort of negligence. But in a situation like the present one where the victim being not aware of the decease/decay, the tree suddenly falls in a still weather condition, no one can anticipate and its is difficult to foresee that a tree would fall suddenly and thereby a person who would be passing by on the road-side, would suffer injury or would die in consequence. The Corporation or the authority is not liable to be sued for tort of negligence since the causation is too remote. Novus actus inconveniences snaps the link and, therefore, it is difficult to establish lack of care resulting in damage and foreseeability of the damage. The case in hand falls in this category. Jayantilal was admittedly passing on the roadside to attend to his office duty. The tree suddenly fell and he sustained injury and consequently died. It was difficult to foresee that a tree would fall on him.

The conditions in India have not developed to such an extent that a Corporation can keep constant vigil by testing the healthy condition of the trees in the public places, road-side, highway frequented by passers-by. There is no duty to maintain regular supervision thereof, though the local authority/other authority/owner of a property is under a duty to plant and maintain the tree. The causation for accident is too remote. Consequently, there would be no Common Law right to file suit for tort of negligence. It would not be just and proper to fasten duty of care and liability for omission thereof. It would be difficult for the local authority etc. to foresee such an occurrence. Under these circumstances, it would be difficult to conclude that the appellant has been negligent in the maintenance of the tees planted by it on the road-sides.

The appeal, therefore, succeeds and is allowed accordingly. Judgment and decree of the trial Court, as affirmed by the High Court, stands set aside. In the facts of the case, we direct that the amount of Rs. 45,000/- may not be recovered from the respondents though they are not entitled in law to the same, since they are to poor and the amount must have already been spent out. In view of the trouble taken by Shri Narasimha as amicus curiae, we direct the Corporation to pay him a further sum of Rs. 5,000/- [Rupees five thousand only] within a period of two months from the receipt of this order.

* * * * *

DEFENCES AGAINST TORTIOUS LIABILITY

Smith v. *Charles Baker and Sons*

(1891) A.C. 325 (HL)

The plaintiff was a workman employed by the defendant railway contractors and had been employed for two months before the accident on working a drill for rock cutting purpose. Whilst he was thus employed stones were being lifted from the cutting by means of a crane. Sometimes the stones were passed over the place where the plaintiff was working. Whilst he was working the drill, a stone, in the course of being lifted, fell upon him and caused serious injuries. No warning was given that the stone was to be jibbed in that direction. The plaintiff stated in his evidence that he got out of the way whenever he saw that the men were jibbing over his head. But at the time that the stone fell upon him he was working the drill and so did not see the stone above. One of his fellow workmen had in the plaintiff's hearing previously complained to the manager of the danger of slinging stones over their heads and the plaintiff himself had told the crane driver that it was not safe. The plaintiff was a navy. He had been accustomed to this work for six or seven years and knew that the work was dangerous. At the trial in the county court, the defendant's counsel submitted that the plaintiff must be nonsuited on his own admission as to his knowledge of the risk. The judge refused to nonsuit. The jury found (1) that the machinery for lifting the stones from the cutting taken as a whole, was not reasonably fit for the purpose for which it was applied; (2) that the omission to supply means of warning when the stones were being jibbed was a defect in the ways, works, machinery and plant; (3) that the employers or some person engaged by them to look after the above matters were guilty of negligence in not remedying the defect; and (4) that the plaintiff was not guilty of contributory negligence and did not voluntarily undertake a risky employment with a knowledge of its risks. They awarded £ 100 damages. An appeal to the Divisional Court was dismissed, but an appeal therefrom to the Court of Appeal was upheld, mainly on the ground that there was no evidence of negligence by the defendants. The plaintiff now appealed to the House of Lords.

LORD HALSBURY, L.C. - My Lords, I am of opinion that the application of the maxim *volenti non fit injuria* is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precaution against its being permitted to fall. My Lords, I emphasize the word 'negligently' here, because, with all respect, some of the judgments below appeal to me to alternate between the question whether the plaintiff consented to the risk, and the question of whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition.

Now, I say that here evidence of negligence must by the form of procedure below be admitted to have been given, and the sole question to be dealt with is that which I am now dealing. For my own part, I think that a person who relies on the maxim must show a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express consent; but if

I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said, "I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself."

It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim, *volenti non fit injuria*. I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies, it applies equally to a stranger as to anyone else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events some year ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was a risk of being run over.

It is, of course, impossible to maintain a proposition so wide as is involved in the example I have just given; and in both ***Thomas* v. *Quartermaine*** [18 Q.B.D. 685] and in ***Yarmouth* v. *France*** [19 Q.B.D. 647]. It has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk. Bowen, L.J. carefully points out in the earlier case (***Thomas* v. *Quartermaine***) that the maxim is not *scienti non fit injuria*, but *volenti non fit injuria*. And Lindley, L.J., in quoting Bowen, L.J.'s distinction with approval, adds [19 Q.B.D. 660]:

> The question in each case, must be, not simply whether the plaintiff knew of the risk, but whether circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff. And again, Lindley, L.J., says: If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it.

Again Lindley, L.J. says:

> If nothing more is proved than that the workman saw danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and not acted voluntarily in the sense of having taken the risk upon himself.

I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and

consented to take the risk upon himself. It is manifest that if the proposition which I have just enunciated be applied to this case, the maxim could here have no application. So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question.

LORD HERSCHELL - It was said that the maxim *volenti non fit injuria* applied, and effectually precluded the plaintiff from recovering. The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. The maxim has no special application to the case of employer and employed, though its application may well be invoked in such a case. The principle embodied in the maxim has sometimes, in relation to cases of employer and employed, been stated thus: A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error. Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done to him even though the cause from which he suffers might give to others a right of action. For example, one who has agreed to take part in an operation necessitating the production of fumes injurious to health, would have no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause.

There may be cases in which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with his knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss; but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, not even, I should judge, as probable. Where, then, a risk to the employed which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risks, preclude the employed, if he suffers from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim, *volenti non fit injuria* applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong.

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain

them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, *volenti non fit injuria*, becomes applicable.

It is to be observed that the jury found that the plaintiff did not voluntarily undertake a risky employment with knowledge of its risks, and the judgment of the county court, founded on the verdict of the jury, could only be disturbed if it were conclusively established upon the undisputed facts that the plaintiff did agree to undertake the risks arising from the alleged breach of duty. I must say, for my part, that in any case in which it was alleged that such a special contract as that suggested had been entered into I should require to have it clearly shown that the employed had brought home to his mind the nature of the risk he was undertaking and that the accident to him arose from a danger both foreseen and appreciated.

I have so far dealt with the subject under consideration as matter of principle apart from authority; but it appears to me that the view which I have taken receives strong support from the approval with which Lord Cranworth refers to the case of ***Sword* v. *Cameron*** in his judgment in the case of ***Bartonshill Coal Company* v. *Reid*** [3 Macq. 266].

In ***Yarmouth* v. *France*** the plaintiff was subjected to a risk owing to a defect in the condition of what was held to be plant within the meaning of section 1 of the Employers' Liability Act. He complained of this to the person who had the general management of the defendant's business, but was told nevertheless to go on with his work. He did so and sustained the injury for which he brought his action. The county court judge gave judgment for the defendant on the ground that the plaintiff must be assumed to have assented to take upon himself the risk, on the authority of ***Thomas* v. *Quartermaine***, to which case I will refer immediately. The Court of Appeal ordered a new trial. Lindley, L.J. said: "The Act cannot, I think, be properly construed in such a way as to protect a master who knowingly provides defective plant for his workmen, and who seeks to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use." And further on he observes: "If nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of taking the risk upon himself."

The defendants' counsel naturally placed his main reliance upon the case of ***Thomas* v. *Quartermaine***. The plaintiff there was employed in a room in the defendants' brewery, where a boiling and a cooling vat were placed. A passage which was in parts only three feet wide ran between these two vats, the rim of the cooling vat rising sixteen inches above the passage. The plaintiff went along this passage in order to get from under the boiling vat a board which was used as a lid, and as this lid stuck, the plaintiff gave it an extra pull, when it came away

suddenly, and the plaintiff, falling back into the cooling vat, was scalded. The county court judge held that there was evidence of defect in the condition of the works in there being no sufficient fence to the cooling vat. He found that the condition of the vat was known to both the plaintiff and the defendant, and that the plaintiff had not been guilty of contributory negligence, and he gave judgment for him. The case was carried to the Court of Appeal where the learned judges, Bowen and Fry, L.JJ. (the Master of the Rolls dissenting), affirmed a decision of the Division Court directing judgment to be entered for the defendant.

The judgments of the learned judges forming the majority in that case were chiefly occupied by a consideration of the provisions of the Employers' Liability Act. It appears to have been contended in that case that the effect of the statute was to preclude the employer from relying on the maxim *volenti non fit injuria* in cases where, but for the statute, such a defence would have been open to him. But it is to be observed that in the case there under consideration, the county court judge had found that the defendant was himself aware of the defective condition of his works, and if he had not taken reasonable care so to carry on his business as not to subject those employed by him to undue risk, he would, according to the law laid down by this House in ***Bortonshill Coal Company* v. *Reid*** be prima facie liable to an action. The learned judges, however, came to the conclusion that the defendant was entitled to judgment, because the maxim *volenti non fit injuria* applied, the county court judge having found that the condition of the vat was known to the plaintiff as well as to the defendant. I find myself unable to concur in the view that this could properly be held under the circumstances as matter of law. The fact seems to have been lost sight of that the danger to the plaintiff did not arise from the circumstances that he had to pass from one part of the premises to the other, in proximity to the vats, even if this would have justified the conclusion arrived at. The accident arose from an operation being performed by him in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them. As far as appears, this was amongst the ordinary duties of his employment, and if it was assumed that there was a breach of duty on the part of the employer in not having the vats fenced, as it obviously was since if there had been no breach of duty it would not have been necessary to inquire whether the maxim *volenti non fit injuria* afforded a defence, it seems to me that it must have been a question of fact and not of law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occasion in question from the particular nature of the work which he had to perform. If the effect of the judgment be that the mere fact that the plaintiff after he knew the condition of the premises continued to work and did not quit his employment, afforded his employer an answer to the action even though a breach of duty on his part was made out, I am unable for the reasons I have given, to concur in the decision.

I think that the judgment of the court below in the case now before your Lordships ought to be reversed and judgment for the plaintiff restored.

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South Indian Industrial Ltd., Madras v. *Alamelu Ammal*

AIR 1923 Mad. 565

SCHWABE, C.J. – The facts are that the defendants for the purposes of their own business used a method of breaking up cast iron which consisted of dropping a heavy weight on pieces of iron resting on a bed of iron with the intention that these pieces should be broken into smaller pieces. The weight was dropped from a height of 35 feet with the inevitable result that pieces of iron flew about. It is common ground that they habitually flow to distances of four or five yards from the pit. If person choose to carry on dangerous operations of that kind, it is their duty not only to the public but to their servants to take adequate precautions that those pieces shall not cause injury. They ought to exercise ordinary care, caution and skill to prevent that. The mere fact an accident has happened is a strong evidence in a case of that kind that they had not taken the ordinary care, caution, and skill required for preventing the happening of the event. They knew that these pieces were being thrown out of the pit. They put up a screen which was obviously so inadequate that, as I have said, pieces were habitually thrown out of the pit. They issued warning to persons near, appreciating fully well that they were carrying on a dangerous operation. They did not trouble themselves to issue warning to persons at a distance, but chose to allow their workmen at a distance, to go on working at the risk of being hit. It is suggested that human foresight and skill could not have discovered that pieces of iron would go to a distance of some 70 to 90 feet, at which the deceased was standing at the time of the accident.

I am not prepared to accept that view. Scientific knowledge has surely by this time reached the length of being able to tell with some accuracy the effect of dropping a weight of a certain amount from a height of 35 feet upon a piece of iron will be and to what distance pieces of that iron will or may be sent. I am quite satisfied that the learned Judge was right in holding sufficient care was not taken and that, therefore, the defendants were guilty of negligence.

It has been suggested by the defendant's Engineer and Manager of the factory that no further precautions have been taken since the accident. I hope that this evidence is not true because that such things should have happened as happened in this case and that they should continue the operation without taking further precautions against the recurrence of such accident is, to my mind, negligence of the grossest kind.

The defence is put forward that the deceased voluntarily undertook the risk of this happening to him. That is the defence which is expressed in the maxim *volenti non fit injuria*; but this to succeed, it is necessary for the other party to prove that the person injured knew of the danger, appreciated it, and voluntarily took the risk. There is no evidence of any of these three things. The suggestion is that he had some knowledge of the danger because man working in the same place spoke to the fact that a short time before a piece of iron had flown from north to south as far as the place at which that man was standing. That he appreciated that risk of pieces striking him is impossible to find in view of the fact that the skilled European manager swore that he himself did not appreciate that there was any risk. Of course a man cannot voluntarily undertake a risk the extent of which he does not appreciate.

This appeal will accordingly be dismissed.

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Haynes v. *Harwood*

(1935) 1 K.B. 146

GREER L.J. - This is an appeal from a decision of Finlay J. in which he awarded the plaintiff damages for personal injuries to the agreed amount of 350.

The defendants were the owners of a two-horse van which was being driven by their servant, a man named Bird, on August 24, 1932. The business on which he was engaged on behalf of his employers took him into Quiney's Yard and Quiney's Wharf on the left-hand side of Paradise Street, Rotherhithe. Bird, who had in the van two horses, one, a mare on the left or near side, the other, a gelding on the right or off side, had to go to the wharf and there unload goods. His van was provided with a chain which, when properly put in position, operates as a drag on the near back wheel of the van. As there is a slope down from the road to the wharf it is usual to put the drag on, and, according to Bird's evidence, he did that on this occasion. When he had finished his unloading, Bird had to get a receipt, but instead of waiting where he was for this, he, out of consideration for the wharf owners, who wanted to go on with their work by receiving another van to unload at their wharf, took his two horses and the van out into Paradise Street, and left them standing on the left-hand side of the street facing in the direction of the police station, while he went to get his receipt. In his evidence he said there was no room in the yard for his to have left his van and horses there. Two boys were coming along, and one of them, obviously with a mischievous propensity, threw a stone at the horses which caused them to run away. The horses ran a considerable distance without any one interfering with them until they got opposite the police station, where the plaintiff was in the charge room. Seeing what was happening, he came out into the street and there saw a woman who was in grave danger if nothing was done to rescue her; he also saw a number of children who would be in grave danger if nothing was done by him to arrest the progress of the horses. At great risk to his life and limb, he seized the off-side horse and tried to stop them both. After going about fifteen yards, he succeeded in doing so, but unfortunately one of the horses fell upon him, with the consequence that he suffered serious personal injuries.

In considering this case one must take into account the nature of the street in which the two horses were left. A little way to the left of Quiney's Yard, on the opposite side of the road, are certain tenement dwellings, and just opposite Quiney's Yard there are dwelling-houses. Coming along on the same side as were the horses and van, one finds a church, a school entrance, and a number of houses which, having regard to the locality, are probably occupied by working-class people with families. We are told that altogether there are three schools in this neighbourhood, and that between 4 and 5 o'clock in the afternoon there are always many children about. It was in this kind of place the defendant's driver chose to leave his vehicle.

It is said for the defendants that the plaintiff is in law without remedy, and in support of this contention certain reasons are given. Before dealing with those, however, I may say that it would be a little surprising if a rational system of law in those circumstances denied any remedy to a brave man who had received his injuries through the original default of the defendant's servant.

It was said that there was no evidence of negligence on the part of the defendant's driver; secondly, assuming there was some evidence of negligence, the accident happened through the intervention of some consciously acting persons between the wrongful conduct of the defendant's driver and the accident; in other words that there was a *novus actus interveniens*, and therefore the chain of causation between the cause of the accident and the damages was broken and the plaintiff's claim cannot be sustained. It was said, thirdly, that quite apart from, and independently of, that question the plaintiff himself assumed the risk which he ran and took the risk upon himself, and therefore as the damage he suffered was the result of his own act, he cannot recover. That again is conveniently put into the Latin phrase, "*volenti non fit injuria*."

I propose to consider first, upon general principles, whether these points are sound. What is meant by negligence? Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owned to the person who makes the claim. In the case, if the duty was owed to, among others, the plaintiff- if he is one of a class affected by the want of care of the negligence of the defendants that is negligence of which the plaintiff can avail himself as a cause of action. What is the negligence complained of here? Mr. Hilbery rightly described it as a failure to use reasonable care for the safety of those who were lawfully using the highway in which this van with the two horses attached was left unattended. I personally have no doubt that a policeman-or indeed any one, and still more a policeman, using the highway for the purpose of stopping a runaway horse and thereby preventing serious accidents and possibly preventing loss of life, is within the category of those lawfully using the highway. Accordingly, I think the first point fails. Of course it dose not follow that in all circumstances it is negligence to leave horses unattended in a highway; each case with all its circumstances has to be considered; but the circumstances which make it quite clear that the defendants servant was guilty of want of reasonable care in leaving his horses unattended are that this was a crowded street in which many people, including children, were likely to be at the time when the horses were left and before the defendants' servant could get back to them. The defendant's servant had been frequently in the neighbourhood; he had often delivered goods at Quiney's wharf; and he must be taken to know something of the character of the neighbourhood, although he denied any knowledge of schools being there. To leave horses unattended, even for such a short time as three minutes, in a place where mischievous children may be about, where something may be done which may result in the horses running away, seems to me to be negligent-having regard to the proved circumstances.

The next point involves a consideration of the maxim "*novus actus interveniens*," but before dealing with the authorities I wish to point out that it is not true to say that where a plaintiff has suffered damage occasioned by a combination of the wrongful act of defendant and some further conscious act by an intervening person, that of itself prevents the Court coming to a conclusion in the plaintiff's favour if the accident was the natural and probable consequence of the wrongful act. That seems to me to be the necessary result of the decided cases which are accepted as authorities.

The third point relied upon for the defendant is *volenti non fit injuria*. Unfortunately there is a dearth of authority in this country on the subject, and apparently a wealth of authority in

the United States. American decisions of course are not binding upon us, and we must act only upon principles which are accepted in this country. There is also, unfortunately, an observation made, obiter, by Scrutton L.J. in ***Cutler* v. *United Dairies (London), Ltd.*** [1933] 2 K.B. 297, 303}, which has to be dealt with and explained, an observation which I think has been much misunderstood and misapplied in the argument put before us.

I now deal quite shortly with the authorities: in ***Lynch* v. *Nurdin*** [(1841) 1 Q.B. 29], the facts were these: the defendant left his horse and cart in the roadway, where he had a right to leave it. Probably he had left it there for a much longer period than the period in this case, but if it is negligent to leave it for one hour it seems to me it may be negligent, though in a less degree, to leave it for three or five minutes. In the road where the defendant left his cart there were a number of children who began to play with the horse and cart; one of them jumped on to the carts; another of them wrongfully set the horse in motion whereby the plaintiff, who was the child upon the cart, was injured. Undoubtedly there was there a *novus actus interveniens* - namely, the misconduct of the boy who started the horse; but it was held that none the less the accident, and the damage, could be treated as a result of the defendant's wrongful act, because it was to be anticipated that children would do mischievous things, and that any one who invites or gives an opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong but that it was done by the mischievous children. The law as there laid down has been accepted since 1841, and (it seems to me) is by itself sufficient to decide the question that there is no absolute rule that an intervening act of some third person who is not the defendant is in itself enough to break the chain of causation between the wrongful act and the damage and injury sustained by the plaintiff.

If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, the accident can be said to be "the natural and probable result" of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence; it is only a step in the way of proving that the damage is the result of the wrongful act.

There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.

The third ground was that the principle of *volenti non fit injuria* applied. On this there is very little actual authority in the country and no actual decision of the Court of Appeal. There is, however, a wealth of authority in the United States, and one of the cases, which is quite sufficient to show what the American law is, has been cited to us - namely, ***Eckert* v. *Long Island Railroad Co.*** [43 N.Y.502]. The effect of the American cases is, I think, accurately stated in Professor Goodhart's article to which we have been referred on "Rescue and Voluntary Assumption of Risk" in Cambridge Law Journal, vol. V., p. 192. In accurately

summing up the American authorities and stating the result of ***Eckert*** case the learned author says this (p.196):

> The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty.

In my judgment that passage not only represents the law of the United States, but I think it also accurately represents the law of this country. It is, of course, all the more applicable to this case because the man injured was a policeman who might readily be anticipated to do the very thing which he did, whereas the intervention of a mere passerby is not so probable.

In ***Brandon* v. *Osborne Garrett & Co***. [(1924) 1 K. B.548] a wife received injury by reason of doing something to protect her husband from further injury due to the wrongful act of the defendants. The learned judge rejected the defence that as it was her own act which brought about her injury she could not recover. That decision is in point, if it is right, and I think it is right.

But still we have to consider certain observations in ***Cutler* v. *United Dairies (London), Ltd***. [1933 2 K.B. 297] I may say at once that the decision in that case has no bearing on the question we have to determine. The decision related to facts as to which it could not be said that the injured man was doing what he did in order to rescue anybody from danger; he was doing no more than this, assisting the defendant's servant in the defendant's work in pacifying the horse in the field. With the decision in that case, on the proved facts, no one can quarrel; it was absolutely and entirely right; but observation made, both by Scrutton L.J. and Slesser L.J. give occasion to some difficulty. Scrutton L.J. said this;

> I now come to the more serious point in the case. I start with this: A horse bolts along a highway, and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances? On those facts it seems to me that he is not. The damage is the result of the accident. The man who was injured, in running out to stop the horse, must be presumed to know the ordinary consequences of his action, and the ordinary and natural consequence of a man trying to stop a runaway horse is that he may be knocked down and injured. A man is under no duty to run out and stop another person's horse, and, if he choose to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head and not on that of the owner of the horse.

That observation is certainly obiter; but of course, any observation made by Scrutton, L.J. is entitled to very great weight, whether it is or is not obiter. In making that observation, however, I do not think Scrutton, L.J.'s mind was directed to the circumstances we have here, of somebody running out for the purpose of rescuing or protecting people is danger of being injured by a runaway horse. I think it is expressed, unfortunately, too widely, and has led to a misunderstanding. I agree to this extent, that the mere fact of a spectator running out into the road to stop a runaway horse will not necessarily entitle him to succeed in an action for the

consequential damage. All the circumstances must be considered, and if his act is one which everybody would expect from a normally courageous man, doing what he does in order to protect other people, I do not think the observation, if it is intended to cover that case, accurately represents the law of this country. Slesser L.J. preferred to put his judgment on the other principle that the rule as to *novus actus interveniens* applied. It obviously did apply in that particular case, but it does not follow that it applies in every case because it applied in that particular case.

I have considered the matter from the point of view of principle, and from that point of view I think it is quite immaterial whether the policeman acted on impulse or whether he acted from a sense of duty to do his best to prevent injury to people lawfully using the highway. If it were necessary to find that he acted on impulse, there is ample evidence of that in his own evidence that he did it on the spur of the moment; but I do not think that is essential. I think it would be absurd to say that if a man deliberately incurs a risk he is entitled to less protection than if he acts on sudden impulse without thinking whether he should do so or not. Appeal dismissed.

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Ramchandraram Nagaram Rice & Oil Mills Ltd. Gaya v. *Municipal Commissioners of Purulia Municipality*

AIR 1943 Pat. 408

VARMA, J. – This is an appeal on behalf of the plaintiff whose suit for damages has been dismissed by the trial Court. The plaintiff is a company registered under the Companies Act, called Ramachandram Nagaram Rice and Oil Mills Ltd., with its head-office in the town of Gaya. The Municipal Commissioners of the Purulia Municipality were impleaded as defendant 1, and defendants 2, 3, 4 and 5 are some of the Municipal Commissioners sued by the plaintiff in their personal capacities.

The plaintiff company alleges that it has been manufacturing oil and rice for the last 14 years and has been selling these articles at various places in the provinces of Bengal, Bihar, Orissa and Assam. The mustard oil manufactured by this company is sold in canisters bearing the registered trade-mark "R.N. Bishnucharan." This brand of mustard oil began to be sent to Purulia and sold there for three years before the filing of the suit; it has a reputation for itself and has found a good market there. On 29th April 1938 the plaintiff despatched to Purulia in a cylindrical van belonging to the East Indian Railway Co., pure mustard oil. This van is made especially for carrying mustard oil, and it has got the words "Mustard Oil Tank" inscribed in bold letters on it. This tank reached Purulia railway station on or about the 3rd May 1938. About 1000 canisters were filled with this oil and their mouths were metalled and metal discs were soldered at the mouths of these canisters. They were lying at the Purulia railway station for delivery to the customers for whom they had been despatched in accordance with agreements entered into between them and the company. On 4th May 1938 after about 400 tins had been delivered to the customers the defendants applied under S. 287, Municipal Act, for the issue of a search warrant on the ground that the said oil had been brought in a crude oil or kerosene oil tank, and the oil was bad, contaminated with kerosene oil and emitted bad odour. The case of the plaintiff is that these allegations were made without any just and probable cause; that at about 4 P.M. on the same day the Sanitary Inspector of Purulia Municipality along with defendants 2, 3 and 4 went to the Purulia railway station yard to detain the mustard oil and in spite of the protests made by the plaintiff company's agent that the oil was pure and meant for human consumption they in conspiracy with one another detained the oil canisters. On the next day, i.e., the 5th May, 1938 the sanitary inspector and defendant 5 ordered 613 tins of mustard oil, which were lying at the railway yard, to be carried in the municipal motor truck which is used for carrying rubbish, road-sweeping and other filthy matters and some of the tins of mustard oil, which were really meant for human consumption were loaded in the motor truck by mehtars (sweepers). The plaintiff company further said that perhaps some of the municipal commissioners were the cause of the steps taken against the company because the company believed they had oil business which had suffered by the introduction of the plaintiff's oil in the market and that is why the municipal authorities acted in a capricious, arbitrary and malicious manner in order to injure the reputation of the plaintiff company and cause loss to it. On 5th May 1938 samples of the oil were taken and sent to the Government analyst at Patna, who found the oil to be genuine. The plaintiff alleges that the conduct of the defendants affected its business inasmuch as its

customers refused to buy the said mustard oil and the plaintiff could not take delivery of it, and as the customers did not buy the mustard oil for some time the plaintiff had to reduce the price of the oil by four annas per maund. From 4th May 1938 to 3rd June 1938, when the Sub-divisional Magistrate informed the company of the result of the chemical analysis, the plaintiff suffered considerable loss in business. The plaintiff, therefore, claimed Rs. 3984-8-0 as price of the mustard oil and canisters seized at the instance of the defendants, Rs. 82-8-0 as interest and also Rs. 5928 for loss of business and damage to the company's reputation, the total coming to Rs. 9995.

Before proceeding any further with the case it is desirable to discuss what the law is on this subject. The trial court has held that they were acting within the purview of the statute and the defendants were protected. Our attention has been drawn to a passage in **Salmond on Law of Torts** (6th Edn., at page 598) which runs as follows:

> If any litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity, or any other reason, and in so doing he commits any act in the nature of a trespass to person or property, he is liable therefor in an action of trespass, and it is not necessary to prove any malice or want of reasonable or probable cause. This is an application of the fundamental principle that mistake, however honest or inevitable, is no defence for him who intentionally interferes with the person or property of another. A supposed justification is no justification at all. A litigant who effects an arrest or seizes property must justify the trespass by pleading a valid execution of legal process, and any irregularity or error which has the effect of making the process invalid will deprive him of all justification.

This principle is based upon the decision in ***Painter* v. *Liverpool Oil Gas Light Co.***, [(1836) 3 A. & E. 433]. Clerk and Lindsel on ***Torts*** [8th Edn., p. 373] say:

> Even in cases in which the nuisance complained of is prima facie authorised by statute, the party causing it will be liable if he does not take reasonable precautions to prevent damage resulting therefrom. Though exempt from the absolute liability which would attach to a person not acting under statutory powers, he is still liable if he exercises his powers negligently or unreasonably.

Mr. Baldeo Sahay appearing on behalf of the plaintiff-appellant contends that the processes issued against his client were void from the very beginning, on reference to the terms of S. 287, Bihar & Orissa Municipal Act. He has drawn our attention to Ss. 12, 24, 25 and 26 of the same Act, and has urged that the sections contemplate action in such matters by the chairman, and he raised the question whether the vice-chairman was authorized to act on behalf of the chairman and whether he was right in addressing the letter to the Deputy Commissioner and not to the Sub-Divisional Officer. Mr. Baldeo Sahay refers to the case in ***David Geddis*** v. ***Proprietors of the Bann Reservoir*** [(1878) 3 A.C. 430]. In that case by an Act of Parliament certain persons were incorporated for the purpose of securing regular and proper supply of water to mill-owners. These persons erected a reservoir, collected the waters of the different streams and sent them to the channel which they were authorized to use, but after a time they all neglected to cleanse the channel so that at times it overflowed its banks

and did damage to the lands of the adjoining proprietors. It was held that under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the Act should not be injurious to the lands lying along the banks of the stream, and that the bed or channel of the stream must be cleaned and kept in a proper state for the flow and re-flow of the water that had to pass through it. Lord Blackburn observed there as follows:

> It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized, if it be done negligently.

In ***Mayor and Councillors of East Fremantle*** **v.** ***Annois*** [1902 A.C. 213], the above decision was referred to, and it was pointed out that the action of the defendants in that case was without any statutory authority. Lord Macnaghten observed in the case as follows:

> If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Kenyon and Buller J. and their view was approved by Abbott, C.J. and the Court of King's Bench. At the same time Abbott C.J. observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy... As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language Turner L.J. observed in a somewhat similar case that such powers are at all times to be exercised bona fide and with judgment and discretion.

Of the Indian decisions, reference has been made to the decision in ***Nagar Valab Narsi*** **v.** ***Municipality of Dhandhuka***, [12 Bom. 490]. There the plaintiff sued the municipality for refusing permission to him to raise a structure. Although their Lordships affirmed the order of the Court below dismissing the suit on the finding that the municipality had not acted beyond the scope of the authority, they observed as follows:

> It does not follow that the commissioners could, therefore, exercise the authority thus given to them in a capricious, wanton and oppressive manner. Public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically. But public functionaries acting within the limits prescribed by the statute which gives them authority are not subject to a suit for thus discharging their duties according to their judgment.

The next case referred to is ***Rup Lal Singh*** **v.** ***Secretary of State*** [AIR 1926 Pat. 258] where Mullick A.C.J. observed as follows:

> It is contended on behalf of the plaintiff that the Regulation could not have intended to empower the native officer to use means which were contrary to law

> and thereby encroach upon the liberty of the subject. But the answer to this is that when a statute confers a power it implies that the donee of that power shall be competent to do all that is needful for its exercise subject to the limitation that he cannot go beyond what is reasonable.

The principle of law that is deducible from these decisions can be shortly stated as follows: If a person is exercising his rights under a statute he is not liable unless it is proved that he acted unreasonably or negligently. Now, let us see how far the plaintiff has succeeded in proving that by the action of the municipality in doing the acts that it did, the case is covered by the principles laid down.

The fact remains that the defendants in their alleged zeal to prevent beri-beri within the municipality acted very hastily in the matter, and in their haste they took steps which led to the seizure of the oil and the despatch of the oil from the station in a scavengers' truck.

The question then arises as to whether the action of the municipality was unreasonable and negligent and caused loss to the plaintiff. On this point, we have got the evidence of Gobind Ram, a servant of the plaintiff company, who says that after the removal he inquired from the merchants of the locality if they would condescend to take the oil and they refused on the ground that the customers will not take the oil because it had been carried in the municipal truck. Ratan Lal, P.W. 5, who is Gomasta of the firm known as Thakur Das Badri Narayan of Purulia, corroborates Gobind Ram when he says that Gobind Ram asked his master to take the oil but his master refused because it had been carried in a municipal truck, and that the plaintiff had to reduce the price of the oil by 4 annas per maund, and this witness's master had to purchase oil from other sources. Madan Gopal Marwari, P.W. 6, says that Gobind Ram asked him to purchase the oil after the analysis but he refused to take it because it had been seized and people did not like to purchase that oil any more. Just before that he had mentioned that the oil was carried by the municipality on the truck on which rubbish is carried. On account of this incident the price of the oil had to be reduced by the plaintiff. Gobind Ram, P.W. 3, also says that those who purchased the tins at the court auction could not sell the oil at Purulia. From the evidence of these witnesses, it is clear that the oil was carried in a scavengers' truck loaded by mehtars, as a result of which the plaintiff could not sell the oil at its proper price, which was admittedly Rs. 14 per maund on that date. The action of the municipality, if not actuated by malice or as a result of a conspiracy, was certainly very unreasonable and negligent. There were other methods available, by which the same object could have been attained. But the one which the municipality adopted does make them liable for the loss which the plaintiff suffered. The municipality is liable for the negligent acts of its agents. Appeal allowed.

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Manindra Nath Mukherjee v. *Mathuradas Chatturbhuj*

AIR 1946 Cal. 175

KHUNDKAR, J. - This is an action for damages for injury caused to the plaintiff by the fall, from the roof of the defendant's premises, of a cinema advertising device, called a banner, which is an article made of the cloth within a wooden frame. According to the defendant's witness Amitava Roy, the frame is of pinewood 2 inches wide by ½ an inch thick.

The defendant is the proprietor of a motion picture exhibition establishment called the Rupali Cinema situated in Ashutosh Mookerjee Road. The portion of the building which abuts on the street is one-storied. On the roof of this, about four feet from its western edge, overlooking the street, there stands a sky sign which is a more or less permanent structure consisting of a steel frame held firmly in place in an upstanding position by means of masonry and iron attachments. It is 12 feet high by 25 feet wide. On this framework and firmly attached to it in a vertical position there is galvanized iron sheeting, the surface of which, facing westwards towards the street, was intended to carry advertising designs. The galvanized sheeting covers, according to the defendant's manager, B.N. Basu Mullick, the whole surface of the framework. The defendant obtained a licence to erect this sky sign from the Calcutta Municipality in December 1938. The plan which he submitted along with his application for a licence was a plan of the construction above described. It did not show any specific advertising sign as a part of the construction, although the definition of a sky-sign under S.3, cl. (65), Calcutta Municipal Act, for which, under the Act, a licence has to be taken out, included the advertising sign itself and not the framework only. The construction described above advertised nothing, and, as just stated, the intention was that advertising designs would be displayed on or against the galvanized sheeting. It appears that both the defendant and the Municipal authorities entertained the idea that paper posters would be pasted on the galvanized sheeting. The evidence is that this was what was frequently done. But the defendant also proceeded to advertise the entertainments provided at the Rupali Cinema in a somewhat different manner. Banners similar to the one with which we are concerned in this case were displayed from the sky sign. There is in the framework of the sky sign no contrivance by means of which such banners could be held firmly and securely in place - no slots, bolts, grooves, flanges or screws.The banners were held against the galvanized sheet by means of cheep coir ropes which were fastened to the four corners of the wooden frame which contained the cloth design, and these ropes were then carried over and under the metal frame of the sky sign, and knotted to certain angles and iron rods behind. The lower portion of the wooden frame of the banners did not rest on the ground.

On the 5th July 1943, at about 7.15 p.m. a banner (produced in Court and found to measure twelve feet in length and three and half feet in width) within a wooden frame, fell from its position against the sky sign of the Rupali Cinema. A very narrow space - according to the evidence for the defendant, four feet - intervened between the sky sign and the edge of the roof, so that there was nothing to intercept or break the fall. The contraption fell on the plaintiff, who was passing along the pavement. Apparently the wooden frame struck him on the head, for he sustained a cut thereon, which the medical evidence has described as severe, and which bled profusely. On behalf of the defendant it was sought to be suggested that the

plaintiff was struck not by the banner but by a corrugated iron sheet, described as a 'shade' one or more of which fell at the same time, the weather being stormy from the roof on an adjoining shop. The evidence in support of this suggestion is totally insufficient, and as a defence it was indeed not seriously pressed.

The defence, apart from the faint suggestion that the plaintiff was not struck by the banner but by something else, is as follows: In the first place, it is for the plaintiff to establish that there was negligence on the part of the defendant or his servants which caused the fall of the banner. Not only has the plaintiff not established this, but the evidence adduced on behalf of the defendant shows that all reasonable care was exercised by the defendant's manager who personally surpervised the tying of the banner to the sky-sign frame on 12th June 1943. A new rope purchased on the 11th June was used. On the 5th July, the manager examined the banner and found it in position and intact. Each of the four corners of the frame of the banner was tied to the sky-sign by 3 strands of this rope which was securely knotted to the supports of the sky-sign frame. No one could be expected to do more, and the banner fell because of a storm of unusual severity which occurred in the afternoon of the 5th July. The injury which the plaintiff sustained was not severe and he is not entitled to any damage.

The plaintiff's case is that the banner would not have fallen but for the defendant's negligence in not having it properly secured. He has called no evidence, but relies on the doctrine of *res ipsa loquitur* which places the burden of proving due care on the defendant, and contends that for injury caused by the fall from the defendant's premises of an article which was potentially capable of causing harm, and which had been brought into those premises by the defendant, the latter is liable under the principle laid down in (1868) 3 H. L. 330 [***Rylands* v. *Fletcher***].

Professor Winfield in his "***Text-Book on the Law of Tort***" has expressed the essentials of negligence in the following words:

> Negligence as a tort is a breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff. Thus its ingredients are : (1) A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of duty; (2) breach of duty; (3) consequential damage to B.

In determining whether the first ingredient here mentioned is established in the present case, one has to ask whether the defendant, an occupier adjoining a public thoroughfare, owed any duty to the plaintiff who was a passerby thereon. In considering whether the second ingredient is present one has to start with the fact that the plaintiff has offered no evidence to show that the defendant had kept the banner on the roof of the premises in a manner which argued want of due care. It has accordingly to be seen whether want of such care may be inferred from the mere fact that the banner fell into the street, that is to say, whether the maxim *res ipsa loquitur* applies.

A careful consideration of the cases discussed above has satisfied me that the maxim *res ipsa loquitur* applies to the facts relating to the occurrence in the present case. The plaintiff's version of those facts, supported as it is by the evidence of Raj Deo Ojha, Ram Laish Singh, and Savajit Singh who are independent and, in my opinion, truthful witnesses must be accepted as a correct statement of the circumstances under which the plaintiff received his

injury, and the suggestion that he was struck by an article or articles described as 'shades' which fell from the roof of a neighbouring building at the same time as did the banner, must be dismissed as a theory which has no foundation and is opposed to the evidence. This conclusion casts the burden of proving exercise of due care on the defendant. Evidence to rebut the presumption of negligence has been given on his behalf, but I am not impressed by it. It is, however, unnecessary at the moment to discuss its inherent infirmities, or to go to the length of saying, at this stage, that what was stated by the defendant's manager, Basu Mullick, regarding the precautions which he took to see that the banner was properly fastened to the frame of the sky sign was materially untrue. I shall refer to this aspect of the matter later. This, in my judgement, is a case in which the indisputable facts attract the rule in (1868) 3 H. L. 330, and that being so, the defendant is called upon to answer his liability for the injury caused to the plaintiff by the falling banner not by merely showing that due care was exercised but in one of modes which alone constitute a defence to liability in cases of the the ***Rylands* v. *Fletcher*** type. One of these is the defence of act of God or *vis major*, and the defendant has in fact raised it by contending that the fall of the banner was caused by a storm of unusual severity. The evidence adduced in support of this contention will have to be examined for the purpose of seeing whether it proves that such a storm took place as would amount to act of God or *vis major* as that concept has been understood in the Law of Torts. Therefore before approaching the evidence regarding the weather which prevailed at the time when the banner fell, it will be necessary first to consider the cases in which act of God or *vis major* has been discussed.

Professor Winfield, following Pollock, has defined act of God as "an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it." In ***Greenock Corporation* v. *Caledonian Railway*** [(1917) A.C. 556, 581], Lord Parker said:

> (1868) 3 H.L. 330 saved the question whether the act of God might not have afforded a defence and this question was answered in the affirmative in (1876) 10 Ex. 255 in which the act of God had been established by the finding of the jury, though I have some doubt whether that finding was correct.

Mr. Mukerji has relied strongly upon (1876) 10 Ex. 255, in support of his contention that the estate of the weather at the time when the banner fell was so stormy that the defendant may plead act of God as an answer to the plaintiff's claim. The facts of that case were as follows: There were some artificial lakes on the defendant's land which had been formed by damming up a stream. Owing to an extraordinary rainfall, greater and more violent than any of the witness could remember, the stream and the lakes burst their banks and the water inundated the plaintiff's land and carried away some county bridges. The plaintiff, who sued on behalf of the county, contended that the defendant was liable on the principle of (1868) 3 H.L. 330, but the Court of Exchequer Chamber decided that the defendant could not be held liable for an extraordinary act of nature which could not be reasonably anticipated.

With reference to the view taken of act of God in (1876) 10 Ex. 255 Fry J. said, in (1878) 9 Ch. D. 503 at p. 516:

> In order that the phenomenon should fall within that rule, it is not in my opinion necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case in (1876) 10 Ex. 255.

This statement was assented to by Lord Coleridge, C.J. in ***Dixon* v. *Metropolitan Board of Works*** [(1881) 7 Q.B.D. 418 at pp. 421 and 422] was distinguished in (1917) A.C. 556. Professor Winfield has dealt with this matter in a short compass at p. 53 of his ***Text Book on the Law of Tort*** (2nd Edn.):

> The principle underlying (1876) 10 Ex. 255 is unquestioned, but the decision itself has aroused adverse criticism in later cases, notably in (1917) A.C. 556. The corporation, in laying out a park, constructed a concrete paddling pool for children in the bed of a stream and thereby altered its course and obstructed its natural flow. Owing to rainfall of extraordinary violence, the stream overflowed at the pond and a great volume of water, which would have been safely carried off by the stream, in its natural course, poured down a street and flooded the property of the railway company. It was held by the House of Lords that this was not *damnum fatale* (the equivalent in Scot's Law of the 'act of God') and that the Corporation was liable. Some of the noble and learned Lords cast doubt upon the finding of facts by the Jury in (1876) 10 Ex. 255.

In (1917) A.C. 556, Lord Finlay observed:

> It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time.

And on this point Lord Dunedin said:

> The appellants argue that …. If they can show that this rainfall was much in excess of what had been previously observed in Greenock that is enough. I do not think that you can rightly confine your view to Greenock alone. *No one can say that such rainfall was unprecedented in Scotland;* and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to.

In the present case, the incident happened during the monsoon, a season in which stormy weather is not unusual and storms of considerable severity are by no means unprecedented. Whether the climatic disturbances of the 5th July 1943 amounted to a severe storm at all is a question of fact which I shall deal with later upon the evidence. ***The Great Western Railway of Canada* v. *Braid*** and ***The Great Western Railway of Canada* v. *Fawcett*** [(1863) 1 Moo. P.C. (N.S.) 101] were two appeals from Canada which were heard together by the Privy Council. They arose out of two suits for damages for deaths occasioned by a railway accident which was caused by the collapse of an embankment. The case was earlier than (1868) 3 H.L. 330, and it is interesting to note that two of the matters which are involved are the principle of the maxim *res ipsa loquitur*, and the defence taken on behalf of the railway company, that the collapse of the embankment was due to storm of such an extraordinary

nature that no experience could have anticipated its occurrence. Lord Chelmsford, delivering the judgment of the Judicial Committee, said regarding the former matter (at p. 115):

> There can be no doubt that when an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to prima facie evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

Regarding the second matter, his Lordship said (at p. 120):

> Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purposes of their judgment in these cases to say that the railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur.

His Lordship referred to what the witnesses had said in describing the storm, and then went on to make the following comment (p. 121):

> In the whole of this evidence there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur.

His Lordship after referring to the report of the company's engineer, said (page 122):

> Whatever his meaning may be, it is evident that the embankment was insufficiently provided with means of resisting the storm, which, though of unusual violence was not of such a character as might not reasonably have been anticipated and which, therefore ought to have been provided against by all reasonable and prudent precautions.

(1863) 1 Moo. P.C. (N.S.) 101 as well as (1917) A.C. 556 were followed by the Privy Council in ***City of Montreal* v. *Watt & Scott Ltd***. [(1922) 2 A.C. 555] where it was laid down that it was the duty of a municipality in constructing sewers, to make them capable of coping with the amount of water which might be expected from time to time in the course of years.

The cases considered above bring us back to the definition of act of God or *vis major* contained in Professor Winfield's book, which, at the expense of repetition, I would quote again: "an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it." I shall now examine the evidence regarding the "storm" which is alleged by the defence to have taken place on the 5th July 1943.

It was suggested in cross-examination to the plaintiff's witness Raj Deo Ojha, Ram Laish Singh, and Savajit Singh, that there was a strong storm or strong wind at the time when the banner fell, but they all categorically denied it. It was similarly suggested to Mr. S.N. Gupta that the weather was stormy on the evening of the 5th July, but he maintained that though there was cloud and rain there was no storm. The witness Raj Deo Ojha conceded that when the banner fell there was a gust of wind, and the plaintiff admitted that this might have been the case.

The defendant's witness Basu Mullick, the manager of the Rupali Cinema, deposed on the other hand that on the 5th July the weather was cyclonic. The question is set at rest by the evidence of Bishnupada Shaha, who is employed as the Chief Observer in the Weather Office of the Metereological Department at Alipore. This witness is a Master of Science of the Calcutta University and gave evidence as an expert. He impressed me as being disinterested and independent. From the records of his department he testified that on the afternoon and evening of the 5th July there was not a great deal of rain and that the velocity of the wind was as follows: From 5.30 p.m. to 7.14 p.m. it was moderate, i.e. from 8 to 10 miles per hour. From 7.14 to 8.40 p.m. it was rather high, the maximum gust being about 27 miles per hour at about 7.46 p.m. From 8.40 p.m. to 11.30 p.m. the wind was again moderate, i.e. from 8 to 10 miles per hour. The witness described the phenomena which occur in different states of wind velocity: at 22 to 27 miles per hour, large branches of trees are put in motion, whistling is heard in telegraph wires, and umbrellas are held with difficulty. At 28 to 33 miles per hour whole trees are in motion and inconvenience is felt in walking against the wind. At 34 to 40 miles per hour, twigs are broken off and walking is impeded. At 41 to 46 miles per hour slight structural damage occurs, and loosely fastened corrugated iron is removed from roofs. The witness further stated that wind velocities of from 31 to 48 miles per hour are sometimes experienced in Calcutta during norwester squalls, and that gusts of from 28 to 33 miles per hour are not uncommon in the monsoon season. This evidence puts an end to the plea of act of God, for, if it is accepted, as I think it must be, then it is idle to say that the force of the wind was so unexpected that no foresight could reasonably be expected to anticipate it.

Although this conclusion is sufficient to fasten liability on the defendant upon the principle in (1868) 3 H.L. 330, I would go further and hold that the presumption of want of due care on the part of the defendant or his servants which the maxim of *res ipsa loquitur* raised against them has not been rebutted. In not taking precautions against winds which are not unusual during the monsoon months, the defendants were prima facie negligent, and the fact that the banner fell in a wind which was not above 27 miles per hour in velocity, goes a long way to discredit all the elaborate evidence of Basu Mullick and Amitava Roy regarding the tying of the banner to the framework of the sky sign on the 11th June by three strands of new coir rope. I cannot believe this evidence, for if it is true, the banner would not have fallen. As stated before, it was made fast in a position flat against the galvanised sheeting of the sky sign structure. If the wind was from the west, that would have pressed against the sky sign frame, not torn it away from there. If the wind was from the east the banner would have been in the lea of the sheeting, which would have kept the wind away from it. I find that there is some confusion in the transcript of the evidence of Bishnupada Shaha as to whether the wind that evening was from the south-west or in south-east, but, for the reason just stated, I do not think that matters much. It certainly does not support the explanation advanced by Basu Mullick, that a strong wind either from the north or the south tore into the narrow space between the galvanised sheeting and the banner, and caused the ropes to part in spite of their having been securely tied. Port or starboard, windward or leaward, it makes no difference to Basu Mullick. And then the ropes at all the four corners parted at the same time. Had one gone, and the others held, the banner would not have fallen into the street, and the evidence given to show that every precaution was taken to see that the banner was securely fastened to the sky sign frame might not have been so transparently untrue. I hold that the defendant is

liable upon the principle in (1868) H.L. 330, and I further find that there was negligence on the part of his servants for which he is responsible in law, inasmuch as proper care was not taken to secure the banner in such a way as to prevent it from being blown into the street during monsoon weather.

* * * * *

NEGLIGENCE

Donoghue v. *Stevenson*

[1932] AC 562 (HL)

Mrs. Donoghue averred that a friend purchased a bottle of ginger-beer for her in Minchella's café in Paisley; that Minchella took the metal cap off the bottle, which was made of dark opaque glass, and poured some of the contents into a tumbler; that, having no reason to suspect that it was anything other than pure ginger-beer, she drank some of the contents; that when her friend refilled her glass from the bottle there floated out the decomposed remains of a snail; that she suffered from shock and severe gastro-enteritis as a result of the nauseating sight and of the impurities she had already consumed. She further averred that the ginger-beer was manufactured by the defender to be sold as a drink to the public (including herself), that it was bottled by him and labelled with a label bearing his name; and that the defender sealed the bottle with a metal cap. She also claimed that it was the duty of the defender to provide a system in his business which would prevent snails entering his ginger-beer bottles, and to provide an efficient system of inspection of bottles prior to their being filled with ginger-beer, and that his failure in both duties caused the accident.

LORD ATKIN - The sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. The law appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations, which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon

some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of ***Heaven* v. *Pender***, as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A.L. Smith L.J. in ***Le Lievre* v. *Gould*** [(1893) 1 Q.B. 491, 497, 504]. Lord Esher says: "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property". So A.L. Smith L.J.: "The decision of ***Heaven* v. *Pender*** was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness or "proximity" was intended by Lord Esher is obvious from his own illustration in ***Heaven* v. *Pender*** of the application of his doctrine to the sale of goods. "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the

goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property." I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship as explained in ***Le Lievre* v. *Gould***, I think the judgment of Lord Esher expresses the law of England; without the qualification, I think the majority of the Court in ***Heaven* v. *Pender*** were justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of cases now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities I should consider the result a grave defect in the law. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser – namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist.

My Lords, if your Lordships accept the view that this pleading disclose a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

LORD MACMILLAN - The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

To descent from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant establishes her allegations, the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterized as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends

to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker, through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness", and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequence of such carelessness can scarcely be less wide than its criminal consequences.

I am anxious to emphasise that the principle of judgment which commends itself to me does not give rise to the sort of objection stated by Parke B. in ***Longmeid* v. *Holliday*** [(1851) 6 Exch. 761, 768; 155 E.R. 752], where he said:

> But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous – a carriage, for instance – but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it.

I read this passage rather as a note of warning that the standard of care exacted in human dealings must not be pitched too high than as giving any countenance to the view that negligence may be exhibited with impunity. It must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is not too remote from the carelessness. I can readily conceive that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer could not in any view be held to be to blame. It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it

to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded.

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, *res ipsa loquitur*. Negligence must be both averred and proved. Appeal allowed.

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Municipal Corporation of Delhi v. *Subhagwanti*

AIR 1966 SC 1750

RAMASWAMI, J. – These appeals arise out of 3 suits for damages filed by the heirs of three persons who died as a result of the collapse of the Clock Tower situated opposite the Town Hall in the main Bazar of Chandni Chowk, Delhi, belonging to the appellant, formerly the Municipal Committee of Delhi.

2. It was held by the trial Court that it was the duty of the Municipal Committee to take proper care of the buildings, so that they should not prove a source of danger to persons using the highway as a matter of right. The trial Court rejected the plea of the Municipal Committee that in the case of latent defects it could not be held liable and the Municipal Committee, as the owner of the building abutting on the highway, was liable in negligence if it did not take proper care to maintain the buildings in a safe condition. It was submitted against the Municipal Committee before the trial Court that, apart from superficial examination of the Clock Tower from time to time by the Municipal Engineer, no examination was ever made with a view to seeing if there were any latent defects making it unsafe. Aggrieved by the decree of the trial Court, the Municipal Committee filed appeals in the High Court in all the three suits. The High Court held that the principle of *res ipsa loquitur* applied to the case. The High Court considered that it was the duty of the Municipal Committee to carry out periodical examination for the purpose of determining whether deterioration had taken place in the structure and whether any precaution was necessary to strengthen the building. The High Court mainly relied on the evidence of Shri B.S. Puri, Retired Chief Engineer, P.W.D., Government of India who was invited by the Municipal Committee to inspect the Clock Tower after its collapse and who was produced by them as their witness. The facts disclosed in his statement and that of Mr. Chakravarty, the Municipal Engineer were that the building was 80 years old and the life of the structure of the top storey, having regard to the type of mortar used, could be only 40 to 45 years and the middle storey could be saved for another 10 years. The High Court also took into consideration the statement of Mr. Puri to the effect that the collapse of the Clock Tower was due to thrust of the arches on the top portion. Mr. Puri was of the opinion that if an expert had examined this building specifically for the purpose he might have found out that it was likely to fall. The witness further disclosed that when he inspected the building after the collapse and took the mortar in his hands he found that it had deteriorated to such an extent that it was reduced to powder without any cementing properties.

4. The main question presented for determination in these appeals is whether the appellant was negligent in looking after and maintaining the Clock Tower and was liable to pay damages for the death of the persons resulting from its fall. It was contended, in the first place, by Mr. Bishen Narain on behalf of the appellant that the High Court was wrong in applying the doctrine of *res ipsa loquitur* to this case. It was argued that the fall of the Clock Tower was due to an inevitable accident which could not have been prevented by the exercise of reasonable care or caution. It was also submitted that there was nothing in the appearance of the Clock Tower which should have put the appellant on notice with regard to the probability of danger. We are unable to accept the argument of the appellant as correct. It is

true that the normal rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. But there is an exception to this rule which applies where the circumstances surrounding the thing which causes the damage are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the defendant's part. The principle has been clearly stated in Halsbury's ***Law of England***, 2nd Edn., Vol. 23, at p. 671 as follows:

> An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res pisa loquitur* applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part.

In our opinion, the doctrine of *res ipsa loquitur* applies in the circumstances of the present case. It has been found that the Clock Tower was exclusively under the ownership and control of the appellant or its servants. It has also been found by the High Court that the Clock Tower was 80 years old and the normal life of the structure of the top storey of the building, having regard to the kind of mortar used, could be only 40 or 45 years. There is also evidence of the Chief Engineer that the collapse was due to thrust of the arches on the top portion and the mortar was deteriorated to such an extent that it was reduced to powder without any cementing properties. It is also not the case of the appellant that there was any earthquake or storm or any other natural event which was unforeseen and which could have been the cause of the fall of the Clock Tower. In these circumstances, the mere fact that there was fall of the Clock Tower tells its own story in raising an inference of negligence so as to establish a prima facie case against the appellant.

5. We shall proceed to consider the main question involved in this case, namely, whether the appellant, as owner of the Clock Tower abutting on the highway, is bound to maintain it in a proper state of repairs so as not to cause any injury to any member of the public using the highway and whether the appellant is liable whether the defect is patent or latent. On behalf of the appellant Mr. Bishen Narain put forward the argument that there were no superficial signs on the structure which might have given a warning to the appellant that the Clock Tower was likely to fall. It is contended that since the defects which led to the collapse of the Clock Tower were latent the appellant could not be held guilty of negligence. It is admitted, in this case, that the Clock Tower was built about 80 years ago and the evidence of the Chief Engineer is that the safe time limit of existence of the building which collapsed was 40 or 45 years. In view of the fact that the building had passed its normal age at which the mortar could be expected to deteriorate it was the duty of the appellant to carry out careful and periodical inspection for the purpose of determining whether, in fact, deterioration had taken place and whether any precautions were necessary to strengthen the building. The finding of

the High Court is that there is no evidence worth the name to show that any such inspections were carried out on behalf of the appellant and, in fact, if any inspections were carried out, they were of casual and perfunctory nature. The legal position is that there is a special obligation on the owner of adjoining premises for the safety of the structures which he keeps besides the highway. If these structures fall into disrepair so as to be of potential danger to the passer-by or to be a nuisance, the owner is liable to anyone using the highway who is injured by reason of the disrepair. In such a case it is no defence for the owner to prove that he neither knew nor ought to have known of the danger. In other words, the owner is legally responsible irrespective of whether the damage is caused by a patent or a latent defect. In ***Wringe* v. *Cohen*** [(1940) 1 KB 229], the plaintiff was the owner of a lock-up shop in Proctor Place, Sheffield, and the defendant Cohen was the owner of the adjoining house. The defendant had let his premises to a tenant who had occupied them for about two years. It appears that the gable end of the defendant's house collapsed owing to a storm, and fell through the roof of the plaintiff's shop. There was evidence that the wall of the gable end of the defendant's house had, owing to want of repair, became a nuisance, i.e., a danger to passers-by and adjoining owners. It was held by the Court of Appeals that the defendant was liable for negligence and that if owing to want of repairs premises on a highway become dangerous and, therefore, a nuisance and a passer-by or an adjoining owner suffers damage by the collapse the occupier or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not. At p. 233 of the Report Atkinson, J. states:

> By common law it is an indictable offence for an occupier of premises on a highway to permit them to get into a dangerous condition owing to non-repair. It was not and is not necessary in an indictment to aver knowledge or means of knowledge…. In ***Reg* v. *Bradford Navigation Co.*** [(1865) 6 B. and S. 631, 651] Lord Blackburn (then Blackburn, J.) laid it down as a general principle of law that persons who manage their property so as to be a public nuisance are indictable. In ***Attorney General* v. *Tod Heatley*** [(1897) 1 Ch. 560] it was clearly laid down that there is an absolute duty to prevent premises from becoming a nuisance. "If I were sued for a nuisance," said Lindley, L.J. in ***Rapier* v. *London Tramways Co.*** [(1893) 2 Ch. 588, 599], 'and the nuisance is proved, it is no defence on my part to say and to prove that I have taken all reasonable care to prevent it.

The *ratio* of this decision was applied by the Court of Appeal in a subsequent case in (1951) 1 KB 517, and also in (1958) 1 WLR 800. In our opinion, the same principle is applicable in Indian Law. Applying the principle to the present case, it is manifest that the appellant is guilty of negligence because of the potential danger of the Clock Tower maintained by it having not been subjected to a careful and systematic inspection which it was the duty of the appellant to carry out. Appeals dismissed.

* * * * *

P. Narasimha Rao v. *Gundavarapu Jayaprakasu*

AIR 1990 AP 207

M.N. RAO, J. - The two appeals and the cross-objection arise out of the judgment of the learned First Additional District Judge, Guntur in O.S. No. 34 of 1969 granting a decree for Rs. 22,000/- in favour of the plaintiff towards damages for performing tonsillectomy operation on the plaintiff in careless and negligent manner. The second defendant Dr. P. Narashima Rao was the E.N.T. Surgeon who performed the tonsillectomy operation upon the plaintiff at the Government General Hospital, Guntur and the third defendant Dr. S.Shankar Rao was the Chief Anaesthetist of the Hospital who administered anaesthetics at the time of the operation. The first defendant is the Government of Andhra Pradesh represented by the District Collector, Guntur who according to the plaintiff is vicariously liable for the damages since the alleged act of negligence was committed by the defendants 2 and 3 in the course of discharging their duties as employees of the State Government.

2. The plaintiff was brilliant youngster aged 17 years in 1966 when he passed the P.U.C (Pre-University Course) examination securing 100% in Mathematics and 93.5% in Physical Sciences. He was a state Government merit scholar getting a monthly scholarship of Rs. 100/-. He was offered a seat in B.E. Degree course in four Engineering Colleges both within and outside the State of Andhra Pradesh. He had a minor ailment -chronic nasal discharge - for which his mother took him to the second defendant Dr. Narasimaha Rao for consultation. The plaintiff's father at that time was working as Senior Officer at Nagpur in the service of the Central Government. The second defendant diagonosed the disease as Nasal Allergy and suggested operation for removal of tonsils. On 6-7-66 the plaintiff was admitted in the Government General Hospital, Guntur and the operation was performed on the morning of 7-7-66. His father came down to Guntur to be present at the time of the operation. None of the relations of the plaintiff including the father were allowed to be present inside the operation theatre and so what happened in the operation theatre at the time of the operation was within the exclusive knowledge of defendants 2 and 3. About one and half hours after the plaintiff was taken inside the operation theatre, he was brought out in an unconscious state and the doctors informed the plaintiff's father that he would regain consciousness within three or four hours. The plaintiff was kept in the E.N.T. Ward of the Hospital. For the next three days he did not regain consciousness and thereafter for another fifteen days he was not able to speak coherently. The treatment was entrusted to two other doctors of the same hospital Dr. Mallikarjuna Rao, Physician and Dr. Suryanarayana, Psychiatrist. He was discharged from the hospital on 28-8-66 and his condition at the time of the discharge was that he was just able to recognise the persons around and utter a few words. He could not even read or write numericals. He lost all the knowledge and learning acquired by him. Greatly upset by the condition of the plaintiff his father took him to Vellore where he was examined by P.W. 1 Dr. K.V. Mathai, Professor of Neuro Surgery, Christian Medical College Hospital, Vellore. After conducting neurological examination and after studying the case history, on 21-11-66 Dr. Mathai gave a written opinion Ex. A-1 stating that the plaintiff had cerebral damage and his intellectual ability was that of a boy of five years age in relation to calculations, reading and understanding. The plaintiff was then taken to Banglore where he was examined by Dr. S. A.

Ansari, Assistant Professor of Psychiatry at the Indian Institute of Medical Health on 28-11-66. After conducting certain tests and studying the case papers the doctor found the plaintiff to be mentally defective. His I.Q. as against the normal 100 was only 60. There was organic brain damage which was due to cerebral anoxia - the damage to nerve cells was total and irreversible. The prolonged unconsciousness of the plaintiff was due to cerebral anoxia suffered during the operation. Claiming compensation in a sum of Rs. 50,000/- after serving notice under section 80 of the C.P.C, it was averred by the plaintiff in the plaint that but for the unfortunate operation which marred permanently his future prospects and rendered him unfit for higher studies, he would have joined the B.E. degree course in any of the four Engineering colleges which offered him admission, successfully completed the same and also gone abroad for higher studies. Being a Government merit scholar in the Pre University Course he would have easily obtained merit scholarship of Rs. 150/- per month until he completed postgraduate studies and secured easily a Government job fetching a minimum initial salary of Rs. 1,000/-. Because of the recklessness and negligence on the part of the defendants 2 and 3 his bright future was marred permanently and he had to depend upon his parents through out his life. Due to the recklessness and negligence of the defendants 2 and 3 the plaintiff suffered respiratory and cardiac arrest for about three or four minutes during general anaesthesia which led to cerebral anoxia causing irreparable damage to the brain. Knowing fully well that he was not in fit state to be operated upon, the second defendant negligently proceeded to perform the operation and in fact completed the operation, thereby further aggravating the damage to the brain. The necessary precautions that ought to have been taken before and during the operation were not taken. Tonsillectomy being a minor operation involving no risk at all, the damage done to him speaks itself of the gross negligence and carelessness on the part of the defendants 2 and 3. The Anaesthetist did not even maintain any record of the pre-anaesthetic assessment of the plaintiff. The plaintiff, therefore, sought a decree in a sum of Rs. 50,000/- as damages under all the heads including mental pain, suffering, loss of earning capacity, expenses incurred for medical treatment etc.

5. The learned Judge after considering the evidence on record both oral and documentary rejected the version put forth by the defendants that the mental depression and brain damage suffered by the plaintiff was functional psychosis. He greatly relied upon the expert medical witness D.W. 5 who stated that the mental disorder of the plaintiff was due to cerebral anoxia, the result of improper induction of anaesthetics and the failure to take immediate steps to reduce anaesthesis and anoxia. That the plaintiff suffered anoxia, the learned Judge concluded, was established beyond reasonable doubt by the notings in the case sheet Ex. A.25.

6. During the operation the respiratory arrest occurred on account of the third defendant, the Anaesthetist, removing the tube from the mouth of the plaintiff without giving fresh breaths of oxygen and there was delay on the part of the third defendant in noticing the respiratory arrest and inserting the tube for the second time and in the meanwhile the respiratory arrest led to cardiac arrest which made the third defendant give massage and chest compression to assist circulation of the blood. The faulty method of induction of anaesthetics led to cerebral anoxia and thus permanently damaging the brain, the learned Judge concluded. The avoidable delay in inserting the tube for the second time to administer oxygen when the

respiratory arrest occurred, according to the learned Judge aggravated the cerebral anoxia. From the symptoms exhibited by the plaintiff on the operation table, any prudent doctor, according to the learned Judge, could have easily suspected cerebral anoxia and the anaesthetist did not care to ascertain the reason for the pulse abnormality of the plaintiff nor did he record the levels of blood pressure after the respiratory arrest and rescuscitation nor had he informed the same to the Surgeon. The third defendant, therefore, was clearly negligent according to the learned Judge in discharging his duties towards the patient and, therefore, it is actionable negligence. So far as the Surgeon, the second defendant is concerned, the learned Judge held that although the Surgeon was aware that the plaintiff had respiratory arrest and the anaesthetist did massage and external compression of the chest to revive respiration and the plaintiff had almost reached the point of death, still he carried on the operation merely because the anaesthetist informed him that the patient was fit for the operation. No prudent Surgeon would have continued with the operation in the particular circumstances of the case. The second defendant ought to have postponed the operation instead of hurriedly continuing the same without caring for the consequences. The performance of the operation aggravated the damage to the brain and the learned Judge, therefore, concluded that the second defendant is liable for the actionable negligence. The learned Judge held that the State Government is vicariously liable since the defendants 2 and 3 are employees of the Hospital owned by the Government. On the question of quantum of damages, the learned Judge awarded Rs. 20,000/- under the head general damages and Rs. 2,000/- under the head special damages although the plaintiff had asked for Rs. 50,000/- towards the damages. The reason for granting the reduced amount appears to be that no similar or comparable cases where damages were awarded were brought to the notice of the learned trial Judge.

7. Against the judgment and decree of the court below, the second defendant, Dr. Narasimha Rao, the Surgeon preferred A.S. 651/79. A.S. 710/79 was preferred by the State Government. The plaintiff filed cross-objection contending that the amount of damages awarded by the court below was inadequate. The Anaesthetist (D3) died after his evidence was recorded. An application was filed by the plaintiff to bring on record the legal representatives of the third defendant and the same was dismissed by the learned Judge. A revision petition filed against that order was also dismissed by this Court.

9. The tragedy that befell the plaintiff is so shocking that any amount of money will not give him what he had lost permanently. He is condemned to a perpetual misery and anguish. He has no present and he has no future. He only had a past before he completed the age of 17. The permanent damage sustained by the plaintiff was due to the operation performed on 7-7-66 is beyond controversy; there is no scintilla of evidence to doubt this. The two important questions that require consideration in these appeals are:

(1) Whether the brain damage sustained by the plaintiff was due to the negligence of defendants 2 and 3.

(2) If the answer to the above is in the affirmative whether the damages awarded by the court below are inadequate in the circumstances?

10. The brain damage sustained by the plaintiff was cerebral anoxia and the medical evidence established this beyond any doubt. The damage suffered by the plaintiff was

irreversible is also proved by medical evidence. The damage sustained was not localized to any part but it was over all damage was also brought out in the medical evidence. Dr. S.A.Kabir (D.W.5) said in his evidence that respiratory arrest and cardiac arrest resulted in cerebral anoxia. The case sheet Ex. A-25 contains the record of the condition of the plaintiff when he was at the Hospital. It does not contain any record that there was any abnormality in the mental health of the plaintiff prior to the operation. Ex. A-25 clearly shows that the brain damage suffered by the plaintiff was due to cerebral anoxia. On this aspect there is no scope for controversy the doctors examined as witnesses in this case, going through the contents of Ex.A-25, were clear in their opinion on this. Respiratory arrest if prolonged would lead to cardiac arrest and in the case of cardiac arrest even a delay of about three minutes would result in permanent brain damage, according to Dr. Variava, Neuro Surgeon of Poone (P.W. 7) who examined the plaintiff and gave his opinion Ex. C-1. The two leading doctors D.W. 5 Dr. Kabir and P.W. 7 Dr. Variaya both agreed that if cardiac arrest has occurred, it is better to postpone the operation and that tonsillectomy is an "elective operation". When a patient is under general anaesthesia, all medical authorities agree the views expressed in this regard by Dr. Artusio have been admitted to by correct by Dr. Kabir D.W. 5 it is the mutual responsibility of the surgeon and the anaesthetist, Dr. Kabir said, and this has not been disputed, that prudence on the part of the surgeon requires him to ascertain from the anesthetist about the state of the patient and that a surgeon should know whether cardiac arrest had followed the respiratory arrest. The preparation of the patient for the operation, according to Dr. Kabir, includes "administration of anaesthetics and anaesthesia forms part of surgical procedure. The second defendant who performed the operation giving evidence as D.W. 4 and Dr. Kabir D.W. 5 both said in their evidence that surgery, anaesthesia and resuscitation are team work of both the surgeon and anesthetist.

12. The patient was brought out of the operation theatre in an unconscious state and several days after the operation he regained consciousness and his condition till he was discharged on 20-8-1966 was recorded in the case sheet Ex. A. 25. One glaring feature of this case clearly suggestive of the recklessness of the Anaesthetist was his failure to maintain any record of either the condition of the patient or the level of anaesthesia and what annaesthetics were administered. The names of drugs reeled out in his evidence and the dosages were all based on his memory. The evidence of the anaesthetist that the pulse returned to normalcy after the resuscitation and, therefore, he asked the Surgeon to proceed with the operation is clearly an after thought. He stated that there are two methods of administering general anaesthesia Oropharyngeal insufflation and tracheal intubation for which some drugs are common and some different. He asserted that he followed the intubation method but admitted that "there is no record to show that I have followed a particular method that I have given certain drugs or their dosages." The respiratory arrest continued for about three minutes or so. A duty was cast on the anaesthetist while resuscitating the patient, as stated by doctor Artusio in his book "Practical Anaesthesiology":

> The anaesthetist should begin respiratory resuscitation by oxygenating the patient with a mask and bag or by mouth to mouth ventilation before attempting to pass endo-tracheal tube.

Although the Aaaesthetist D3 did not dispute the above view of Dr. Artusio, he admitted in the cross-examination that before the second intubation after the respiratory arrest:

> I did not resuscitate by oxygenating the patient with mask or bag or even mouth to mouth.

It was also elicitated from the Anaesthetist from his cross examination that:

> On two occasions, i. e. after removal of the tube and before putting the mouth gag and from the time the mouth gag disconnected and the second intubation was done the plaintiff was breathing only room air. Diffusion hypoxia will not occur during the brief periods plaintiff was exposed to room air.

The way anaesthetics administered and how the Anaesthetist performed his duty in the operation theatre clearly indicate his negligence. The removal of endoracheal tube in the first instance was also a fatal mistake committed by the Anaesthetist. On this aspect the two leading doctors examined for the plaintiff and the defendants DW 7 and DW 5 agreed that if the endotracheal tube had not been removed in the first instance it is possible that respiratory arrest need not have occurred. The Anaesthetist did not feel the pulse of the patient after the second intubation which he admitted in the cross-examination but still he did not bother to go into the details; he did not record the blood pressure and what is more shocking is that:

> I did not inform D-2 about the pulse not being normal.

If the blood pressure falls significantly below the pre-operative level, it is the view of the medical experts including Dr. Hale as admitted by D.W-5 that:

> (I)t should be considered a sign of severe hypoxia, unless some other factor such as shock, haemorrhage or parasympathetic stimulation, is obviously the cause.

There is no record in the case sheet Ex. A-25 indicating the presence of any of the above factors. Dr. Kabir's view - he is the expert medical witness examined on behalf of the defendants - respiratory arrest may not have occurred if on noting shallow respiration the anaesthetic mixture was discontinued and only oxygen was given to the patient. A few breaths of pure oxygen should be administered, according to Dr. Kabir, before removal of endotracheal tube. It was the failure of oxygenating the plaintiff at the time of second intubation that led to the disaster. The pulse rate was abnormal because of the plaintiff not being oxygenated as stated by Dr. Kabir and that was the reason why external compression of the chest was resorted to by the Anaesthetist. The minimum care expected of an ordinary anaesthetist was not taken by the third defendant, although he claimed to be a specialist in anaesthesia and also worked for some time at the University hospitals in Medicine in the State of Wisconsin, U.S.A.

13. The second defendant who has performed the operation upon the plaintiff is an experienced Surgeon; he has been in the field since 1946. He is a post graduate in surgery, a Fellow of the American College of Surgeons and also a Fellow of International College of Surgeons. Tonsillectomy operation is an elective one about which there is unanimity among all the medical witnesses. The Anaesthetist admitted that the pulse of the patient could not be felt. Surgery, anaesthesia and resuscitation being team work of both the surgeon and anaesthetist, it was surgeon's duty to find out from the anaesthetist the state of the patient.

The Surgeon was present in the operation theatre since the time of the starting general anaesthesia. The Surgeon Dr. Narashimha Rao admitted that he was sitting at the head of the table and looking into the throat of the patient. When he notice a respiratory arrest, that circumstance itself ought to have cautioned him to gather more particulars about the condition of the patient before he ventured to begin the operation. He did not bother to follow the method adopted by the third defendant the Anaesthetist when respiratory arrest was noticed by him. He did not even ask the Anaesthetist as to why the respiratory arrest was occurred and his statement in the cross examination:

> I saw D3 putting his hands on plaintiff's chest, but I did not know for what purpose…I did not ask D3 why he was putting his hands on plaintiff's chest… I did not ask anybody to take the B.P. or pulse rate as I was satisfied that everything was normal by the assurance of the anesthetist…

It is clearly suggestive of his negligence. The minimum care and caution expected of an ordinary surgeon, let alone a specialist in the field, I should say in the particular circumstance of the case, were thrown to winds by the second defendant. He not only did not bother to ascertain from the Anaesthetist the state of the patient but he commenced the operation and completed the same. His indifference to the realities and the reckless manner with which he commenced and completed the operation are clearly acts of negligence. The situation when the Anaesthetist resorted to resuscitation was clearly indicative of the patient being afflicted with anoxia, a circumstance in which the second defendant ought not have commenced the operation. The Surgeon in his evidence says that:

> It is one of my duties as a surgeon to know depending on the circumstances of each case what is happening to the patient and why it is happening and what is being done to the patient and why it is being done.
>
> Having stated the cardinal duty of a surgeon, he committed breach of it in the fullest measure.

14. Negligence constitutes as independent basis of tort liability. Law imposes a duty on every one to conform to a certain standard of conduct for the protection of others. In the case of persons who undertake work requiring:

> Special skill must not only exercise reasonable care but measure up to the standard of proficiency that can be expected from persons of such profession." (John G. Flemming's "***The Law of Torts***" 5th ed. at 109)

Failure to conform to the required standard of care resulting in material injury is actionable negligence if there is proximate connection between the defendant's conduct and the resultant injury. A surgeon or anaesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. In the case of specialists a higher degree of skill is called.

15. The civil liability of medical men as held in ***R.*** **v.** ***Beteman*** is:

> If a person holds himself out as possessing special skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use

> diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward… The law requires a fair and reasonable standard of care and competence. (Charlesworth and Percy on ***Negligence*** 7th Edition, The ***Common Law Library*** No. 6 at p. 540)

16. Mc Nair J., in ***Bolam* v. *Friern Hospital Management Committee*** [(1957) 2 All ER 118 at 121-122] explained the legal position thus "…where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham Omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not posses the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercise the ordinary skill of an ordinary competent man exercising that particular art… Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent ... A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion."

This statement of law has specifically been upheld by the House of Lords in ***Whitehouse* v. *Jordan*** [(1981) 1 WLR 246]. Lord Edmund-Davies, with whom Lord Fraser of Tullybelton and Lord Russel of Killowen agreed, in his speech observed:

> To say that a surgeon committed an error of clinical judgment is wholly ambiguous, for, while some such errors may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising clinical judgment may be so glaringly below proper standards as to make a finding of negligence inevitable.

After referring to the tests laid down in ***Bolam* v. *Friern Hospital Management Committee,*** the learned law Lord observed:

> If a surgeon fails to measure up to that standard in any respect (clinical judgment or otherwise), he has been negligent and should be so adjudged.

Demarcating the line between negligence and error of judgment, Lord Fraser of Tullybelton in his speech observed:

> Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having. And acting with ordinary care, then it

is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.

The law in our country is no different from the English law. Adverting to the duties which a doctor owes to his patient, the Supreme Court in ***Laxman* v. *Trimbak*** [AIR 1969 SC 128, 131-132] held:

> The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertake that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz. a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or duty of care in the administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: (ch. Halsbury's Laws of England, 3rd ed. Vol. 26 p. 17).

17. Adjudged in the light of the legal principles referred to above and from the evidence available on record, which has already been discussed by me, it is clear that both the Surgeon and the Anaesthetist have failed to exercise reasonable care. There has been breach of duty on the part of the Anesthetist by reason of his failure, an act per se negligence in the circumstances, to administer respiratory resuscitation by oxygenating the patient with a mask or bag. He exposed the plaintiff to the room temperature for about three minutes and this coupled with his failure to administer fresh breaths of oxygen before the tube was removed from the mouth of the plaintiff had resulted in respiratory arrest: these are foreseeable factors. There is proximate connection between the Anaesthetist's conduct and the resultant injury - cerebral anoxia.

18. Dr. Narasimha Rao, the second defendant failed in his duty to conform to the standard of conduct expected of an ordinary surgeon although he is an experienced specialist. Without bothering to verify the state of plaintiff he started and completed the operation despite the fact that tonsillectomy was an elective operation. Had he not proceeded with the operation there was every possibility of the plaintiff being saved from the brain damage sustained by him. Both the defendants 2 and 3 are guilty of negligence. For 45 days the plaintiff was in the Hospital without any proper treatment. As rightly observed by the learned trial judge his ailment was not even diagnosed. The physician visited the plaintiff only on four occasions and subsequent to 14-7-66 did not attend on him. The learned trial judge very justifiably observed that, despite being specialist in their respective fields, defendants 2 and 3 have failed to exercise that much of care and caution which an ordinary practitioner of their standard would have exercised in similar circumstances.

20. The Government being the owner of the Hospital cannot escape their vicarious liability. This is well established law. In ***Gold* v. *Essex County Council*** [(1942) 2 KB 293] it was held:

> A local authority carrying on a public hospital owes to patient the duty to nurse and treat him properly and is liable for the negligence of its servants even though the

negligence arises while a servant is engaged on work which involves the exercise of professional skill on his part.

The powers of hospital authorities as observed by Lord Greene M.R include the power of:

> Treating patients, and that they are entitled, and, indeed, bound in a proper case, to recover the just expense of doing so. If they exercise that power, the obligation which they undertake is an obligation to treat, and they are liable if the persons employed by them to perform the obligation on their behalf act without due care.

Lord Denning in ***Cassidy*** v. ***Ministry of Health*** [(1951) 1 KB 343] applying the law laid down in ***Gold* v. *Essex County Council*** stated the rule thus:

> In my opinion authorities who run a hospital, be they local authorities, government boards or any other corporation, are in law under the self same duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ ; and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. What possible difference in law, I ask, can there be between hospital authorities who accept a patient for treatment, and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not.
>
> It is no answer for them to say that their staffs are professional men and women who do not tolerate any interference by their lay masters in the way they do their work ... The reasons why the employers are liable in such cases is not because they can control the way in which the work is done - they often have not sufficient knowledge to do so but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct, the power of dismissal. (at page 360)

The liability of the hospital authorities for the negligent acts of their employees, therefore, is no longer in doubt.

21. In view of the answer to question No. 1 that the injury suffered by the plaintiff was due to the negligence of defendants 2 and 3 it necessarily follows that the plaintiff is entitled for damages. What should be adequate damages in the circumstances? The plaintiff sought a decree in a sum of Rs. 50,000/- but the learned judge awarded Rs. 20,000/- under the head "General damages" and Rs. 2,000/- towards "Special damages" observing that no similar or comparable cases where damages were awarded have been brought to his notice.

22. Damages are awarded for pecuniary loss and non-pecuniary loss. Pecuniary loss, a called 'special damages' must be pleaded and proved. Loss of earnings, expenses incurred for treatment as a result of the accident and future pecuniary loss fall under the head 'special damage'. Damages awarded under the head non-pecuniary loss are also called 'general

damages'. Non-pecuniary loss is of three kinds; (1) pain and suffering (2) loss of amenities of life, and (3) shortened expectation of life.

23. The total sum of Rs. 50,000/- claimed by the plaintiff was under all the heads "pain and suffering loss of earning expenses incurred etc…" Under the head loss of earnings the plaintiff obviously is not entitled to any sum since he was only a student on the date of the operation and so the question of any loss in earning between the date of operation and the date of the judgment does not arise. It is undeniable as is established by the evidence of P.W. 4 the father of the plaintiff that the plaintiff was taken to Christian Medical College, Vellore, Indian Institute of Mental Health, Banglore and Poona for consultation and treatment by experts P.Ws. 1, 2 and 7. The expenses reasonably incurred in this behalf would be at least Rs. 2,000/-.

24. Under the head 'special damages' the most important claim relates to future pecuniary loss of the plaintiff. By the date of the operation the plaintiff was a normal healthy youth of 17 years age,; except the minor inconvenience of nasal discharge his health was perfectly alright. Ex. A-24 dated 14-6-1966, certificate of physical fitness issued by the Assistant Surgeon, Government Hospital, Vijayawada bears ample testimony to his physical health. Ex. A-11 is the S.S.L.C. register of the plaintiff and it says he was one of the best three students of the school. His rating was that he was a most promising child with a bright future. The marks obtained by him in the P.U.C. examination held in March, 1966 as evidenced by Ex. A-12 further testify his scholastic record. He obtained 100% in Mathematics and 93.5% in Physical Sciences. He was a holder of Government scholarship because of his extraordinary brilliant academic career. The monthly scholarship amount paid to him was Rs. 100/- (vide Exs. A-13 and A-14). When he applied for admission to B.E. course, 4 Engineering Colleges including the Regional College of Engineering, Tiruchunapally, Tamil Nadu selected him for admission as can be seen from Exs. A-18 and A-23. As a matter of course he would have got government merit scholarship of Rs. 150/- per month for the entire duration of his Engineering course up to post graduate level with his brilliance and industry he would have effortlessly secured admission into Post Gradate or Ph.D. course in Engineering in any of the reputed colleges in United States if he wanted to pursue higher education, or he would have secured a decent job either in public sector or private sector on a minimum initial salary of Rs. 1,000/- per month in 1971 after completing the B.E. degree course. For about 35 years the plaintiff would have continued in gainful employment and reached higher positions. The permanent brain damage suffered by the plaintiff as a result of the operation disabled him completely from pursuing any lucrative avocation. The plaintiff's further hoping fondly that his mental condition would be improved, put him in Ravi Tutorial College of which P.W.-3 in the Principal so that the coaching given by the tutorial college would enable him to secure admission to any of the Engineering Colleges. Even after one year he could not pick up even 20% of the prescribed average. The brain damage because of cerebral anoxia as per the medical evidence was irreversible P.W.-7 Dr. Variava in his opinion Ex. C-1 stated that there would be no appreciable improvement in the mental capacity of the plaintiff and, therefore, the doctor suggested that the plaintiff should not be made to pursue academic studies. He took eight chances for completing his B.Sc. degree obtaining a third class. The small job he got, lower than a clerk in Post and Telegraphs Department, he

could not retain because of his brain injury. He was served with memos Exs. A-6 and A-7 for his poor and inefficient work and ultimately his services were terminated by Ex. A-62 dated 5-7-68. With permanent mental deficiency there is no prospect of his getting any gainful employment For the rest of his life he needs financial support. The permanent mental deficiency of the plaintiff was also established by the evidence of D.W. 5 and P.Ws -1 and 2. Taking all these circumstances into consideration, I think, a sum of Rs. 2 lakhs would be reasonable compensation under the head 'future pecuniary loss'.

25. Damages for pain and suffering and loss of amenities are generally given in a single sum. For a grave injury of the nature sustained by the plaintiff no amount of money would be a perfect compensation. Any amount of money cannot restore to him what he had lost permanently. He is condemned to a perpetual life of misery and agony, during the lucid intervals he is haunted by his brilliant past academic record. His bright future prospects are permanently wiped out. The thrill and joy of life deserted him once and for all. Thinking that a partner in life would give peace and comfort, his parents performed his marriage and it appears that the marriage came to a tragic end, his wife had deserted him because of his mental deficiency. The tragedy which struck him at the age of 17 in the form of irreversible cerebral anoxia made his life a permanent nightmare. He has no happiness or pleasure for the rest of his life. He is, therefore, entitled to substantial damages under the head "loss of amenities" which in the circumstances, I estimate of Rs. 2 lakhs.

26. The facts proved are so glaring that there is no need to have assistance of decisions in comparable cases. The learned trial judge was therefore, not right in limiting the damages to Rs. 22,000/- in all towards damages under all the heads. Even so the plaintiff cannot get a decree for more than what he has asked. In the circumstances, the cross appeal is allowed and there will be a decree in favour of the plaintiff in a sum of Rs. 50,000/- with interest at 12% from the date of the suit till realization. As the suit was instituted in forma pauperis by the plaintiff on the balance of the amount the defendants are directed to pay the court-fee.

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Jacob Mathew v. *State of Punjab*

(2005) 6 SCC 1

R.C. LAHOTI, C.J. - Ashok Kumar Sharma, Respondent 2 herein filed a first information report with Police Station, Division 3, Ludhiana, whereupon an offence under section 304-A read with section 34 of the Indian Penal Code ("IPC") was registered. The gist of the information is that on 15-2-1995, the informant's father, late Jiwan Lal Sharma was admitted as a patient in a private ward of CMC Hospital, Ludhiana. On 22-2-1995 at about 11 p.m., Jiwan Lal felt difficulty in breathing. The complainant's elder brother, Vijay Sharma who was present in the room contacted the duty nurse, who in her turn called some doctor to attend to the patient. No doctor turned up for about 20 to 25 minutes. Then, Dr. Jacob Mathew, the appellant before us and Dr. Allen Joseph came to the room of the patient. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The patient tried to get up but the medical staff asked him to remain in bed. The oxygen cylinder was found to be empty. There was no other gas cylinder available in the room. Vijay Sharma went to the adjoining room and brought a gas cylinder therefrom. However, there was no arrangement to make the gas cylinder functional and in-between, 5 to 7 minutes were wasted. By this time, another doctor came who declared that the patient was dead.

On the abovesaid report, an offence under sections 304-A/34 IPC was registered and investigated. Challan was filed against the two doctors.

2. The Judicial Magistrate First Class, Ludhiana framed charges under section 304-A IPC against the two accused persons, both doctors. Both of them filed a revision in the Court of Sessions Judge submitting that there was no ground for framing charges against them. The revision was dismissed. The appellant filed a petition in the High Court under section 482 of the Code of Criminal Procedure praying for quashing of FIR and all the subsequent proceedings.

3. It was submitted before the High Court that there was no specific allegation of any act of omission or commission against the accused persons in the entire plethora of documents comprising the challan papers filed by the police against them. The learned Single Judge who heard the petition formed an opinion that the plea raised by the appellant was available to be urged in defence at the trial and, therefore, a case for quashing the charge was not made out. Vide order dated 18-12-2002, the High Court dismissed the petition. An application for recalling the abovesaid order was moved which too was dismissed on 24-1-2003. Feeling aggrieved by these two orders, the appellant has filed these appeals by special leave.

4. According to the appellant, the deceased Jiwan Lal was suffering from cancer in an advanced stage and as per the information available, he was, in fact, not being admitted by any hospital in the country because of his being a case of cancer at the terminal stage. He was only required to be kept at home and given proper nursing, food, care and solace coupled with prayers. But as is apparent from the records, his sons are very influential persons occupying important positions in the Government. They requested the hospital authorities that come what may, even on compassionate grounds their father may be admitted in the hospital for

regulated medical treatment and proper management of diet. It was abundantly made clear to the informant and his other relations who had accompanied the deceased that the disease was of such a nature and had attained such gravity, that peace and solace could only be got at home. But the complainant could prevail over the doctors and hospital management and got the deceased admitted as an in-patient. Nevertheless, the patient was treated with utmost care and caution and given all the required medical assistance by the doctors and paramedical staff. Every conceivable effort was made by all the attending staff comprising doctors and nurses and other paramedicals to give appropriate medical treatment and the whole staff danced attendance on the patient but what was ordained to happen, did happen. The complainant and his relations, who were misguided or were under mistaken belief as to the facts, lodged a police report against the accused persons, wholly unwarranted and uncalled for.

5. The matter came up for hearing before a Bench of two learned Judges of this Court. Reliance was placed by the appellant on a recent two-Judge Bench decision of this Court in ***Suresh Gupta (Dr.)* v. *Govt. of NCT of Delhi***. The Bench hearing this appeal doubted the correctness of the view taken in ***Dr. Suresh Gupta*** case and vide order dated 9-9-2004 expressed the opinion that the matter called for consideration by a Bench of three Judges. This is how the case has come up for hearing before this Bench.

6. In ***Dr. Suresh Gupta*** case the patient, a young man with no history of any heart ailment, was subjected to an operation performed by Dr. Suresh Gupta for nasal deformity. The operation was neither complicated nor serious. The patient died. On investigation, the cause of death was found to be "not introducing a cuffed endo'tracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". The Bench formed an opinion that this act attributed to the doctor, even if accepted to be true, could be described as an act of negligence as there was lack of due care and precaution. But, the Court categorically held:

> For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so *reckless or grossly negligent* as to make him criminally liable.

7. The referring Bench in its order dated 9-9-2004 has assigned two reasons for their disagreement with the view taken in ***Dr. Suresh Gupta*** case which are as under:

(*1*) Negligence or recklessness being "gross" is not a requirement of Section 304-A IPC and if the view taken in ***Dr. Suresh Gupta*** case is to be followed then the word "gross" shall have to be read into Section 304-A IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.

(*2*) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degrees of rashness or negligence, violence would be done to the plain and unambiguous language of Section 304-A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved.

8. We have heard the learned counsel for the appellant, the respondent State and the respondent complainant. As the question of medical negligence arose for consideration, we thought it fit to issue notice to the Medical Council of India to assist the Court at the time of hearing which it has done. In addition, a registered Society "People for Better Treatment", Kolkata; the Delhi Medical Council, the Delhi Medical Association and the Indian Medical Association sought for intervention at the hearing as the issue arising for decision is of vital significance for the medical profession. They too have been heard. Mainly, the submissions made by the learned counsel for the parties and the intervenors have centred around two issues: (*i*) is there a difference in civil and criminal law on the concept of negligence?; and (*ii*) whether a different standard is applicable for recording a finding of negligence when a professional, in particular, a doctor is to be held guilty of negligence?

9. With the awareness in society, and people in general gathering consciousness about their rights, actions for damages in tort are on the increase. Not only are civil suits filed, the availability of a forum for grievance redressal under the Consumer Protection Act, 1986 having jurisdiction to hear complaints against professionals for "deficiency in service", which expression is very widely defined in the Act, has given rise to a large number of complaints against professionals, in particular against doctors, being filed by the persons feeling aggrieved. Criminal complaints are being filed against doctors alleging commission of offences punishable under section 304-A or sections 336/337/338 IPC alleging rashness or negligence on the part of the doctors resulting in loss of life or injury (of varying degree) to the patient. The present one is such a case. The order of reference has enabled us to examine the concept of "negligence", in particular "professional negligence", and as to when and how it does give rise to an action under the criminal law. We propose to deal with the issues in the interests of settling the law.

Negligence as a tort

10. The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well stated in the ***Law of Torts***, Ratanlal & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh). It is stated (pp. 441-42):

> Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. … the definition involves three constituents of negligence: (*1*) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (*2*) breach of the said duty; and (*3*) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.

11. According to **Charlesworth & Percy on *Negligence*** (10th Edn., 2001), in current forensic speech, negligence has three meanings. They are: (*i*) a state of mind, in which it is

opposed to intention; (*ii*) careless conduct; and (*iii*) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (para 1.01) The essential components of negligence, as recognised, are three: "duty", "breach" and "resulting damage", that is to say:

(1) the existence of a duty to take care, which is owed by the defendant to the complainant;

(*2*) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

(*3*) damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant. (para 1.23)

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. (para 1.24)

Negligence - as a tort and as a crime

12. The term "negligence" is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In ***R.* v. *Lawrence,*** Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in ***R.* v. *Caldwell*** and dealt with the concept of recklessness as constituting *mens rea* in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said: (All ER p. 982*e-f*)

> Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.

13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimising violations, may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in ***Andrews* v. *Director of Public Prosecutions*** stated: (All ER p.556 C)

> Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.

Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. In ***Riddell* v. *Reid*** (AC at p. 31) Lord Porter said in his speech -

> A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. (*Charlesworth & Percy*, *ibid*., para 1.13)

15. The fore-quoted statement of law in *Andrews* has been noted with approval by this Court in ***Syad Akbar* v. *State of Karnataka***. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

16. Law laid down by Straight, J. in the case of ***Empress of India* v. *Idu Beg*** has been held good in cases and noticed in ***Bhalchandra Waman Pathe* v. *State of Maharashtra*** a three-Judge Bench decision of this Court. It has been held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the *gross and culpable neglect or failure* to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to

all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

17. In our opinion, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree.

Negligence by professionals

18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practises. In ***Michael Hyde and Associates* v. *J.D. Williams & Co. Ltd***. Sedley, L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (*Charlesworth & Percy*, *ibid*., para 8.03.)

19. An often quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair, J. in ***Bolam* v. *Friern Hospital Management Committee*,** WLR at p. 586 in the following words: (All ER p. 121 D-F)

> [W]here you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill … It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary

competent man exercising that particular art. (*Charlesworth & Percy*, *ibid*., para 8.02)

20. The water of ***Bolam*** test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and a well-condensed one. After a review of various authorities Bingham, L.J. in his speech in ***Eckersley* v. *Binnie*** summarised the ***Bolam*** test in the following words: (Con LR p. 79)

> From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet. (*Charlesworth & Percy*, *ibid*., para 8.04)

21. The degree of skill and care required by a medical practitioner is so stated in ***Halsbury's Laws of England*** (4th Edn., Vol. 30, para 35):

> *35*. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.
>
> Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (*1*) that there is a usual and normal practice; (*2*) that the defendant has not adopted it; and (*3*) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care.

The abovesaid three tests have also been stated as determinative of negligence in professional practice by **Charlesworth & Percy** in their celebrated work on ***Negligence***.

22. In the opinion of Lord Denning, as expressed in ***Hucks* v. *Cole*** a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

23. The decision of the House of Lords in ***Maynard* v. *West Midlands Regional Health Authority*** by a Bench consisting of five Law Lords has been accepted as having settled the law on the point by holding that it is not enough to show that there is a body of competent professional opinion which considers that the decision of the defendant professional was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken, it was reasonable, in the sense that a responsible body of medical opinion would have accepted it as proper. Lord Scarman who recorded the leading speech with which the other four Lords agreed quoted (at All ER p. 638*f*) the following words of Lord President (Clyde) in ***Hunter* v. *Hanley***, observing that the words cannot be bettered: (SLT p. 217)

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men…. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care….

Lord Scarman added: (All ER p. 638*g-h*)

> A doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence.

His Lordship further added that: (All ER p. 639*d*)

> [A] judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred.

24. The classical statement of law in ***Bolam*** case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

26. No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur*.

27. *Res ipsa loquitur* is a rule of evidence which in reality belongs to the Law of Tort. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule. Incidentally, it may be noted that in ***Krishnan* v. *State of Kerala,*** the Court has observed that there may be a case where the proved facts would themselves speak of sharing of common intention and while making such observation one of the learned Judges constituting the Bench has in his concurring opinion merely stated "*res ipsa loquitur*". Nowhere has it been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under Section 304-A IPC cannot be decided solely by applying the rule of *res ipsa loquitur*.

28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason — whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

31. The subject of negligence in the context of the medical profession necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work ***Errors, Medicine and the Law*** (Cambridge University Press, 2001). There is a marked tendency to look for a human actor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of *mens rea* has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. The human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator i.e. the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how the doctor functions in real life. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

32. At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (*i*) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (*ii*) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (*iii*) that many incidents involve a contribution from more than

one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the "smoking gun".

33. Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated (see **Black's *Law Dictionary***, 7th Edn.). Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse it with the consequence of negligence.

Medical professionals in criminal law

34. The criminal law has invariably placed medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to the person and that person has not consented to suffer such harm. There are four exceptions listed in the section which are not necessary in this context to deal with. Section 93 saves from criminality certain communications made in good faith. To these provisions are appended the following illustrations:

Section 88

> *A*, a surgeon, knowing that a particular operation is likely to cause the death of *Z*, who suffers under a painful complaint, but not intending to cause *Z*'s death, and intending, in good faith, *Z*'s benefit, performs that operation on *Z*, with *Z*'s consent. *A* has committed no offence.

Section 92

> (*a*) *Z* is thrown from his horse, and is insensible. *A*, a surgeon, finds that *Z* requires to be trepanned. *A*, not intending *Z*'s death, but in good faith, for *Z*'s benefit, performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence.
>
> (*c*) *A*, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. *A* performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. *A* has committed no offence.

Section 93

> *A*, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

35. It is interesting to note what Lord Macaulay had himself to say about the Indian Penal Code. We are inclined to quote a few excerpts from his speech to the extent relevant for our purpose from "***Speeches and Poems with the Report and Notes on the Indian Penal Code***" by Lord Macaulay (Houghton, Mifflin and Company, published in 1874):

Under the provisions of our Code, this case would be very differently dealt with according to circumstances. If A kills Z by administering abortives to her, with the knowledge that those abortives are likely to cause her death, he is guilty of voluntary culpable homicide, which will be voluntary culpable homicide by consent, if Z agreed to run the risk, and murder if Z did not so agree. If A causes miscarriage to Z, not intending to cause Z's death, nor thinking it likely that he shall cause Z's death, but so rashly or negligently as to cause her death, A is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A took such precautions that there was no reasonable probability that Z's death would be caused, and if the medicine were rendered deadly by some accident which no human sagacity could have foreseen, or by some peculiarity in Z's constitution such as there was no ground whatever to expect, A will be liable to no punishment whatever on account of her death, but will of course be liable to the punishment provided for causing miscarriage.

It may be proper for us to offer some arguments in defence of this part of the Code.

It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it, would be in the highest degree barbarous and absurd. (p. 419)

To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from every thing which is at all likely to cause death. No fear of punishment can make him do more than this; and therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. (p. 421)

When a person engaged in the commission of an offence causes death by rashness or negligence, but without either intending to cause death, or thinking it likely that he shall cause death, we propose that he shall be liable to the punishment of the offence which he was engaged in committing, superadded to the ordinary punishment of involuntary culpable homicide.

The arguments and illustrations which we have employed for the purpose of showing that the involuntary causing of death, without either rashness or negligence, ought, under no circumstances, to be punished at all, will, with some modifications, which will readily suggest themselves, serve to show that the involuntary causing of death by rashness or negligence, though always punishable, ought, under no circumstances to be punished as murder. (p. 422)

36. The following statement of law on criminal negligence by reference to surgeons, doctors, etc. and unskilful treatment contained in *Roscoe's* ***Law of Evidence*** (15th Edn.) is classic:

> Where a person, acting as a medical man, &c., whether licensed or unlicensed, is so negligent in his treatment of a patient that death results, it is manslaughter if the negligence was so great as to amount to a crime, and whether or not there was such a degree of negligence is a question in each case for the jury. In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, Judges have used many epithets, such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete'. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment. (pp. 848-49)
>
> Whether he be licensed or unlicensed, if he display gross ignorance, or gross inattention, or gross rashness, in his treatment, he is criminally responsible. Where a person who, though not educated as an accoucheur, had been in the habit of acting as a man-midwife, and had unskilfully treated a woman who died in childbirth, was indicted for the murder, L. Ellenborough said that there was no evidence of murder, but the jury might convict of manslaughter. To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the [most?] criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter. (p. 849)

A review of Indian decisions on criminal negligence

37. We are inclined to, and we must — as duty-bound, take note of some of the relevant decisions of the Privy Council and of this Court. We would like to preface this discussion with the law laid down by the Privy Council in ***John Oni Akerele* v. *R.*** A duly qualified medical practitioner gave to his patient the injection of sobita which consisted of sodium bismuth tartrate as given in the British Pharmacopoeia. However, what was administered was an overdose of sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act. He was convicted. The matter reached in appeal before the House of Lords. Their Lordships quashed the conviction. On a review of judicial opinion and an illuminating discussion on the points which are also relevant before us, what Their Lordships have held can be summed up as under:

> (*i*) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State. (AIR p. 75*a*)
>
> (*ii*) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. … There is a difference in kind

> between the negligence which gives a right to compensation and the negligence which is a crime. (AIR p. 75*b*-*c*)
>
> (*iii*) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinions. (AIR p. 75*c*-*d*)
>
> … The most favourable view of the conduct of an accused medical man has to be taken, *for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck*. (AIR p. 75*e*)

Their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

38. The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In ***Kurban Hussein Mohammedali Rangwalla* v. *State of Maharashtra*** while dealing with Section 304-A IPC, the following statement of law by Sir Lawrence Jenkins in ***Emperor* v. *Omkar Rampratap*** was cited with approval:

> To impose criminal liability under section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*.

39. K.N. Wanchoo, J. (as he then was), speaking for the Court, observed that the abovesaid view of the law has been generally followed by the High Courts in India and was the correct view to take of the meaning of section 304-A. The same view has been reiterated in ***Kishan Chand* v. *State of Haryana***.

40. In ***Juggankhan* v. *State of M.P.*** the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of dhatura to the patient suffering from guinea worm. The accused had not studied the effect of such substances being administered to a human being. The poisonous contents of the leaf of dhatura were not satisfactorily established by the prosecution. This Court exonerated the accused of the charge under section 302 IPC. However, on a finding that stramonium and dhatura leaves are poisonous and in no system of medicine, except perhaps the Ayurvedic system, is the dhatura leaf given as cure for guinea worm, the act of the accused who prescribed poisonous material without studying their probable effect was held to be a rash and negligent act. It would be seen that the profession of a Homoeopath which the accused claimed to profess did not permit use of the substance administered to the patient. The accused had no knowledge of the effect of such substance being administered and yet he did so. In this background, the inference of the accused being guilty of a rash and negligent act was drawn against him. In our opinion, the principle which

emerges is that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is *prima facie* acting with rashness or negligence.

41. ***Laxman Balkrishna Joshi* v. *Trimbak Bapu Godbole*** was a case under the Fatal Accidents Act, 1855. It does not make a reference to any other decided case. The duties which a doctor owes to his patients came up for consideration. The Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties viz. a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires. The doctor no doubt has a discretion in choosing the treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of the patient was caused due to shock resulting from reduction of the fracture attempted by doctor *without taking the elementary caution of giving anaesthesia to the patient*. The doctor was held guilty of negligence and liability for damages in civil law. We hasten to add that criminal negligence or liability under criminal law was not an issue before the Court, as it did not arise and hence was not considered.

42. In the year 1996, there are three reported decisions available. ***Indian Medical Assn.* v. *V.P. Shantha*** is a three-Judge Bench decision. The principal issue which arose for decision by the Court was whether a medical practitioner renders "service" and can be proceeded against for "deficiency in service" before a forum under the Consumer Protection Act, 1986. The Court dealt with how a "profession" differs from an "occupation" especially in the context of performance of duties and hence the occurrence of negligence. The Court noticed that medical professionals do not enjoy any immunity from being sued in contract or tort (i.e. in civil jurisdiction) on the ground of negligence. However, in the observation made in the context of determining professional liability as distinguished from occupational liability, the Court has referred to authorities, in particular, *Jackson & Powell* and have so stated the principles, partly quoted from the authorities:

> *22*. In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise

reasonable care in giving advice or performing services. (See *Jackson & Powell on* ***Professional Negligence*****,** 3rd Edn., paras 1-04, 1-05 and 1-56.)

44. In ***Achutrao Haribhau Khodwa* v. *State of Maharashtra,*** the Court noticed that in the very nature of medical profession, skills differ from doctor to doctor and more than one alternative course of treatment is available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession. It was a case where a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady. The doctrine of *res ipsa loquitur* was held applicable "in a case like this".

45. ***Spring Meadows Hospital* v. *Harjol Ahluwalia*** is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The Court referred to the decision in ***Whitehouse* v. *Jordan*** and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence:

> The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence.

47. Before we embark upon summing up our conclusions on the several issues of law which we have dealt with hereinabove, we are inclined to quote some of the conclusions arrived at by the learned authors of ***Errors, Medicine and the Law*** (pp. 241-48), (recorded at the end of the book in the Chapter titled "*Conclusion*") highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence we quote:

(*i*) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity - in principle - from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasised may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable. (*ibid*., pp. 242-43)

(*ii*) Culpability may attach to the consequence of an error in circumstances where sub-standard antecedent conduct has been deliberate, and has contributed to the generation of the

error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (*ibid*., p. 245)

(*iii*) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake: the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (*ibid*., p. 246) A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (*ibid*., p. 247) While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (*ibid*., p. 247)

(*iv*) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high — a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. (*ibid*., p. 248)

(*v*) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (*a*) *accidents* which are life's misfortune for which nobody is morally responsible, (*b*) *wrongs* amounting to culpable conduct and constituting grounds for compensation, and (*c*) those (i.e. wrongs) calling for punishment on account of being *gross* or of a *very high degree* requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society. (*ibid*., p. 248) (emphasis supplied)

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to society.

Conclusions summed up

48. We sum up our conclusions as under:

(*1*) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in ***Law of Torts***, Ratanlal & Dhirajlal (edited by

Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage".

(*2*) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(*3*) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(*4*) The test for determining medical negligence as laid down in ***Bolam*** case holds good in its applicability in India.

(*5*) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(*6*) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be

"gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly".

(*7*) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(*8*) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence.

49. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in ***Dr. Suresh Gupta*** and reaffirm the same. *Ex abundanti cautela*, we clarify that what we are affirming are the legal principles laid down and the law as stated in ***Dr. Suresh Gupta*** case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from ***Errors, Medicine and the Law*** by Alan Merry and Alexander McCall Smith which has been cited with approval in ***Dr. Suresh Gupta*** case.

Guidelines - Re: prosecuting medical professionals

50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law under section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain

guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the ***Bolam*** test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

Case at hand

53. Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused-appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be — we express no opinion thereon) but the accused-appellant cannot be proceeded against under section 304-A IPC on the parameters of the ***Bolam*** *test*.

* * * * *

Malay Kumar Ganguly v. Sukumar Mukherjee & Ors

AIR 2010 SC 1162

S.B. SINHA, J.

BACKGROUND FACTS

The patient (Anuradha) and her husband Dr. Kunal Saha (for short, "Kunal") were settled in the United States of America. Anuradha, a child Psychologist by profession, was a recent graduate from a prestigious Ivy League School (`Columbia University' in the New York State). Although a doctor by profession, Kunal has been engaged in research on H.I.V/ AIDS for the past 15 years.

They left U.S.A. for a vacation to India on 24th March, 1998. They arrived in Calcutta on 1st April, 1998. While in Calcutta, Anuradha developed fever along with skin rash on 25th April, 1998. On 26th April, Dr. Sukumar Mukherjee, Respondent No. 1 herein attended and examined Anuradha at her parental residence on a professional call. Dr. Mukherjee assured the patient and her husband of a quick recovery and advised her to take rest but did not prescribe her any specific medicine. However, two weeks thereafter, i.e., on 7th May, 1998, the skin rash reappeared more aggressively. Dr. Mukherjee was again contacted and as per his instructions, Anuradha was taken to his chamber. After examining Anuradha, Dr. Mukherjee prescribed Depomedrol injection 80 mg twice daily for the next three days. Despite administration of the said injection twice daily, Anuradha's condition deteriorated rapidly from bad to worse over the next few days. Accordingly, she was admitted at the Advanced Medicare Research Institute (AMRI) in the morning of 11th May, 1998 under Dr. Mukherjee's supervision. Anuradha was also examined by Dr. Baidyanath Halder, Respondent No. 2 herein. Dr. Halder found that she had been suffering from Erithima plus blisters. Her condition, however, continued to deteriorate further. Dr. Abani Roy Chowdhury, Consultant, Respondent No. 3 was also consulted on 12th May, 1998.

On or about 17th May, 1998, Anuradha was shifted to Breach Candy Hospital, Mumbai as her condition further deteriorated severely. She breathed her last on 28th May, 1998.

Kunal sent a lawyer's notice to 26 persons on 30th September, 1998. The first 19 addressees were those who had treated Anuradha at Kolkata while addressee numbers 20 to 26 were those who treated her in Mumbai.

On or about 19th November, 1998 one of his relatives, Malay Kumar Ganguly filed a Criminal Complaint in the Court of Chief Judicial Magistrate, 24 Paraganas at Alipore against Dr. Sukumar Mukherjee, Dr. Baidyanath Halder and Dr. Abani Roy Chowdhury, respondent Nos. 1, 2 and 3 for commission of offence under Section 304-A of the Indian Penal Code.

Thereafter Kunal filed O.P. Nos. 240 of 1999 against 19 persons who had rendered medical advice/treatment/facilities to Anuradha between 23rd April, 1998 and 17th May, 1998 at Kolkata before the National Consumer Disputes Redressal Commission, New Delhi (Commission). However, pursuant to the orders of the Commission names of some of the respondents were struck off.

In the said petition the complainant claimed an amount of compensation of Rs. 77,76,73,500/- with interest for the alleged deficiency in the service rendered by Respondent Nos. 1, 2, 3, 5, 6 and AMRI hospital (Respondent No.4).

On or about 17.7.1999, a complaint was filed by Kunal against Dr. Sukumar Mukherjee, Dr. Baidyanath Halder and Dr. Abani Roy Chowdhury before the West Bengal Medical Council (WBMC) making allegations similar to the one he had made in his complaint before the Commission. On or about 29th May, 2000 , OP No. 179 of 2000 was filed by Kunal against the doctors, including Dr. Udwadia of the Breach Candy Hospital at Mumbai and the hospital itself before the Commission.

Before the learned Chief Judicial Magistrate, in the said criminal complaint a large number of witnesses were examined. A large number of documents were also marked as exhibits. The learned Chief Judicial Magistrate, Alipore by his judgment and order dated 29th May, 2002 found Respondent Nos. 1 and 2 guilty of commission of an offence under Section 304-A of the Indian Penal Code and sentenced them to undergo simple imprisonment for three months and to pay a fine of Rs.3,000/- each and in default to undergo a further simple imprisonment for 15 days. Respondent No.3, Dr. Abani Roy Chowdhury was, however, acquitted.

The West Bengal Medical Council dismissed the complaint filed by Dr. Kunal by its order dated 1st July, 2002.

On 25th May, 2003 the complainant-Kunal withdrew O.P. No.179/2009 filed before the Commission against the doctors/Breach Candy Hospital.

Against the order of the learned Magistrate, Respondent No.1 filed Criminal Appeal which was marked as Criminal Appeal No.55 of 2002 and Respondent No.2 filed Criminal Appeal No. 54 of 2002 before the learned Sessions Judge at Alipore, whereas the complainant, Mr. Malay Kumar Ganguly, filed a revision application being C.R.R. No. 1856 of 2002 for enhancement of the punishment imposed on Respondent Nos. 1 and 2. The complainant also filed another revision application before the High Court questioning the legality of the judgment with respect to acquittal of Respondent No.3. The Calcutta High Court withdrew the appeals preferred by Respondent Nos. 1 and 2 before the learned Sessions Judge to itself and heard the criminal appeals and revision petitions together.

By a judgment and order dated 19th March, 2004 the appeals preferred by Respondent Nos. 1 and 2 were allowed while the Criminal Revision Petitions filed by the complainant were dismissed. The said order has been challenged before us by way of Criminal Appeal Nos. 1191-1194 of 2005.

The Commission also by its judgment and order dated 1st June, 2006 dismissed O.P. No. 240 of 1999. Civil Appeal No.1727 of 2007 arises out of the said order.

GENERAL OBSERVATIONS BY THE HIGH COURT

(i) As Anuradha was treated at AMRI for six days and at Breach Candy Hospital for 12 days, by no stretch of imagination her death had anything to do with the treatment at AMRI ; the cause of death being absent.

(ii) The contention of Dr. Kunal Saha that his wife was almost dead when brought to Breach Candy Hospital, was untrue.

(iii) Anuradha was admitted under Dr. Balaram Prasad, who was a Consultant Physician having Post Graduate Degree. He also claimed to be the physician-in-charge of the treatment.

(iv) Interference by Dr. Kunal Saha was sufficient to indicate that treatment of Anuradha was monitored by him alone and nobody else. Although, he claimed that Anuradha

was suffering from TEN which was a dermatological disease, but Anuradha was admitted by him under a Plastic Surgeon, Dr. S. Keshwani. Even at the initial stage Dr. Kunal Saha gave instructions to the doctors on 17th May, 1998 rejecting the treatment suggested by doctors attending at Breach Candy Hospital, Mumbai. Thus the diagnosis of the disease and the follow-up action was done under the direct supervision of Dr. Kunal Saha and his brother-in-law. Such was the position at AMRI also.

(v) The opinion of three internationally-accepted experts on TEN was not acceptable as none of them were examined in Court. From the records of Breach Candy Hospital it would itself appear that Anuradha was being administered medicines other than the ones prescribed by the doctors. Cash memos for purchase of medicines would show the discrepancy in the medicines prescribed by the doctors like Bactroban Ointment, Efcorlin (one kind of steroid) and Sofratule purchased on 12th, 13th and 16th May, 1998 had not been prescribed by the doctors. Relatives of the patient having not followed the treatment protocol of the doctors under whom the patent is admitted; as soon as any interference is made therewith, the doctors are absolved of their liability.

Charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He also cannot be held liable for mischance or misadventure or for an error of judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis.

Even under the law of tort a medical practitioner can only be held liable in respect of an erroneous diagnosis if his error is so palpably wrong as to prove by itself that it was negligently arrived at or it was the product of absence of reasonable skill and care on his part regard being held to the ordinary level of skill in the profession. For fastening criminal liability very high degree of such negligence is required to be proved.

Death is the ultimate result of all serious ailments and the doctors are there to save the victims from such ailments. Experience and expertise of a doctor are utilised for the recovery. But it is not expected that in case of all ailments the doctor can give guarantee of cure.

NATIONAL COMMISSION JUDGMENT

The Commission in its judgment noted that doctor or a surgeon never undertakes that he would positively cure the patient nor does he undertake to use the highest degree of skill, but he only promises to use fair, reasonable and competent degree of skill. In this regard the commission opined that if there are several modes of treatment and a doctor adopts one of them and conducts the same with due care and caution, then no negligence can be attributed towards him.

It went on to note that there was no negligence on part of Dr. Mukherjee because even Dr. A. K. Ghoshal, Dermatologist, who diagnosed the disease of Mrs. Anuradha as TEN, prescribed the same treatment.

Further, it observed that no records were produced by Dr. Saha regarding the treatment given to Mrs. Anuradha from 1st April 1998 to 7th May 1998. As there is no specific treatment for TEN, error of judgment in the process of diagnosis does not amount to deficiency in service, considering that the disease TEN is a rare occurring in 1 case out of 1.3 per million per year.

It went on to observe that the patient was never in the absolute care of Dr. Haldar, who had treated her only on 12th of May 1998. Dr. Haldar, it noted, was, therefore, an unnecessary party.

It opined that all the necessary care was taken by Dr. Mukherjee and Dr. Haldar. It laid special emphasis on the fact that a complaint had been filed before the West Bengal Medical Council, which concluded that there was no deficiency on the part of the doctors. The Writ petition against the said decision before the High Court was dismissed. Therefore, it was concluded that there was no negligence on the part of the doctors.

DIAGNOSIS AND TRAIL OF TREATMENT

OVERVIEW OF TOXIC EPIDERMAL NNECROLYSIS

Toxic Epidermal Nnecrolysis (TEN hereinafter) is also known as Lyell's Syndrome, epidermolysis acuta toxica and scalded skin syndrome. TEN begins with a non- specific prodome of 1- 14 days in atleast half of the patients. It is a severe and extensive variant of erythematobullous drug eruption. In TEN, the patient is ill with high fever occasionally suffers somnolence and lassitude. Because of the extensive area of eroded skin, large amount of body fluid is lost with consequent disturbances of electrolyte and fluid balance. [See Dermatology in General Medicine (Fitz Patrick's) (5th Ed), and Comprehensive Dermatological Drug Therapy]

NEGLIGENCE IN TREATMENT OF TEN

For determining the question as to whether the respondents herein are guilty of any negligence, we may notice the treatment protocol.

Anuradha, it is conceded, was suffering from TEN. She had been positively diagnosed to be suffering from the said disease on 12th May, 1998. TEN is a spectrum of symptoms. The treatment protocol for TEN has undergone considerable change throughout the world.

TEN was discovered in the year 1956 by Lyell. It leads to immunosuppression. For treating the patients suffering from TEN, doctors used to administer steroid. Later researches showed that they should not be used. Such a conclusion was arrived at upon undertaking researches of patients suffering from the said disease with administration of steroid as well as non-administration of them. It was found that those patients treated with steroids do not respond properly thereto. Indisputably, however, some doctors still use steroids. It is stated that the researchers found out that use of steroids was more detrimental than beneficial to the TEN patients.

Admittedly, Anuradha was administered steroids. The learned counsel for the parties have brought before us a vast volume of material to contend that the experts in the field as also the doctors or medical practitioners who have specialized in TEN and other dermatological diseases are sharply divided on the administration of steroid. We for the sake of brevity refer to them as the pro-steroid group and anti-steroid group. Medical science, therefore, has a grey area in this respect.

At the outset, we may place on record the treatment pattern prescribed by two experts, viz., Jean Edouard Revuz and Jean Claude Roujeau who are generally accepted world over. According to them, the treatment pattern should be as under:

"The disease usually begins with non specific symptoms, such as fever, cough, sore throat, burning eyes, followed in 1 to 3 days by skin and mucous membrane lesions. A

burning or painful rash starts systematically on the face and in the upper part of the tongue and rapidly extends. Most frequently, the initial individual skin lesions form poorly defined margins with darker purpuric centre progressively emerging on the skin, chest and back. Less frequently, the initial manifestations may be extensive scarlatiniform erythema. Symptomatic therapy is a must. IV fluids must be replaced mandatorily.

The treatment protocol includes:

- Symptomatic treatment
- Monitoring
- Fluid replacement and anti-infection therapy
- Nutrition
- Warming (30-32 degree Celsius)
- Skin care
- Eyes and mucous membrane care"

They hold the view that the current evidence suggests that corticosteroids are more dangerous than useful in these disorders as they increase the risk of death from infections, including systemic candidiasis, a complication that had never been observed in many patients treated without steroids.

After the death of Anuradha, Kunal consulted a large number of experts from various countries including India.

Dr. David Fine, Dermatologist from University of North Carolina opined as under:

"..... conventional therapy of TEN with systemic corticosteroids involves either oral or intravenous preparation. I have personally never seen intramuscular corticosteroids administration for this condition. In addition, intramuscular corticosteroids are never given on a BID schedule (and with some preparations no more frequently than every 4-6 weeks) because of the prolonged Depot effect related to administration by this particular route. In general, intramuscular administration of systemic corticosteroids is not employed in the treatment of dermatological diseases since this routes provides very erratic release of medication from the tissue....."

He also remarked, as far as the treatment in the present case is concerned:

" .... manner in which the treatment was instituted in your wife certainly appears to be unprecedented."

The opinion that steroids should not be used as a standard therapy for TEN is shared by the majority of authors and was unanimously agreed on at an international workshop on TEN held in Creteil, France in October 1985. More recently, Halebian et al have reported high improvement of survival in patients treated without steroids when compared with a previous series of patients treated with high dose steroid therapy in the same institution.

Kunal had also consulted several doctors and experts in India. We would notice the opinion of some of them here but we would deal with their admissibility at a later stage.

Dr. S.K. Bose from Apollo Hospital, Delhi, on a query made by the appellant, opined that the treatment protocol should be symptomatic and corticosteroids should be avoided. The resume of the protocol which should be followed, according to him, is as under:

- Discontinue all drugs implicated in TEN JAAD 1991

- Intravenous canalization for fluid replacement depending upon % of TBSA, Nasogastric tube feeding, catheter if required
- Topical skin care
- Monitoring serum electrolytes by culture
- Room Temperature of about 30-32 degrees Celsius, sterile environment, air fluidized bed, barrier nursing
- Encourage oral fluids
- Hyperbaric oxygen, aerosols, bronchial aspiration, physical therapy, therapies for herpes and mycoplasma.

Appellant also consulted those Indian doctors who still administered steroids. Dr. J.S. Pasricha is one of them. According to him, use of corticosteroids in TEN was very controversial; however, if they are used appropriately, the patient's life can be saved. Death due to usage of corticosteroids in TEN patients, he stated, occurs only when :

- The reaction is not controlled properly
- Corticosteroids are not withdrawn quickly Attention has also been drawn to the protocol treatment on behalf of the respondents. They have placed reliance on a number of authorities to suggest a protocol of treatment of the disease TEN in which the administration of glucocorticosteriods plays an integral role. Some of the authorities suggested by them include:
- Journal of Association of Physicians of India.
- Comprehensive Dermatological Drug Therapy.
- Dermatology by O. Brian Falco.
- Dermatology in General Medicine (Fitz Patrick) (5th Ed)
- Goodman and Gillman: The Pharmacological Basis of Therapuetics (9th) (Ed)
- Harrison's Principle of Internal Medicine
- Principle's of Pharmacology.
- Journal of Burn Care and Rehabilitation (A 10 year experience with TEN)
- TEN - Medical Findings and Prognosis in 87 Patients, Jean Revuz, From the archives of Dermatology
- J.S. Pasricha, TEN, International Journal of Dermatology.

Nonetheless the following principles are integral to the treatment of TEN as suggested by the Respondents:

a. Treatment in burn units should be strived for in exceptional cases but is not generally necessary.

b. Treatment has to be individually tailored according to cause, type, stage and presence of complications.

c. Systemic glucocorticoids should not be used routinely but are justified in the early stages of drug induced TEN. They should be given in doses from 80 to 120 mg of methlypredisolone per day by mouth, for several days until disease progression has ceased. Dosages should be tapered quickly and cautiously since no further benefit can be expected thereafter and the untoward effects may then predominate.

d. Treatment may focus on early detection and prevention of the most fatal complication e.g. overwhelming infection. Cultures from skin and mucosal erosions, must be regularly performed.

e. Blood gases and fluid, electrolytes and protein balance must be monitored and adjusted appropriately. Fluid replacement regimens as used for burn patients.

f. Supportive care is of great importance and particular attention must be paid to a high calorie and high - protein diet.

g. Debridgement of necrotic skin should not be performed before disease activity ceases. In the criminal case, the appellant examined Dr. Salil Kumar Bhattacharjee. For the sake of completeness it would be necessary to place on record his opinion in the matter.

Dr. Bhattacharjee, as noticed hereinbefore, is a Professor of Pharmacology at the Institute of Medical Science, Benaras Hindu University. In an answer to a query, on whether he was aware of the drug Depomedrol and its usage, he answered that "it is usually used in chronic clinical condition like Bronchial Asthma and Rheumatiod Arthritis" and on being questioned, whether Depomedrol can be used for TEN, he answered in the negative. He stated that recommended usage is 40 to 120 mg at intervals of at least one week and a daily dose of 80 mg can never be used.

In the criminal case, even Dr. Prasad who was examined as PW-3 stated that he prescribed Depomedrol for a day after seeing the prescription of Dr. Mukherjee. And before the National Commission he stated that Depomedrol 80 mg twice daily cannot be administered to any patient. Before the Commission Dr. Mukherjee admitted that he prescribed the injection of Depomedrol and gave it to the patient at the request of Kunal on compassionate grounds. Dr. Halder accepted that Depomedrol is not the correct medicine for TEN and is used in acute medical condition.

We would, in view of the difference of opinion amongst experts as noticed by us heretoabove in some detail, proceed on the assumption that steroid can be administered in the TEN patients. However, it is clear from the opinion of the pro-steroid experts that:

(i) The nature of steroid which should be used is corticosteroid meaning thereby methyl prednisolone.

(ii) It should be used only at the early stages for a few days and then should be stopped or tapered to avoid the effect of immunosuppresion as also sepsis.

(iii) Supportive treatment must be administered.

(iv) It should be individually tailored according to the patients' need.

Supportive treatment is also advised by Dr. Pasricha and others. Two factors, however, must be noticed at this juncture:

(i) The chemical composition of Depomedrol is different from other type of glucocorticosteroid inasmuch as Depomedrol is methyl prednisolone acetate and glucocorticosteroid is methyl prednisolone sodium succinate. The evidence of Kunal in this behalf is absolutely categorical and unequivocal.

(ii) All the authors are one in stating that their opinion is subject to the instructions given in the package insert of the medicine.

Kunal examined Dr. Anil Shinde as PW-8. He is the Manager, Medical Service of Pharmacia India Private Limited. Depomedorol is manufactured by Pharmacia and Upjohn, USA. The company is the distributor of the said product in India. The packet insert of Depomedrol reads as under:

"DOSAGE: The usual dosage for patients with Dermatalogic Lesions benefitted by systemic corticoid therapy is 40-120 MG of Methyl Prednisolone acetate administered

intramuscularly at weekly intervals for 1-4 weeks. In acute severe dermatitis due to poison IV relief may result within 8-12 hrs following intramuscular administration of a single dose of 80-120 MG. In chronic Contact dermatitis, repeated injections at 5-10 day intervals may be necessary. Following intramuscular administration of 80-120 MG to asthmatic patient's relief may result within 6-48 hrs and persist for upto 2 weeks. Intramuscular dosage will vary with the condition being treated when a prolonged effect is desired; the weekly dose may be calculated by multiplying the daily dose by 7 and given as a singular intramuscular injection. Dosage must be individualised according to the severity of the disease and the response of the patients. In general, the duration of the treatment should be kept as short as possible. Medical surveillance is necessary.

PROPERTIES: After a single IM injection of 40-80 MG of Depomedrol, duration of HPA Axis suppression ranges from 4-8 days. An intra-articular injection of 40 MG in both knees given after 4-8 hrs methyl prednisolone peaks of approximately 21.5 micrograms/ 100 ML. After intrarticular administration, methyl prednisolone acetate defuses from the joint into systemic circulation over approximately 7 days as demonstrated by the duration of HPA Axis suppression and by the serum Methyl Prednisolone Values.

INDICATIONS: For Intramuscular administration, Methyl Prednisolone acetate (Depomedrol) is not suitable for the treatment of acute life threatening conditions if a rapid hormonal effect of maximum intensity is required the IV administration of highly soluble methyl prednisolone sodium succinate (Solumedrol) is indicated.

PRECAUTION: Since the complications of treatment with glucocorticoids are dependant on the size of the dose and the duration of treatment ,a risk/ benefit decision must be made in each individual case as to dose and duration of treatment and as to whether daily or intermittent therapy should be used.

Glucocorticoids may musk some signs of infection and new infections may appear during their use. There may be decreased resistance and inability to localise infection when glucocorticoids are used. Do not use intrarticulary, intra bursally or intra tendinous administration in the presence of acute infection. IM administration can only be considered after institution of an appropriate anti microbial treatment."

The necessity of following the instructions given in the packet insert cannot be underestimated. Admittedly, the instructions in the said packet insert had not been followed in the instant case.

EFFECT OF EXCESS DOSAGE: There is, thus, a near unanimity that the doses of glucocorticosteroid and in particular Depomedrol were excessive. From the prescription of Dr. Mukherjee, it is evident that he not only prescribed Depomedrol injection twice daily, but had also prescribed Wysolone which is also a steroid having the composition of Methyl Predinosolone.

From the AMRI records, it would appear that while admitting the patient, it had categorically been noticed that both Depomedrol injection twice daily and Wysolone were being administered from 7th May, 1998 following the prescription of Dr. Mukherjee. It also now stands admitted that Dr. Prasad also prescribed the same medicine. From Dr. Mukherjee's prescription dated 11.05.1998, it is furthermore evident that he had prescribed Wysolone 50 mg once daily for one week, 40 mg daily for next week and 30 mg daily for the third week. He had also prescribed Depomedrol injection 80 mg twice daily for two days.

"Depomedrol", is a "long acting" steroid recommended for the treatment of "chronic" clinical conditions like "asthma" or "arthritis" for its prolonged immnumosupressive action. The maximum recommended dose of Depomedrol is 40-120 mg at 1-4 week intervals as clearly mentioned by the drug manufacturer, Pharmacia. Dr. J.S. Pasricha, Prof. and Ex - head of Dermatology at the All India Institute of Medical Sciences (AIIMS) has categorically stated, "Depo - preparations are used for chronic diseases and not for acute disease like TEN. Secondly, Depo preparations are not to be used twice a day".

In his deposition, Dr. Anil Gupta deposed that, he wrote to Pharmacia Upjohn, to know from them if the drug can be used in this fashion (as was done by the Kolkata doctors) in any clinical condition. In the reply sent by Dr. S.P.S. Bindra, it was stated that "our package insert on Depomedrol does not recommend the twice daily dose of injection Depomedrol 80 mg in any clinical condition". Moreover he also testified to the cause of Anuradha's death was due to Septicemia, which happened as a result of profound immuno - suppression, caused by overuse of steroid as prescribed by Dr. Mukherjee.

Further cause of death of Anuradha was lack of supportive treatment and lack of care on the part of Dr. Abani Roycoudhuri and Dr. Halder and other attending Physicians. In his deposition Dr. Anil Shinde stated that he was working as a Manager, Medical Service with Pharmacia India Pvt. Ltd and elucidated the details of Depomedrol. He stated that the dosage should be between 40 to 120 mg once a week or once in two weeks. On questioned whether 80 mg of Depomedrol can be given twice daily, the answer was "No".

In his deposition Dr. Salil Kumar Bhattacharya stated that he was a] Professor of Pharmacology. On being questioned whether he is aware of the Drug Depomedrol and its usage, it was answered that "it is usually used in chronic clinical condition like Bronchial Asthama and Rheumatoid Arthritus".

On being questioned whether Depomedrol can be used for TEN, the answer was "No" He furthermore stated that the recommended usage is 40 to 120 mg. at intervals of at least 1 week and a daily dose of 80 mg can never be used. On the question whether `long acting' steroids can accumulate in the body, he replied `Yes, it can accumulate.' On being questioned, whether it is discretion of the Physician to decide the mode of administration of any drug, he answered that the choice is "prerogative". However, he has to follow the pharmaco-therapeutic norms of the drug chosen.

SUPPORTIVE THERAPY

No symptomatic therapy was administered. No emergency care was provided. Dr. Halder himself accepted that the same was necessary. This has also been stated by Roujeau and Revuz in their book in the following terms:

"Withdrawal of any suspect drug, avoidance of skin trauma, inserting a peripheral venous line, administration of macromolecular solution, direct the patient to burn unit or ICU."

AMRI records demonstrate how abysmal the nursing care was. We understand that there was no burn unit in AMRI and there was no burn unit at Breach Candy Hospital either. A patient of TEN is kept in ICU. All emphasis has been laid on the fact that one room was virtually made an ICU. Entry Restrictions were strictly adhered to. Hygiene was ensured.

But constant nursing and supervision was required. In the name of preventing infection, it cannot be accepted that the nurses would not keep a watch on the patient. They

would also not come to see the patients or administer drugs. No nasogastric tube was given although the condition of mouth was such that she could not have been given any solid food. She required 7 to 8 litres of water daily. It was impossible to give so much water by mouth. The doctors on the very first day found that condition of mouth was bad.

The ENT specialist in his prescription noticed blisters around the lips of the patient which led her to difficulty in swallowing or eating.

No blood sample was taken. No other routine pathological examination was carried out. It is now beyond any dispute that 25-30% body surface area was affected (re. prescription of Dr. Nandy, Plastic Surgeon)

The next day, he examined the patient and he found that more and more body surface area was affected. Even Dr. Prasad found the same.

Supportive therapy or symptomatic therapy, admittedly, was not administered as needle prick was prohibited. AMRI even did not maintain its records properly. The nurses reports clearly show that from 13th May onwards even the routine check-ups were not done.

ANALYSIS

The High Court as also the Commission principally proceeded on the premise that the respondents herein are not liable either for any act of criminal misconduct or negligence because of cleavage of opinion. The cleavage of opinion, if any, as we have noticed hereinbefore, is between prosteroid group and anti-steroid group. Accepted treatment protocol so far as the pro-steroid group is concerned has also been noticed by us. We have proceeded to determine the question of negligence on the part of the respondents herein principally on the premise that even if the opinion of the pro-steroid group is followed, the respondents have failed and/or neglected to even act strictly in terms of the treatment protocol laid down by them. The opinion of the anti-steroid group appears to be more scientific and structured but the same by itself, we are conscious of the fact, would not lead us to the conclusion that the respondents are guilty of gross negligence.

BURDEN OF PROOF

Kunal had not only obtained opinion of a large number of experts, he examined some of the including Dr. Anil Shinde P.W. 9,; Dr. Udwadia (P.W.10) and, Dr. Salil Kumar Bhattacharyya, P.W. 11.

Respondents did not examine any expert. They, however, relied upon some authorities to which we have referred to heretobefore. The onus of proof, therefore, on a situation of this nature shifted to the respondents.

While we say so we must place on record that we are not oblivious of the fact that the principle of res ipsa loquitur may not be strictly applicable in a criminal case, although certain authorities suggest application of the said principle.

In Spring Meadows Hospital v. Harjol Ahluwalia, [(1998) 4 SCC 39], this Court has held as under:-

"10. Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of res ipsa loquitur can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly."

However, in Rattan Singh v. State of Punjab, [(1979) 4 SCC 719}, this Court has held:-

"3. This, however, does not excuse the accused from his rash driving of a "blind Leviathan in berserk locomotion". If we may adapt the words of Lord Greene, M.R.: "It scarcely lies in the mouth of the truck driver who plays with fire to complain of burnt fingers". Rashness and negligence are relative concepts, not absolute abstractions. In our current conditions, the law under Section 304-A IPC and under the rubric of Negligence, must have due regard to the fatal frequency of rash driving of heavy duty vehicles and of speeding menaces. Thus viewed, it is fair to apply the rule of res ipsa loquitur, of course, with care. Conventional defences, except under compelling evidence, must break down before the pragmatic Court and must be given short shrift. Looked at from this angle, we are convinced that the present case deserves no consideration on the question of conviction."

In Nizam Institute of Medical Sciences v. Prasanth S. Dhananka and others, [2009 (7) SCALE 407] this Court held as under :-

"32. We are also cognizant of the fact that in a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of negligence on the part of the hospital or the doctor concerned, the onus then shifts on to the hospital or to the attending doctors and it is for the hospital to satisfy the Court that there was no lack of care or diligence. In Savita Garg (Smt.) v. Director, National Heart Institute it has been observed as under:

Once an allegation is made that the patient was admitted in a particular hospital and evidence is produced to satisfy that he died because of lack of proper care and negligence, then the burden lies on the hospital to justify that there was no negligence on the part of the treating doctor or hospital. Therefore, in any case, the hospital is in a better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities."

CIVIL LIABILITY UNDER TORT LAW AS ALSO UNDER CONSUMER PROTECTION ACT

In this case, we are concerned with the extent of negligence on the part of the doctors, if any, for the purpose of attracting rigours of Section 304A of the Indian Penal Code as also for attracting the liability to pay compensation to the appellant in terms of the provisions of the Consumer Protection Act, 1986. We intend to deal with these questions separately.

It is noteworthy that standard of proof as also culpability requirements under Section 304 -A of Indian Penal Code stands on an altogether different footing. On comparison of the provisions of Penal Code with the thresholds under the Tort Law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under Civil and Criminal branches of Medical Negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to same under section 304 - A.

Bearing this in mind, we further elaborate on both the questions separately.

LAW OF NEGLIGENCE UNDER TORT LAW

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. [See Law of Torts, Ratanlal & Dhirajlal Twenty-fourth Edition 2002, at p.441-442]

Negligence means "either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative one; is rather a comparative term. In determining whether negligence exist in a particular case, all the attending and surrounding facts and circumstance have to be taken into account." [See Municipal Corpn. Of Greater Bombay v. Laxman Iyer, (2003) 8 SCC 731, para 6; Adavanced Law Lexicon, P Ramanatha Aiyar, 3rd ed. 2005, p. 3161]

Negligence is strictly nonfeasance and not malfeasance. It is the omission to do what the law requires, or the failure to do anything in a manner prescribed by law. It is the act which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or ordinance or is contrary to the dictates of ordinary prudence.

In Bolam v. Friern Hospital Management Committee, [(1957) 2 All ER 118], the law was stated thus:

"Where you get a situation which involves the use of some special skill or competence, then the test.....is the standard of ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art....

[A doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art....Putting it the other way round, a [doctor] is not negligent, if he [has acted] in accordance with such a practice, merely because there is a body of opinion which [takes] a contrary view."

It has been laid down that an ordinary skilled professional standard of care for determining the liability of medical professional should be followed. (See Maynard v. West Midland Regional Health, Authority, [(1985) 1 All ER 635 (HL)]) Recently in Martin F.D' Souza v. Mohd. Ishfaq, [(2009) 3 SCC 1], this Court laid down the precautions which doctors/hospitals etc. should have taken, in the following terms :-

"(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly....

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt...."

In fact, the Bolam case in common laws jurisdictions is weakened in recent years by reasons of series of decisions in Australia [Rogers v. Whitaker: (1992) 109 Aus LR 625 and Roenbreg v. Percival 2001 HCA 18]; Canada [Ribl v. Hughes: (1980) 114 DLR 3d 1] and the United States and even in the United Kingdom.

We may refer to Bolitho v. City and Hackney Health Authority, [(1997) 4 All ER 771 (HL)], where the Court got away from yet another aspect of Bolam case. It was observed :-

"The court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable and respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

In this regard it would be imperative to notice the views rendered in Jacob Mathew v. State of Punjab, [(2005) 6 SCC 1, where the court came to the conclusions:

(i) Mere deviation from normal professional practice is not necessarily evidence of negligence.

(ii) Mere accident is not evidence of negligence

(iii) An error of judgment on the part of a professional is not 7negligence per se.

(iv) Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitor.

RIGHT OF THE PATIENT TO BE INFORMED

The patients by and large are ignorant about the disease or side or adverse affect of a medicine. Ordinarily the patients are to be informed about the admitted risk, if any. If some medicine has some adverse affect or some reaction is anticipated, he should be informed thereabout. It was not done in the instant case.

The law on medical negligence also has to keep up with the advances in the medical science as to treatment as also diagnostics. Doctors increasingly must engage with patients during treatments especially when the line of treatment is a contested one and hazards are involved. Standard of care in such cases will involve the duty to disclose to patients about the risks of serious side effects or about alternative treatments. In the times to come, litigation may be based on the theory of lack of informed consent. A significant number of jurisdictions, however, determine the existence and scope of the doctor's duty to inform based on the information a reasonable patient would find material in deciding whether or not to undergo the proposed therapy.

INDIVIDUAL LIABILITY OF THE DOCTORS

There cannot be, however, by any doubt or dispute that for establishing medical negligence or deficiency in service, the courts would determine the following:

(i) No guarantee is given by any doctor or surgeon that the patient would be cured.

(ii) The doctor, however, must undertake a fair, reasonable and competent degree of skill, which may not be the highest skill.

(iii) Adoption of one of the modes of treatment, if there are many, and treating the patient with due care and caution would not constitute any negligence.

(iv) Failure to act in accordance with the standard, reasonable, competent medical means at the time would not constitute a negligence. However, a medical practitioner must exercise the reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.

(v) In a complicated case, the court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to be best of his ability.

Bearing in mind the aforementioned principles, the individual liability of the doctors and hospital must be judged.

We enumerate heretobelow the duty of care which ought to have been taken and the deficiency whereof is being complained of in the criminal case and the civil case, respectively, so far as respondent Nos. 1 to 3 are concerned.

When Dr. Mukherjee examined Anuradha, she had rashes all over her body and this being the case of dermatology, he should have referred her to a dermatologist. Instead, he prescribed "Depomedrol" for the next 3 days on his assumption that it was a case of "vasculitis". The dosage of 120 mg Depomedrol per day is certainly a higher dose in case of a TEN Patient or for that matter any patient suffering from any other bypass of skin disease and the maximum recommended usage by the drug manufacturer has also been exceeded by Dr. Mukherjee. On 11th May, 1998, the further prescription of Depomedrol without diagnosing the nature of the disease is a wrongful act on his part.

According to general practice, long acting steroids are not advisable in any clinical condition, as noticed hereinbefore. However, instead of prescribing to a quick acting steroid, the prescription of a long acting steroid without foreseeing its implications is certainly an act of negligence on his part without exercising any care or caution. As it has been already stated by the Experts who were cross examined and the authorities that have been submitted that the usage of 80-120 mg is not
permissible in TEN.

Furthermore, after prescribing a steroid, the effect of immunosuppression caused due to it, ought to have been foreseen. The effect of immunosuppression caused due to the use of steroids has affected the immunity of the patient and Dr. Mukherjee has failed to take note of the said consequences.

After taking over the treatment of the patient and detecting TEN, Dr. Halder ought to have necessarily verified the previous prescription that has been given to the patient. On 12th May, 1998 although `depomedrol' was stopped, Dr. Halder did not take any remedial measures against the excessive amount of `depomedrol' that was already stuck in the patient's body and added more fuel to the fire by prescribing a quick acting steroid `Prednisolone' at 40mg three times daily, which is an excessive dose, considering the fact that a huge amount of "Depomedrol" has been already accumulated in the body.

Life saving `supportive therapy' including IV fluids/ electrolyte replacement, dressing of skin wounds and close monitoring of infection is mandatory for proper care of TEN patients. Skin(wound) swap and blood tests also ought to be performed regularly to detect the

degree of infection. Apart from using the steroids, aggressive supportive therapy that is considered to be rudimentary for TEN patients was not provided by Dr. Halder. Further `vital-signs' of a patient such as temperature, pulse, intake- output and blood pressure were not monitored. All these factors are considered to be the very basic necessary amenities to be provided to any patient, who is critically ill. The failure of Dr. Halder to ensure that these factors are monitored regularly is certainly an act of negligence.

Occlusive dressing were carried as a result of which the infection had been increased. Dr Halder's prescription was against the Canadian treatment protocol reference to which we have already made herein before.

It is the duty of the doctors to prevent further spreading of infections. How that is to be done is the doctors concern. Hospitals or nursing homes where a patient is taken for better treatment should not be a place for getting infection.

After coming to know that the patient is suffering from TEN, Dr. Abani Roy Chowdhury ought to have ensured that supportive therapy had been given. He had treated the patient along with Dr. Halder and failed to provide any supportive therapy or advise for providing IV fluids or other supplements that is a necessity for the patient who was critically ill.

As regards, individual liability of the respondent Nos 4, 5 and 6 is concerned, we may notice the same hereunder.

As regards AMRI, it may be noticed:

(i) Vital parameters of Anuradha were not examined between 11.05.1998 to 16.05.1998 (Body Temperature, Respiration Rate, pulse, BP and urine input and output)

(ii)I.V. Fuid not administered. (I.V. fluid administration is absolutely necessary in the first 48 hours of treating TEN)

As regards, Dr. Balaram Prasad, Respondent No. 5, it may be noticed:

(i) Most Doctors refrain from using steroids at the later stage of the disease - due to the fear of Sepsis, yet he added more steroids in the form of quick - acting "Prednisolone" at 40g three times a day.

(ii)He stood as second fiddle to the treatment and failed to apply his own mind.

(iii)No doctor has the right to use the drug beyond the maximum recommended dose.

So far as the judgment of the Commission is concerned, it was clearly wrong in opining that there was no negligence on the part of the hospital or the doctors. We are, however, of the opinion, keeping in view the fact that Dr. Kaushik Nandy has done whatever was possible to be done and his line of treatment meets with the treatment protocol of one of the experts, viz. Prof. Jean Claude Roujeau although there may be otherwise difference of opinion, that he cannot be held to be guilty of negligence.

CONCLUSION

We remit the case back to the Commission only for the purpose of determination of quantum of compensation.

ASSESSING CRIMINAL CULPABILITY UNDER SECTION 304-A

Criminal Medical Negligence is governed by Section 304A of the Indian Penal Code.

Medical science is a complex science. Before an inference of medical negligence is drawn, the court must hold not only existence of negligence but also omission or commission on his part upon going into the depth of the working of the professional as also the nature of

the job. The cause of death should be direct or proximate. A distinction must be borne in mind between civil action and the criminal action.

The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do.

CUMULATIVE EFFECT OF NEGLIGENCE

A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court must deal with the consequences the patient faced keeping in view the cumulative effect.

In the instant case, negligent action has been noticed with respect to more than one respondent. A cumulative incidence, therefore, has led to the death of the patient. It is to be noted that doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the respondent. In such a scenario finding of medical negligence under section 304-A cannot be objectively determined.

CONCLUSION

In view of our discussions made hereinbefore, we are of the opinion that for the death of Anuradha although Dr. Mukherjee, Dr. Halder, Dr. Abani Roy Chowdhury, AMRI, Dr. B. Prasad were negligent, the extent thereof and keeping in view our observations made hereinbefore, it cannot be said that they should be held guilty for commission of an offence under Section 304-A of the Indian Penal Code.

SUMMARY

For the reasons aforementioned, the criminal appeals are dismissed. As regards the civil appeal, the matter is remitted to the National Commission for determining the compensation with a request to dispose of the matter as expeditiously as possible and preferably within a period of six months from the date of receipt of a copy of this judgment. Civil Appeal is disposed of
accordingly.

We, keeping in view the stand taken and conduct of AMRI and Dr. Mukherjee, direct that costs of Rs. 5,00,000/- and Rs. 1,00,000/- would payable by AMRI and Dr. Mukherjee respectively.

We further direct that if any foreign experts are to be examined it shall be done only through video conferencing and at the cost of respondents.

Khenyei v. New India Assurance Company Ltd. & Ors.

(2015) 9 SCC 273

ARUN MISHRA, J. –Leave granted. In the appeals, the main question which arises for consideration is, whether it is open to a claimant to recover entire compensation from one of the joint tort feasors, particularly when in accident caused by composite negligence of drivers of trailor-truck and bus has been found to 2/3rd and 1/3rd extent respectively.

2. In the instant cases the injuries were sustained by the claimants when two vehicles - bus and trailor-truck collided with each other. The New India Assurance Co. Ltd. is admittedly the insurer of the bus. However, on the basis of additional evidence adduced the High Court has come to the conclusion that the New India Assurance Co. Ltd. is not the insurer of the trailor-truck, hence is not liable to satisfy 2/3rd of the award.

5. In **Law of Torts** by *Winfield and Jolowicz, 17th Edn., 2006*, the author has referred to ***Performance Cars Ltd. v. Abraham*** [1962 (1) QB 33], ***Baker v. Willoughby*** 1970 A.C. 467, **Rogers on Unification of Tort Law: Multiple Tortfeasors**; ***G.N.E.R. v. Hart*** [2003] EWHC 2450 (QB), ***Mortgage Express Ltd. v. Bowerman & Partners*** 1996 (2) All E.R. 836 etc. and observed thus:

"WHERE two or more people by their independent breaches of duty to the claimant cause him to suffer distinct injuries, no special rules are required, for each tortfeasor is liable for the damage which he caused and only for that damage. Where, however, two or more breaches of duty by different persons cause the claimant to suffer a single, indivisible injury the position is more complicated. The law in such a case is that the claimant is entitled to sue all or any of them for the full amount of his loss, and each is said to be jointly and severally liable for it. If the claimant sues defendant A but not B and C, it is open to A to seek "contribution" from B and C in respect of their relative responsibility but this is a matter among A, B and C and does not affect the claimant. This means that special rules are necessary to deal with the possibilities of successive actions in respect of that loss and of claims for contribution or indemnity by one tortfeasor against the others. It may be greatly to the claimant's advantage to show that he has suffered the same, indivisible harm at the hands of a number of defendants for he thereby avoids the risk, inherent in cases where there are different injuries, of finding that one defendant is insolvent (or uninsured) and being unable to execute judgment against him. Even where all participants are solvent, a system which enabled the claimant to sue each one only for a proportionate part of the damage would require him to launch multiple proceedings, some of which might involve complex issues of liability, causation and proof. As the law now stands, the claimant may simply launch proceedings against the "easiest target". The same picture is not, of course, so attractive from the point of view of the solvent defendant, who may end up carrying full responsibility for a loss in the causing of which he played only a partial, even secondary role. Thus a solicitor may be liable in full for failing to point out to his client that there is reason to believe that a valuation on which the client proposes to lend is suspect, the valuer being insolvent; and an auditor will be likely to carry sole responsibility for negligent failure to discover fraud during a company audit. A sustained campaign against the rule of joint and several liability has been mounted in this country by certain professional bodies, who have argued instead for a regime of "proportionate liability"

whereby, as against the claimant, and not merely among defendants as a group, each defendant would bear only his share of the liability. While it has not been suggested here that such a change should be extended to personal injury claims, this has occurred in some American jurisdictions, whether by statute or by judicial decision. However, an investigation of the issue by the Law Commission on behalf of the Dept of trade and Industry in 1996 led to the conclusion that the present law was preferable to the various forms of proportionate liability."

6. *Pollock* in **Law of Torts**, 15th Edn. has discussed the concept of composite negligence. The relevant portion at page 361 is extracted below:

"Another kind of question arises where a person is injured without any fault of his own, but by the combined effects of the negligence of two persons of whom the one is not responsible for the other. It has been supposed that A could avail himself, as against Z who has been injured without any want of due care on his own part, of the so-called contributory negligence of a third person B. It is true you were injured by my negligence, but it would not have happened if B had not been negligent also, therefore, you can not sue me, or at all events not apart from B. Recent authority is decidedly against allowing such a defence, and in one particular class of cases it has been emphatically disallowed. It must, however, be open to A to answer to Z: You were not injured by my negligence at all, but only and wholly by B's. It seems to be a question of fact rather than of law (as, within the usual limits of a jury's discretion, the question of proximate cause is in all ordinary cases) what respective degrees of connection, in kind and degree, between the damage suffered by Z and the independent negligent conduct of A and B will make it proper to say that Z was injured by the negligence of A alone, or of B alone, or of both A and B,. But if this last conclusion be arrived at, it is now quite clear that Z can sue both A and B.

At page 362 Author has observed as:-

"The strict analysis of the proximate or immediate cause of the event: the inquiry who could last have prevented the mischief by the exercise of due care, is relevant only where the defendant says that the plaintiff suffered by his own negligence. Where negligent acts of two or more independent persons have between them caused damage to a third, the sufferer is not driven to apply any such analysis to find out whom he can sue. He is entitled- of course, within the limits set by the general rules as to remoteness of damage- to sue all or any of the negligent persons. It is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he can not recover in the whole more than his whole damage."

7. In ***Palghat Coimbatore Transport Co. Ltd. v. Narayanan***, [ILR (1939) Mad. 306], it has been held that where injury is caused by the wrongful act of two parties, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage. He has a right to recover the full amount of damages from any of the defendants.

14. In our opinion, the law laid down by the Madhya Pradesh High Court in ***Smt. Sushila Bhadoriya*** is also in tune with the decisions of the High Court of Karnataka in ***Ganesh*** and ***Arun @ Aravind***. However, at the same time, suffice it to clarify that even if all the joint tort feasors are impleaded and both the drivers have entered the witness box and the tribunal or the court is able to determine the extent of negligence of each of the driver that is for the purpose of inter se liability between the joint tortfeasors but their liability would remain joint and several so as to satisfy the plaintiff/claimant.

15.*There is a difference between contributory and composite negligence.**In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons.*This Court in ***T.O. Anthony v. Karvarnan & Ors.*** [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder:

"6. ***'Composite negligence'*** refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong- doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his '***contributory negligence***.' Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7.Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between

composite negligence and contributory negligence. The High Court has failed to correct the said error."

16. In ***Pawan Kumar &Anr. v. Harkishan Dass Mohan Lal &Ors.*** [2014 (3) SCC 590], the decisions in ***T.O. Anthony*** and ***Hemlatha*** have been affirmed, and this Court has laid down that where plaintiff/claimant himself is found to be negligent jointly and severally, liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. He is entitled to damages not attributable to his own negligence. The law/distinction with respect to contributory as well as composite negligence has been considered by this Court in ***Machindranath Kernath Kasar v. D.S. Mylarappa & Ors.***[2008 (13) SCC 198] and also as to joint tort feasors. This Court has referred to ***Charlesworth & Percy*** on negligence as to cause of action in regard to joint tort feasors thus:

"42. Joint tortfeasors, as per 10th Edn.of Charlesworth & Percy on Negligence, have been described as under:

'Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely, that the same evidence would support an action against them, individually..... Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them.' "

17. The question also arises as to the remedies available to one of the joint tort feasors from whom compensation has been recovered. When the other joint tort feasor has not been impleaded, obviously question of negligence of non-impleaded driver could not be decided apportionment of composite negligence cannot be made in the absence of impleadment of joint tort feasor. Thus, it would be open to the impleaded joint tort feasors after making payment of compensation, so as to sue the other joint tort feasor and to recover from him the contribution to the extent of his negligence. However, in case when both the tort feasors are before the court/tribunal, if evidence is sufficient, it may determine the extent of their negligence so that one joint tort feasor can recover the amount so determined from the other joint tort feasor in the execution proceedings, whereas the claimant has right to recover the compensation from both or any one of them.

21. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several.In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

22. What emerges from the aforesaid discussion is as follows:

22.1. In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

22.2. In the case of composite negligence, apportionment of compensation between two tort feasorsvis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3. In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

22.4. It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award.

23. Resultantly, the appeals are allowed. The judgment and order passed by the High Court is hereby set aside. Parties to bear the costs as incurred.

* * * * *

NERVOUS SHOCK

Hambrook v. *Stokes Bros.*

[1925] 1 KB 141 : 1924 All ER Rep 110

BANKES, L.J. - This appeal raises an important and interesting point of law. The appellant, who was plaintiff in the court below, claimed compensation under Lord Campbell's Act for the loss of his wife. His case was that his wife died as the result of nervous shock caused by the negligence of the defendant's servant. The material facts proved or admitted at the trial were that the defendants were the owners of a motor lorry, which was left by their servant unattended and with the engine running, and which ran down a street in Folkestone, so narrow that in places the road was only just 6 ft. wide. It was admitted that the defendant's servant was negligent in allowing this to happen. The lorry was finally pulled up by running into a house close to where the plaintiff's wife happened to be standing. The plaintiff's case was that his children, at the time the lorry came down the street, were on their way to school, and having regard to the time at which they started, would presumably be where the lorry might strike them, the street being so narrow and the lorry swaying from side to side of the street. He further contended that the shock to his wife was due either to a reasonable fear of immediate personal injury to herself, or, alternatively, of injury to her children, and that her death was the result of the shock. The case for the defendants was that the shock was due to a fear of injury to her children, which did not give rise to any cause of action, and, further, that the wife's death was due to quite independent causes.

The matter comes before this court upon a complaint of misdirection by the learned judge. What the learned judge told the jury in substance was that, if they found that the shock to the wife resulted in her death, and arose from reasonable fear of immediate injury to herself, they might award the husband compensation, but that, if they found that the fear was fear, not of injury to herself, but of injury to her children, they must find for the defendants. In thus directing the jury the learned judge was following the latest decision upon the point, and the object of this appeal is to get that decision, if decision it be, as opposed to a mere dictum, set aside or corrected, and the law laid down in terms wide enough to embrace either view of the cause of the shock to the wife. The branch of the law relating to the responsibility for causing nervous shock has developed considerably in comparatively recent years. In ***Lynch* v. *Knight*** [(1861) 9 H.L. Cas 577], decided in 1861, Lord Wensleydale speaks of mental pain or anxiety as something which the law cannot value and does not pretend to redress. In 1888, in the case in the Privy Council of the ***Victorian Rail, Comrs.* v. *Coultas*** [(1888) 13 AC 222], the question was directly raised whether damages were recoverable for a nervous shock or mental injury caused by fright of an impending collision. The decision was that they were not, and the ground of the decision was that such damages would be too remote.

The question does not appear to have been directly raised in England until 1901, when ***Dulieu* v. *White & Sons*** [(1901) 2 KB 669] came before a Divisional Court consisting of Kennedy and Phillimore, JJ. The facts in that case were that the plaintiff was claiming

damages for illness caused by the shock resulting from the negligence of the defendants' servant in driving a pair-horse van into the house in which she was. The defendants contended that the statement of claim disclosed no cause of action. The court refused to follow the Privy Council decision, and in elaborate and closely reasoned judgments both learned judges held that the plaintiff had disclosed a cause of action. In giving judgment, Kennedy, J. says this:

> It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be shock which arises from a reasonable fear of immediate injury to oneself. A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C.

Accepting the line of reasoning illustrated by these authorities, it follows that what a man ought to have anticipated is material when considering the extent of his duty. Upon the authorities as they stand, the defendant ought to have anticipated that, if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health. Can any real distinction be drawn from the point of view of what the defendant ought to have anticipated, and what, therefore, his duty was, between that case and the case of a women whose fear is for her child, and not for herself? Take a case in point as a test. Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. On mother is courageous and devoted to her child. She is terrified, but thinks only of the damage of the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the metal shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not. In my opinion, the step which the court is asked to take, in the circumstances of the present case, necessarily follows from an acceptances of the decision in ***Dulieu* v. *White & Sons*** and I think that the dictum of Kennedy, J., laid down in quite general terms in that case cannot be accepted as good law applicable in every case.

While coming to this conclusion, for the reasons I have given, I wish to confine my decision to cases where the facts are indistinguishable in principle from the facts of the present case, and in the present case I am merely deciding that, in my opinion, the plaintiff would establish a cause of action if he proved to the satisfaction of the jury all the material facts on which be relies namely, that the death of his wife resulted from the shock occasioned by the running away of the lorry; that the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses, and not from something which someone told her; and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children. The judgment for the defendants must be set aside and a new trial ordered

the costs of the appeal to be paid by the respondent and the costs of the first trial to abide the event of the new trial.

ATKIN, L. J.- This action, so far as is relevant to our present decision, was brought under the Fatal Accidents Act, 1846, as amended by the Act of 1864, by a husband to recover damages for the death of his wife, alleged to be caused by the negligence of the defendants. On the morning in question, May 1, 1923, Mrs. Hambrook had escorted her children, two boys and a girl Mabel, aged ten, to the pavement in Dover Street, where they joined other children on their way to school. The group of children proceeded on their way, turning a corner of Dover Street within few yards of leaving Mrs. Hambrook, and so passing out of her sight. They had hardly turned the corner when the derelict motor lorry coming down the street, ricocheting from one side of the road to the other, dashed into the children, inflicting serious injuries to the child Mabel. The progress of the lorry would be heard by those round the corner, including Mrs. Hambrook. After injuring the child it shot round the corner, and finally came to a stop within 15 or 20 feet of Mrs. Hambrook. She immediately evinced signs of great mental disturbance, caused, as the jury have found, by apprehension, not of injury to herself, but of injury to the child. She was pregnant at the time; as to the stage of the pregnancy there is some discrepancy between the evidence of the husband, who says three months, and the doctor who attended her at her death on July 16, 1923, who says that on May 1 she had been pregnant two to six weeks. She had a severe haemorrhage on May 3, which she thought was a miscarriage. She partially recovered, but about June 28 became worse, and died on July 16, 1923. On July 11 she was operated on and a foetus removed, which the doctor said had been dead "say a month, and about two to three months' development." The learned judge directed the jury that, unless the death of the wife was the result of shock produced by fear of harm to herself as contrasted with shock produced by fear of harm to her child, the plaintiff could not recover. The question for us is whether that is a misdirection. In my opinion, it was and in consequence there must be a new trial.

The legal effects of injury by shock have undoubtedly developed in the last thirty or forty years. At one time the theory was held that damage at law could not be proved in respect of personal injuries, unless there was some injury which was variously called "bodily" or "physical" but which necessarily excluded an injury which was only "mental". There can be no doubt at the present day that this theory is wrong.

It appears to me that, if the plaintiff can prove that her injury was the direct result of a wrongful act or omission by the defendant, she can recover, whether the wrong is a malicious and willful act, is a negligent act, or is merely a failure to keep dangerous thing in control as, for instance, a failure to keep a wild beast in control. Once a breach of duty to the plaintiff is established, one has no longer to consider whether the consequences could reasonably be anticipated by the wrongdoer. The question is whether the consequences causing damage are the direct result of the wrongful act or omission. I agree that in the present case the plaintiff must show a breach of duty to her, but this she shows by the negligence of the defendants in the case of this lorry. I am clearly of opinion that the breach of duty to her is admitted in the pleadings.

The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the high way. If so, he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway. It is thus a duty owed to all wayfarers, whether they are injured or not though damage by reason of the breach of duty is essential before any wayfarer can sue. Further, the breach of duty does not take place necessarily when the vehicle strikes or injures the wayfarer. The negligent act or omission may precede the act of injury. In this case it was completed at the top of Dover Street when the car was left unattended in such a condition that it would run violently down the steep place. Here, then was a breach of a duty owed to Mrs. Hambrook. No doubt, the particular injury was not contemplated by the defendants, but it is plain from ***Re Polemis and Furness, Withy & Co., Ltd*** [(1921) 3 K B 560] that this is immaterial. If the act would or might probably cause damage, the fact that the damage it in the fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act. I can find no principle to support the self-imposed restriction stated in the judgment of Kennedy, J., in ***Dulieu* v. *White & Sons***, that the shock must be a shock which arises from a reasonable fear of immediate personal injury to oneself.

Personally, I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of, or the actual sight of, injury to a third party. There may well be cases where the sight of suffering will directly and immediately physically shock the most indurate heart; and, if the suffering of another be the result of an act wrongful to the spectator, I do not see why the wrongdoer should escape. The reason why a threatened battery upon the plaintiff is actionable, if it causes damage, is that it is an assault, a crime committed against the plaintiff and, therefore, a wrong to him. The reason why a threatened or an actual battery against a third person is not actionable by a spectator is that is not a wrong to him. It may be that to negative Kennedy, J.'s restriction is to increase possible actions. I think this may be exaggerated. I find only about half a dozen cases of direct shock reported in about 30 years, and I do not expect that shocks to bystanders will outnumber them.

In my opinion, it is not necessary to treat this cause of action as based upon a duty to take reasonable care to avoid administering a shock to wayfarers. The cause of action, as I have said, appears to be created by breach of the ordinary duty to take reasonable care to avoid inflicting personal injuries, followed by damage, even though the type of damage may be unexpected-namely, shock the question appears to be as to the extent of the duty, and not as to remoteness of damage. If it were necessary, however, I should accept to view that the duty extended to the duty to take care to avoid threatening personal injury to a child in such circumstances as to cause damage by shock to a parent or guardian then present, and that the duty was owed to the parent or guardian; but I confess that, upon this view of the case, I should find it difficult to explain why the duty was confined to the case of parent or guardian and child, and did not extend to other relations of life also involving intimate associations; and why it did not eventually extend to bystanders. It may be, however, that there is not any practical difference between the two ways of putting it; for the degree of care to be exercised by the owner of the vehicle would still in practice be measured by the standard of care

necessary to avoid the ordinary form of personal injuries. One may, therefore, conclude by saying that this decision in no way increases the burden of care to be taken by the drivers of vehicles, and that the risk, foreshadowed in one of the cases, of an otherwise careful driver being made responsible for frightening an old lady at Charing Cross, is non-existent. The case must go for a new trial.

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(Hay or) Bourhill v. *Young*

[1943] AC 92 : (1942) 2 All ER 396

The defender was the executor of John Young, who drove a motor-cycle too fast along an Edinburgh road, overtook a stationary tram-car on the inside and collided with an oncoming motor-car executing a right-hand turn across his path just in front of the term-car. At the time, Mrs. Euphemia Bourhill, a fish-wife and eight months pregnant, was standing at the offside of the tram-car, having her fish-basket lifted on to her back by the driver. She could not see the crash, since the tram-car was in the way, but she heard it and later said: "I just got in a pack of nerves, and I did not know whether I was going to get it or not." She subsequently saw the blood left on the road after the removal of John Young's corpse. Condescendence 4 of the record stated: "As an immediate result of the violent collision and the extreme shock of the occurrence in the circumstance explained, the pursuer wrenched and injured her back and was thrown into a state of terror and sustained a very severe shock to her nervous system. Explained that the pursuer's terror did not involve any element of reasonable fear of immediate bodily injury to herself. The pursuer was about eight months pregnant at the time, and give birth to a child on November 18, 1938, which was still –born owing to the injuries sustained by the pursuer.

LORD MACMILLAN - My Lords, it is established that the appellant suffered in her heath and in her ability to do her work by reason of the shock which she sustained, when motor-cycle ridden by the deceased John Young collided with a motor-car in her vicinity. The question for decision is whether the respondent, as representing the late John Young, can be rendered accountable at law for what the appellant has suffered.

It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the car without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system. And a mental shock may have consequences more serious than those resulting from physical impact. But in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability.

She can recover damages only if she can show that in relation to her the late John Young acted negligently. To establish this she must show that he owed her a duty of care which he failed to observe, and that, as a result of this failure in duty on his part, she suffered as she did.

The late John Young was riding a motor-bicycle in an Edinburgh street. What duty then was incumbent on him? It cannot be better or more succinctly put than it was by Lord Jamieson in the Second Division in the present case when he said that "the duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the

highway." Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rule and signals and so on. Then, to whom is the duty owed? Again I quote and accept Lord Jameson's words: "To persons so placed that they may reasonably by expected to be injured by the omission to take such care." The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree. In the present instance the late John Young was clearly negligent in a question with the occupants of the motor-car with which his cycle collided. He was driving at an excessive speed in a public thoroughfare and he ought to have foreseen that he might consequently collide with any vehicle which he might meet in his course, for such an occurrence may reasonably and probably be expected to ensure from deriving at high speed in a street. But can it be said that he ought to further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle, might cause injury by shock to the appellant? The appellant was not within his line of vision, for she was on the other side of a tram-car which was standing between him and her when he passed and it was not until he had proceeded some distance beyond her that he collided with the motor-car. The appellant did not see the accident and she expressly admits that her "terror did not involve any element of reasonable fear of immediate bodily injury to herself." She was not so placed that there was any reasonable likelihood of her being affected by the cyclist's careless driving. In these circumstances I am of opinion with the majority of the learned judges of the Second Division that the late John Young was under no duty to the appellant to foresee that his negligence in driving at an excessive speed and consequently colliding with a motor-car might result in injury to her, for such result could not reasonably and probably be anticipated. He was, therefore, not guilty of negligence in a question with the appellant.

That is sufficient for the disposal of the case and absolves me from considering the question whether injury through mental shock is actionable only when, in the words of Kennedy J. the shock arises from a reasonable fear of immediate personal injury to oneself [***Dulieu* v. *White & Sons*** *(*1901) 2 K.B. 669, 682], which was admittedly not the case in the present instance. It also absolves me from considering whether, if the late John Young neglected any duty which he owed to the appellant-which, in my opinion, he did not- the injury of which she complains was to remote to entitle her to damages. I shall observe only that the view of authority, although it was not accepted by the Court of Appeal in England in ***Hambrook* v. *Stokes Brothers*** [(1925) 1 K.B. 141], notwithstanding a powerful dissent by Sargant L.J. This House has not yet been called upon to pronounce on the question either as a matter of Scots law or as a matter of English law, and I reserve my opinion on it. The decision in ***Owens* v. *Liverpool Corporation*** [(1939) 1 K.B. 394], if it is the logical consequence of Hambrook's case, shows how far-reaching is the principle involved.

LORD THANKERTON - The shock resulting to the appellant, situated as she was, was not within the area of potential danger which the cyclists should reasonably have had in view…

LORD WRIGHT - Can it be said, apart from everything else, that it was likely that a person of normal nervous strength would have been affected in the circumstances by illness as the appellant was? Does the criterion of reasonable foresight extend beyond people of ordinary health or susceptibility, or does it take into account the peculiar susceptibilities or infirmities of those affected which the defendant neither knew of nor could reasonably be taken to have foreseen?

LORD PORTER - The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time by expected to occur to them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent toward one who does not possess the customary phlegm…. ***A* v. *B's Trustees*** [(1906) 13 S.L.T 830] in which a lodger committed suicide in the lodgings he had hired and both did some material as founded on contract or on the fact that the material damage might have been anticipated.

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McLoughlin v. *O'Brian*

(1983) 1 AC 410 (HL)

LORD WILBERFORCE - My Lords, this appeal arises from a very serious and tragic road accident which occurred on October 19, 1973 near Withersfield, Suffolk. The appellant's husband, Thomas McLoughlin, and three of her children, George, aged 17, Kathleen, aged 7 and Gillian, nearly 3, were in a Ford motor car: George was driving. A fourth child, Michael then aged 11, was a passenger in a following motor car driven by Mr. Pilgrim: this car did not become involved in the accident. The Ford car was in collision with a lorry driven by the first respondent and owned by the second respondent. That lorry had been in collision with another lorry driven by the third respondent and owned by the fourth respondent. It is admitted that the accident to the Ford car was caused by the respondent's negligence. It is necessary to state what followed in full detail.

As a result of the accident, the appellant's husband suffered bruising and shock; George suffered injuries to his head and face, cerebral concussion, fractures of both scapullae and bruising and abrasions; Kathleen suffered concussion, fracture of the right clavicle, bruising, abrasions and shock; Gillian was so seriously injured that she died almost immediately.

At the time, the appellant was at her home about two miles away; an hour or so afterwards the accident was reported to her by Mr. Pilgrim, who told her that he thought George was dying, and that he did not know the whereabouts of her husband or the condition of her daughter. He then drove her to Addenbrooke's Hospital Cambridge. There she saw Michael, who told her that Gillian was dead. She was taken down a corridor and through a window she saw Kathleen, crying, with her face cut and begrimed with dirt and oil. She could hear George shouting and screaming. She was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he was covered in mud and oil. He saw the appellant and started sobbing. The appellant was then taken to see George. The whole of his left face and left side was covered. He appeared to recognize the appellant and then lapsed into unconsciousness. Finally, the appellant was taken to Kathleen who by now had been cleaned up. The child was too upset to speak and simply clung to her mother. There can be no doubt that these circumstances, witnessed by the appellant, were distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow.

The appellant subsequently brought proceedings against the respondents. At the trial, the judge assumed, for the purpose of enabling him to decide the issue of legal liability that the appellant subsequently suffered the condition of which she complained. This was described as severe shock, organic depression and a change of personality. Numerous symptoms of a physiological character are said to have been manifested. The details were not investigated at the trial, the court being asked to assume that the appellant's condition had been caused or contributed to by shock, as distinct from grief or sorrow, and that the appellant was a person of reasonable fortitude.

On these facts, or assumed facts, the trial judge (Boreham J.) gave judgment for the respondents holding, in a most careful judgment reviewing the authorities, that the

respondents owed no duty of care to the appellant because the possibility of her suffering injury by nervous shock, in the circumstances, was not reasonably foreseeable.

On appeal by the appellant, the judgment of Boreham J. was upheld, but not on the same ground. Stephenson L.J. took the view that the possibility of injury to the appellant by nervous shock was reasonably foreseeable and that the respondents owed the appellant a duty of care.However, he held that considerations of policy prevented the appellant from recovering. Griffiths L.J. held that the injury by nervous shock to the appellant was "readily foreseeable" but that the respondents owed no duty of care to the appellant. The duty was limited to those on the road nearby. Cumming-Bruce L.J. agreed with both judgments. The appellant now appeals to this House. The critical question to be decided is whether a person in the position of the appellant, i.e. one who was not present at the scene of grievous injuries to her family but who comes upon those injuries at an interval of time and space, can recover damages for nervous shock.

Although we continue to use the hallowed expression "nervous shock" English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognizable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms is understood by the ordinary man or woman who is hypothesised by the courts in situations where claims for negligence are made. Although in the only case which has reached this House [***Bourhill* v. *Young*** (1943) A.C. 92] a claim for damages in respect of "nervous shock" was rejected on its facts, the House gave clear recognition to the legitimacy, in principle, of claims of that character. As the result of that and other cases, assuming that they are accepted as correct, the following position has been reached:

1. While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for "nervous shock" caused by negligence can be made without the necessity of showing impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. in ***Dulieu* v. *White & Sons*** [(1901) 2 KB 669], though taken up by Sargant L.J. in ***Hambrook* v. *Stokes Brothers*** [(1925) 1 KB 141] has not gained acceptance and although the respondents, in the courts below, reserved their right to revive it, they did not do so in argument. I think that it is now too late to do so. The arguments on this issue were fully and admirably stated by the Supreme Court of California in ***Dillon* v. *Legg*** [(1968) 29 A.L.R. 3d 1316].

2. A plaintiff may recover damages for "nervous shock" brought on by injury caused not to him-or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the plaintiff (***Hambrook* v. *Stokes Brothers***, ***Boardman* v. *Sanderson*** [(1964) 1 W.L.R. 1317], ***Hinz* v. *Berry*** [(1971) 2 QB 40] - including foster children - (where liability was assumed) and see ***King* v. *Phillips*** [(1953) 1 QB 429].

3. Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of plaintiff. In ***Hambrook* v. *Stokes Brothers*** an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case.

4. An exception from or I would prefer to call it an extension of, the latter case, has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath. In ***Boardman* v. *Sanderson*** the father was within earshot of the accident to his child and likely to come upon the scene: he did so and suffered damage from what he then saw. In ***Marshall* v. *Lionel Enterprises Inc.*** [(1972) 2 OR 177], the wife came immediately upon the badly injured body of her husband. And in ***Benson* v. *Lee*** [(1972) VR 879], a situation existed with some similarity to the present case. The mother was in her home 100 yards away, and, on communication by a third party, ran out to the scene of the accident and there suffered shock. Your Lordships have to decide whether or not to validate these extensions.

5. A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately thereafter and acted as a rescuer of those involved (***Chadwick* v. *British Railways Board*** [(1967) 1 W.L.R. 912]. "Shock" was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of "rescuer" cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether and how far, it can be applied to such cases as the present.

Throughout these developments as can be seen, the courts have proceeded in the traditional manner of the common law from case to case, upon a basis of logical necessity. If a mother, with or without accompanying children, could recover on account of fear for herself, how can she be denied recovery on account of fear for her accompanying children? If a father could recover had he seen his child run over by a backing car, how can he be denied recovery if he is in the immediate vicinity and runs to the child's assistance? If a wife and mother could recover if she had witnessed a serious accident to her husband and children, does she fail because she was a short distance away and immediately rushes to the scene (cf. ***Benson* v. *Lee***). I think that unless the law is to draw an arbitrary line at the point of direct sight and sound, these arguments require acceptance of the extension mentioned above under 4 in the interest of justice.

If one continues to follow the process of logical progression, it is hard to see why the present plaintiff also should not succeed. She was not present at the accident, but she came vary soon after upon its aftermath if, from a distance of some 100 yards (cf. ***Benson* v. *Lee***) she had found her family by the roadside, she would have come within principle 4 above Can it make any difference that she comes upon them in an ambulance or, as here, in a nearby hospital, when, as the evidence shows, they were in the same condition, covered with oil and mud, and distraught with pain? If Mr. Chadwick can recover when, acting in accordance with normal and irresistible human instinct, and indeed moral compulsion, he goes to the scene of an accident, may not a mother recover if, acting under the same motives, she goes to where her family can be found?

I could agree that a line can be drawn above her case with less hardship than would have been apparent in ***Boardman* v. *Sanderson*** and ***Hinz* v. *Berry***, but so to draw it would not appeal to most people's sense of justice. To allow her claim may be, I think it is, upon the margin of what the process of logical progression would allow. But where the facts are strong and exceptional, and, as I think fairly analogous, her case, ought, prima facie, to be assimilated to those which have passed the test.

To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind. But the lawyer still has to inquire whether, in so doing, he has crossed some critical line behind which he ought to stop. That is said to be the present case.

Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J. that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary. This is an approach which one can see very clearly from the way in which Lord Atkin stated the neighbour principle in ***Donoghue* v. *Stevenson*** [(1932) A.C. 562, 580]: "persons who are so closely and directly affected by my act that ought reasonably to have them in contemplation as being so affected…" This is saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such. When it is said to result in a duty of care being owed to a person or a class, the statement that there is a "duty of care" denotes a conclusion into the forming of which considerations of policy have entered. That forseeability does not of itself, and automatically, lead to a duty of care is, I think, clear. I gave some examples in ***Anns* v. *Merton London Borough Council*** [(1978) A.C. 728, 752] ***Anns*** itself being one. I may add what Lord Reid said in ***McKew* v. *Holland & Hannen & Cubitts (Scotland) Ltd.*** [(1969) 3 All ER 1621, 1623]:

> A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee.

We must then consider the policy arguments. In doing so we must bear in mind that cases of "nervous shock", and the possibility of claiming damages for it, are not necessarily confined to those arising out of accidents on public roads. To state, therefore, a rule that recoverable damages must be confined to persons on or near the highway is to state not a principle in itself, but only an example of a more general rule that recoverable damages must be confined to those within sight and sound of an event caused by negligence or, at least, to those in close, or very close, proximity to such a situation.

The policy arguments against a wider extension can be stated under four heads.

First, it may be said that such extension may lead to proliferation of claims and possibly fraudulent claims to the establishment of an industry of lawyers and psychiatrist who will formulate a claim for nervous shock damages, including what in America is called the customary miscarriage for all, or many, road accidents and industrial accidents.

Secondly, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. In so far as such defendants are insured, a large additional burden will be placed on insurers, and ultimately upon the class of persons insured - road users or employers.

Thirdly, to extend liability beyond the most direct and plain cases would greatly increase evidentiary difficulties and tend to lengthen litigation.

Fourthly, it may be said-and the Court of Appeal agreed with this that an extension of the scope of liability ought only to be made by the legislature, after careful research. This is the course which has been taken in New South Wales and the Australian Capital Territory.

The whole argument has been well summed up by Dean Prosser (Prosser, ***Torts***, 4th ed. (1971), p. 256):

> The reluctance of the courts to enter this field even where the mental injury is clearly foreseeable, and the frequent mention of the difficulties of proof, the facility of fraud, and the problem of finding a place to stop and draw the line, suggest that here it is the nature of the interest invaded and the type of damage which is the real obstacle.

Since he wrote, the type of damage has, in this country at least, become more familiar and less deterrent to recovery. And some of the arguments are susceptible of answer. Fraudulent claims can be contained by the courts, who, also, can cope with evidentiary difficulties. The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a floods of litigation may be exaggerated- experience in other fields suggests that such fears usually are. If some increase does occur, that may only reveal the existence of a genuine social need: that legislation has been found necessary in Australia may indicate the same thing.

But, these discounts accepted there remains, in my opinion, just because "shock" in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognized; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties- of parent and child, or husband and wife- and the ordinary bystander. Existing law recognizes the claims of the first: it denies that of the second either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable and since the present case falls within the first class, it is strictly unnecessary to say more. I think however, that it should follow that other cases involving less close relationships must he very carefully scrutinized. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for

consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.

As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the "nervous shock". Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the "aftermath" doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in ***Benson* v. *Lee*** was correct and indeed inescapable. It was based, soundly, upon "direct perception of some of the events which go to make up the accident as an entire event, and this includes… the immediate aftermath…" (p. 880)

The High Court's majority decision in ***Chester* v. *Waverley Corporation*** [(1939) 62 C.L.R. 1], where a child's body was found floating in a trench after a prolonged search, may perhaps be placed on the other side of a recognizable line (Evatt J. in a powerful dissent placed it on the same side), but, in addition, I find the conclusion of Lush J to reflect developments in the law.

Finally, and by way of reinforcement of "aftermath" cases, I would accept, by analogy with "rescue" situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene - normally a parent or a spouse could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible.

Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In ***Hambrook* v. *Stokes Brothers***, indeed it was said that liability would not arise in such a case and this is surely right. It was so decided in ***Abramzik* v. *Brenner*** [(1967) 65 D.L.R. (2d) 651]. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing e.g. through simultaneous television, would suffice may have to be considered.

My Lords, I believe that these indications, imperfectly sketched, and certainly to be applied with common sense to individual situations in their entirely, represent either the existing law, or the existing law with only such circumstantial extension as the common law process may legitimately make. They do not introduce a new principle. Nor do I see any reason why the law should retreat behind the lines already drawn. I find on this appeal that the appellants case falls within the boundaries of the law so drawn. I would allow her appeal.

LORD EDMUND-DAVIES - It is common ground in the appeal that, the appellant's claim being based on shock. "there can be no doubt since ***Bourhill* v. *Young*** that the test of liability… is forseeability of injury by shock" (per Denning L.J.) ***King* v. *Phillips*** [(1953) 1 Q.B. 429]. But this was not always the law, and great confusion arose in the cases from

applying to claims based on shock restrictions hedging negligence actions based on the infliction of physical injuries. In the same year as that in which ***King* v. *Phillips*** was decided, Professor A.L.Goodhart perceptively asked in "The Shock Cases and Area of Risk" [(1953) 16 M.L.R. 14, 22] why it was considered that the area of possible physical injury should be relevant to a case based on the unlawful infliction of shock, and continued:

> A woman standing at the window of a second-floor room is just as likely to receive a shock when witnessing an accident as she would be if she were standing on the pavement. To say that the careless driver of a motor car could not reasonably foresee such a self-evident fact is to hide the truth behind a fiction which must disappear as soon as we examine it. The driver obviously cannot foresee that the woman at the window will receive a physical injury, but it does not follow from this that he cannot foresee that she will receive a shock. As her cause of action is based on shock it is only foresight of shock which is relevant.

Indeed, in ***King* v. *Phillips*** itself Denning L.J. expressly held that the fact that the plaintiff was in an upstairs room 80 yards away from the scene of the accident was immaterial.

It is true that, as Goodhart observed (p. 22), in most cases the foresight concerning emotional injury and that concerning physical injury are identical, the shock following the physical injury, and the result was that, in the early development of this branch of the law, the courts tended to assume that this must be so in all cases. But in fact, as Goodhart laconically put it (p. 16, n. 10): " …the area of risk of physical injury may extend to Y yards." That error still persists is indicated by the holding of Stephenson L.J. in the instant case (1981) Q.B. 599, 614 that the ambit of duty of care owed by a motorist is restricted to persons "on or near the highway at or near the time or near to it who may be directly affected by the bad driving. It is not owed to those who are nowhere near the scene." The most feature in the present case is that such limits on the duty of care were imposed notwithstanding the unanimous conclusion of the Court of Appeal that it was reasonably foreseeable (and even "readily" so in the judgment of Griffiths L.J.) that injury by shock could be caused to a person in the position of the appellant.

Similar restrictions were unsuccessfully sought to be imposed in ***Haynes* v. *Harwood*** [(1935) 1 K.B. 146], the plaintiff having been inside a police station when he first saw the bolting horses and therefore out of sight and seemingly out of danger. And they were again rejected in ***Chadwick* v. *British Railways Board*** [(1967) 1 W.L.R. 912], where the plaintiff was in his home 200 yards away when the Lewisham railway accident occurred. Griffiths L.J. expressed himself (1981) Q.B. 599, 622-623 as "…quite unable to include in the category of rescuers to whom a duty [of care] is owed a relative visiting victims in hospital …"I do not share the difficulty, and in my respectful judgment none exists. I am here content to repeat once more the noble words of Cardozo J. In ***Wagner* v. *International Railway Co.*** [(1921) 232 N.Y. 176, 180]:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and

> probable. The wrong that imperils life is wrong to the imperiled victim; it is wrong also to his rescuer.

Was not the action of the appellant in visiting her family in hospital immediately she heard of the accident basically indistinguishable from that of a "rescuer," being intent upon comforting the injured? And was not her action "natural and probable" in the circumstances? I regard the questions as capable only of affirmative answers, and, indeed, Stephenson L.J. in [1981] Q.B. 599, 611 D-F, so answered them.

I turn to consider the sole basis upon which the Court of Appeal dismissed the claim, that of public policy. They did so on the grounds of what, for short, may be called the "floodgates" argument. I remain unconvinced that the number and area of claims in "shock" cases would be substantially increased or enlarged were the respondents here held liable. It is question which Kennedy J. answered in ***Dulieu* v. *White & Sons*** [(1901) 2 K.B. 699,681] in the following terms, which commend themselves strongly to me:

> I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain amount of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this case of claim.

I accordingly hold, as Griffiths LJ. [1981] Q.B. 599, 618, did that "The test of forseeability is not a universal touchstone to determine the extent of liability for the consequences of wrongdoing." Authority for that proposition is both ample in quantity and exalted in status. My noble and learned friend, Lord Wilberforce, has already quoted in this context the observation of Lord Reid in ***McKew* v. *Holland & Cubitts (Scotland) Ltd.*** {[1969] 3 All Er 1621, 1623} and referred to his own treatment of the topic in ***Anns* v. *Merton London Borough Council*** {[1978] A.C. 728, 752}, where further citations are furnished. To add yet another, let me conclude by recalling that in ***Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*** {[1964] A.C. 465, 536} Lord Pearce observed:

> How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts assessment of the demands of society for protection from the carelessman of others.

The distinguishing feature of the common law is this judicial development and formation of principle. Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, not the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.

The present case is a good illustration. Certainly could have been achieved by leaving the law as it was left *by* ***Victorian Railways Commissioners* v. *Coultas*** [13 App. Cas. 222] or

again by holding the line drawn in 1901 by ***Dulieu* v. *White & Sons*** [(1901) 2 K.B. 669], or today by confining the law to what was regarded by Lord Denning M.R. in ***Hinz* v. *Berry*** [(1970) 2 Q.B. 40, 42], as "settled law," namely that "…damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative."

But I am by no means sure that the result is socially desirable. The "floodgates" argument may be exaggerated. Time alone will tell: but I foresee social and financial problems if damages for "nervous shock" should be made available to persons other than parents and children who without seeing or hearing the accident, or being present in the immediate aftermath, suffer nervous shock in consequence of it. There is, I think, a powerful case for legislation such as has been enacted in New South Wales and the Australian Capital Territories.

This is only the second case ever to reach your Lordships House concerning the liability of a tort-feasor who has negligently killed or physically injured A to pay damages to B for a psychiatric illness resulting from A's death or injury. The previous case was ***Bourhill* v. *Young*** [(1943) A.C. 92]. The impression with which I am left, after being taken in argent through all the relevant English authorities, a number of Commonwealth authorities and one important decision of the Supreme Court of California, is that this whole are of English law stands in urgent need of review.

The basic difficulty of the subject from the fact that the crucial answers to the questions which it raises lie in the difficult field of psychiatric medicine. The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognizable psychiatric illness, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal, emotion, but a positive psychiatric illness. That is here not in issue. A plaintiff must then establish the necessary chain of causation in fact between his psychiatric illness and the death or injury of one or more third parties negligently caused by the defendant. Here again, this is not in dispute in the instant case. But when causation it fact is in issue, it must no doubt be determined by the judge on the basis of the evidence of psychiatrists. Then here comes the all-important question. Given the fact of the plaintiff's psychiatric illness caused by the defendant's negligence in killing or physically injuring another, was the chain of causation from the one event to the other, considered ex post facto in the light of all that has happened, "reasonably foreseeable" by the "reasonable man"? A moment's thought will show that the answer to that question depends on what knowledge is to be attributed to the hypothetical reasonable man of the operation of cause and effect in psychiatric medicine. There are at least two theoretically possible approaches. The first is that the judge should receive the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect, and apply to that the appropriate legal test of reasonable foreseebility as the criterion of the defendant's duty of care. The second is that the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, as fairly representative of that of the educated layman, should treat himself as the reasonable man and form his own view from the primary facts as to whether the proven chain of cause

and effect was reasonably foreseeable. In principle, I think there is much to be said for the first approach. Forseeability, in any given set of circumstances, is ultimately a question of fact. If a claim in negligence depends on whether some defect in a complicated piece of machinery was foreseeably a cause of injury, I apprehend that the judge will decide that question on the basis of the expert evidence of engineers. But the authorities give no support to this approach in relations to the foreseeability of psychiatric illness. The judges, in all the decisions we have been referred to, have assumed that it lay within their own competence to determine whether the plaintiff's "nervous shock" (as lawyers quaintly persist in calling it) was in any given circumstances a sufficiently foreseeable consequence of the defendant's act or omission relied on as negligent to bring the plaintiff within the scope of those to whom the defendant owed a duty of care. To depart from this practice and treat the question of foreseeable causation in this field, and hence the scope of the defendant's duty, as a question of fact to be determined in the light of the expert evidence adduced in each case would, no doubt, be too large an innovation in the law to be regarded as properly within the competence, even since the liberating 1966 practice direction (Practice Statement: Judicial Precedent [1966] I W.L.R. 1234) of your Lordships House Moreover, psychiatric medicine is far from being an exact science. The opinions of its practitioners may differ widely. Clearly it is desirable in this, as in any other, field that the law should achieve such a measure of certainty as is consistent with the demands of justice. If would seem that the consensus of informed judicial opinion is probably the best yardstick available to determine whether, in any given circumstances, the emotional trauma resulting from the death or injury of third parties, or indeed the threat of such death or injury, ex hypothesis attributable to the defendant's negligence, was a foreseeable cause in law, as well as the actual cause in fact, of the plaintiff's psychiatric or psychosomatic illness. But the word I would empahsise in the foregoing sentence is "informed". For too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility. Now, I venture to hope, that attitude has quite disappeared. No judge who has spent any length of time trying personal injury claims in recent years would doubt that physical injuries can give rise not only to organic but also to psychiatric disorders. The suffering of the patient from the latter are no less real and frequently no less painfull and disabling than from the former. Likewise, I would suppose that the legal profession well understands that an acute emotional trauma, like a physical trauma, can well cause a psychiatric illness in a wide range if circumstances and in a wide range of individuals whom it would be wrong to regard as having any abnormal psychological make up. It is in comparatively recent times that these insights have come to be generally accepted by the judiciary. It is only by giving effect to these insights in the developing law of negligence that we can do justice to an important, though no doubt small, class of plaintiff's whose genuine psychiatric illnesses are caused by negligent defendants.

My Lords, in the instant case I cannot help thinking that the learned trial judge's conclusion that the appellant's illness was not the foreseeable consequence of the respondents negligence was one to which, understandably, he felt himself driven by authorities. Free of authority and applying the ordinary criterion of reasonable foreseeability to the facts with an eye "enlightened by progressive awareness of mental illness" (the language of Stephenson L.J. [(1981) Q.B. 599, 612] any judge must, I would, think, share the view of all three members of the Court of Appeal, with which I understand all your Lordships agree, that, in

the words of Griffiths L.J. at p. 617, it was "readily foreseeable that a significant number of mothers exposed to such an experience might break down under the shock of the event and suffer illness." The question, then, for your Lordships decision is whether the law, as a matter of policy, draw's a line which exempts from liability a defendant whose negligent act or omission was actually and foreseeably the cause of the plaintiff's psychiatric illness and, if so, where the line is to be drawn. In thus formulating the question. I do not, of course, use the word "negligent" as prejudging the question whether the defendant owes the plaintiff a duty, but I do use the word "foreseeably" as connoting the normally accepted criterion of such a duty.

Before attempting to answer the question, it is instructive to consider the historical development of the subject as illustrated by the authorities and to note, in particular, three features of that development. First, it will be seen that successive attempts have been made to draw a line beyond which liability should not extend, each of which has in due course had to be abandoned. Secondly, the ostensible justification for drawing the line has been related to the current criterion of a defendant's duty of care, which, however expressed in earlier judgments, we should now describe as that of reasonable foreseeability. But, thirdly, in so far as policy considerations can be seen to have influenced any of the decisions, they appear to have sprung from the fear that to cross the chosen line would be to open the floodgates to claims without limit and largely without merit.

I should mention two Commonwealth decisions of first instance. In ***Benson* v. *Lee,*** Lush J. in the Supreme Court of Victoria, held that a mother who did not witness, but was told of, an accident to her son 100 yards from her home, went to the scene and accompanied the child in an ambulance to hospital where he died was entitled to damages for "nervous shock" notwithstanding evidence that she was prone to mental illness from stress. In ***Marshall* v. *Lionel Enterprises Inc.*** [(1971) 25 DLR (3d) 141], Haines J. in the Ontario High Court, held that a wife who found her husband seriously injured shortly after an accident caused by defective machinery was not, as a matter of law, disentitled to damages for the "nervous shock" which she claimed to have suffered as a result. On the other hand in ***Abramzik* v. *Brenner*** [65 DLR (2d) 651] the Saskatchewan Court of Appeal held that a mother who suffered "nervous shock" on being informed by her husband that two of her children had been killed in a road accident was not entitled to recover.

Chester* v. *Waverley Corporation [62 C.L.R. 1] was a decision of the High Court of Australia. The plaintiff's seven-year old son, having been out to play, failed to return home when expected. A search was mounted which continued for some hours. Eventually, in the presence of the plaintiff, his mother, the child's dead body was recovered from a flooded trench which the defendant authority had left inadequately fenced. The plaintiff claimed damages for "nervous shock". The majority of the court (Latham C.J. Rich and Starke JJ) rejected the claim. The decision was based squarely on the ground that, the plaintiff's injury not being a foreseeable consequence of the defendant's omission to fence the trench, they owed her no duty.

In a powerful dissenting judgment, which I find wholly convincing Evatt J. drew a vivid picture of the mother's agony of mind as the search continued, culminating in the gruesome discovery in her presence of the child's drowned body. I cannot for a moment doubt the

correctness of his conclusion that the mother's mental illness was the reasonably foreseeable consequence of the defendant's negligence. This was a case from New South Wales and I cannot help wondering whether it was not the manifest injustice of the result which led, a few years later, to the intervention of the New South Wales legislature, to enable the parent, husband or wife of a person "killed, injured or put in peril" by another's negligence to recover damages for "mental or nervous shock" irrespective of any spatial or temporal relationship to the accident in which the death, injury or peril occurred (New South Wales Law Reform (Miscellaneous Provisions) Act 1944, section 4(1).

My Lords looking back I think it is possible to discern that there only ever were two clear lines of limitation of a defendants liability for "nervous shock" for which any rational justification could be advanced in the light of both of the state of the law of negligence and the state of medical science as judicially understood at the time when those limitation were propounded. In 1888 it was, no doubt perfectly sensible to say: "Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot…be considered a consequence which, in the ordinary course of things, would flow from …negligence" [***Victorian Railway Commissioners* v. *Coultas***]. Here the test, whether of duty or of remoteness, can be recognized as a relatively distant ancestor of the modern criterion of reasonable foreseeability. Again in 1901 it was, I would suppose equally sensible to limit a defendants liability for "nervous shock" which could "reasonably or actually be expected" to be such as was suffered by a plaintiff who was himself physically endangered by the defendant's negligence [***Dulieu* v. *White & Sons***]. But once that line of limitation has been crossed as it was by the majority in ***Hambrook* v. *Stokes Brothers***, there can be no logical reasons whatever for limiting the defendants duty to persons in physical proximity to the place where the accident, caused by the defendant's negligence, occurred. Much of the confusing in the authorities since ***Bourhill* v. *Young*** including, if I may say so, has judgments of the courts below in the instant case, the arisen, as it seems to me, from the deference still accorded, notwithstanding the acceptance of the *Hambrook* principle, to dicta of their Lordships in *Bourhill* v. *Young* which only make sense if understood as based on the limited principle of liability propounded by Kennedy J. in ***Dulieu* v. *White & Sons***, and adopted in the dissenting judgment of Sargant L.J. in ***Hambrook* v. *Stokes Brothers***.

My Lords before returning to the policy question, it is, I think, highly instructive to consider the decision of the Supreme Court of California in ***Dillon* v. *Legg***, [29 A.L.R. 3d 1316]. Before this decision the law of California and evidently of other states of the Union, had adhered to the English position before ***Hambrook* v. *Stokes Brothers***, that damages for nervous shock could only be recovered if resulting from the plaintiff's apprehension of danger to herself and, indeed, this view had been affirmed by the Californian Supreme Court only five years earlier. The majority in ***Dillon* v. *Legg*** adopted a contrary view in refusing a motion to dismiss a mother's claim for damages for emotional trauma caused by seeing her infant daughter killed by a car as she crossed the road.

In approaching the question whether the law should, as a matter of policy, define the criterion of liability, in negligence for causing psychiatric illness by reference to some test other than that of reasonable foreseeability it is well to remember that we are concerned only with the question of liability of defendant who is, ex hypothesis, guilty of fault in causing the

death, injury or danger which has in turn triggered the psychiatric illness. A policy which is to be relied on to narrow the scope of the negligent tortfeasor's duty must be justified by cogent and readily intelligible considerations and must be capable of defining the appropriate limits of liability by reference to factors which are not purely arbitrary. A number of policy consideration which have been suggested as satisfying these requirements appear to me, with respect, to be wholly insufficient. I can see no grounds whatever for suggesting that to make the defendant liable for reasonably foreseeable psychiatric illness caused by his negligence would be to impose a crushing burden on him out of proportion to his moral responsibility. However, liberally the criterion of reasonable foreseeability is interpreted, both the number of successful claims in this field and the quantum of damages they will attract are likely to be moderate. I can not accept as relevant the well-known phenomenon that litigation may delay recovery from psychiatric illness. If this were a valid policy consideration it would lead to the conclusion that psychiatric illness should be excluded altogether from the heads of damages which the law will recognise. It cannot justify limiting the cases in which damages will be awarded for psychiatric illness by reference to the circumstances of its causation. To attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the legislature, not he courts, to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court's function of developing and adapting principles of the common law to changing conditions, in a particular corner of the common law which exemplifies, par excellence, the important and indeed necessary part which that function has to play. In the end I believe that the policy question depends on weighing against each other two conflicting considerations. On the one hand, if the criterion of liability is to be reasonable foreseeability simpliciter, this must, precisely because questions of causation in psychiatric medicine give rise to difficulty and uncertainty, introduce an element of uncertainty into the law and open the way to a number of arguable claims which a more precisely fixed criterion of liability would exclude. I accept that the element of uncertainty is an important factor. I believe that the "floodgates" argument, however, is, as it always has been, greatly exaggerated. On the other hand, it seems to me inescapable that any attempt to define the limit of liability by requiring, in additions to reasonable foreseeability, that the plaintiff claiming damages for psychiatric illness should have witnessed the relevant accident, should have been present at or near the place where it happened, should have come upon its aftermath and thus have had some direct perception of it, as opposed to merely learning of it after the event, should be related in some particular degree to the accident victim-to draw a line by references to any of these criteria must impose a largely arbitrary limit of liability. I accept, of course, the importance of the factors indicated in the guidelines suggested by Tobriner J. in ***Dillon* v. *Legg***, as bearing upon the degree of foreseeability of the plaintiff's psychiatric illness. But let me give two examples to illustrate what injustice would be wrought by any such hard and fast lines of policy as have been suggested. First, consider the plaintiff who learned after the event of the relevant accident. Take the case of a mother who knows that her husband and children are staying in a certain hotel. She reads in her morning newspaper that it has been the scene of a disastrous fire. She sees in the paper a photograph of unidentifiable victims trapped on the top floor waving for help from the windows. She learns shortly afterwards that all her family have perished. She suffers an acute psychiatric illness. That her illness in these circumstances was a reasonably

foreseeable consequence of the events resulting from the fire is undeniable. Yet, is the law to deny her damages as against a defendant whose negligence was responsible for the fire simply on the ground that an important link in the chain of causation of her psychiatric illness was supplied by her imagination of the agonies of mind and body in which her family died, rather than by direct perception of the event? Secondly, consider the plaintiff who is unrelated to the victims of the relevant accident. If rigidly applied, an exclusion of liability to him would have defeated the plaintiff's claim in ***Chadwick* v. *British Railways Board***. The Court of Appeal treated that case as in a special category because Mr. Chadwick was a rescuer. Now, the special duty owed to a rescuer who voluntarily places himself in physical danger to save others is well understood, and is illustrated by ***Haynes* v. *Harwood***, the case of the constable injured in stopping a runaway horse in crowded street. But in relation to the psychiatric consequences of witnessing such terrible carnage as must have resulted from the Lewisham train disaster, I would find it difficult to distinguish in principle the position of a rescuer, like Mr. Chadwick, from a mere spectator as, for example, an uninjured or only slightly injured passenger in the train, who took no part in the rescue operations but was present at the scene after the accident for some time, perforce observing the rescue operations while he waited for transport to take him home.

My Lords, I have no doubt that this is an area of the law of negligence where we should resist the temptation to try yet once more to freeze the law in rigid posture which would deny justice to some who, in the applications of the classic principles of negligence derived from ***Donoghue* v. *Stevenson*** [(1932) AC 562] ought to succeed, in the interests of certainty, where the very subject matter is uncertain and continuously developing, or in the interests of saving defendants and their insurers from the burden of having sometimes to resist doubtful claims. I find myself in complete agreement with Tobriner J. in ***Dillon* v. *Legg*** that the defendants duty must depend on reasonable foreseeability and "must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future."

To put the matter in another way, if asked where the thing is to stop. I should answer, in an adaptation of the language of Lord Wright in ***Bourhill* v. *Young*** [(1943) A.C. 92, 110] and Stephenson LJ. [1981] Q.B. 599, 612], "where in the particular case the good sense of the judge, enlightened by progressive awareness of mental illness, decides."

I regret that my noble and learned friend, Lord Edmund-Davies, who criticizes my conclusion that in this area of the law there are no policy consideration sufficient to justify limiting the liability of negligent tort-feasors by reference to some narrower criterion than that of reasonable foreseeability, stops short of indicating his view as to where the limit of liability should be drawn or as to the nature of the policy considerations (other than the "floodgates" argument, which I understand he rejects) which he would invoke to justify such a limit.

My Lords, I would accordingly allow the appeal.

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Alcock v. *Chief Constable of South Yorkshire Police*

(1991) 3 WLR 1057

LORD KEITH OF KINKEL. - My Lords, the litigation with which these appeals are concerned arose out of the disaster at Hillsborough Stadium, Sheffield, which occurred on 15 April 1989. On that day a football match was arranged to be played at the stadium between the Liverpool and the Nottingham Forest football clubs. It was a semi-final of the F.A. Cup. The South Yorkshire police force, which was responsible for crowd control at the match, allowed an excessively large number of intending spectators to enter the ground at the Leppings Lane end, an area reserved for Liverpool supporters. They crammed into pens 3 and 4, below the West Stand, and in the resulting crush 95 people were killed and over 400 physically injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster, and recordings were broadcast later.

The Chief Constable of South Yorkshire has admitted liability in negligence in respect of the deaths and physical injuries. Sixteen separate actions were brought against him by persons none of whom was present in the area where the disaster occurred, although four of them were elsewhere in the ground. All of them were connected in various ways with persons who were in that area, being related to such persons or, in one case, being a fiance. In most cases the person with whom the plaintiff was concerned was killed, in other cases that person was injured, and in one case turned out to be uninjured. All the plaintiffs claim damages for nervous shock resulting in psychiatric illness which they allege was caused by the experiences inflicted on them by the disaster.

The actions came on for trial before Hidden J. on 19 June 1990, and he gave judgment on 31 July 1990 [(1991) 2 W.L.R. 814]. That judgment was concerned with the question whether the defendant owed a duty of care in relation to nervous shock to any, and if so to which, of the plaintiffs. The defendant admitted that if he owed such a duty to any plaintiff, and if that plaintiff could show causation, then the defendant was in breach of duty and liable in damages to that plaintiff. For purposes of his judgment Hidden J. assumed in the case of each plaintiff that causation was established, leaving that matter to be dealt with, if necessary, in further proceedings. In the result, he found in favour of ten out of the sixteen plaintiffs before him and against six of them. The defendant appealed to the Court of Appeal in the cases of nine out of the ten successful plaintiffs, and the six unsuccessful plaintiffs also appealed to that court. On 3 May 1991 the Court of Appeal (Parker, Stocker and Nolan L.JJ.) gave judgment allowing the defendant's appeals in the cases of the nine formerly successful plaintiffs and rejecting the appeals of the six unsuccessful ones. Ten only of these fifteen plaintiffs now appeal to your Lordships' House, with leave granted in the Court of Appeal.

The circumstances affecting each of the 10 plaintiffs were thus summarised in the judgment of Parker L.J. ante, pp. 1062D-E, E-F, H - 1063C, E-F, H - 1064B, C-D:

> "Brian Harrison was at the ground. He was in the West Stand. He knew both of his brothers would be in the pens behind the goal. He saw the horrifying scene as it developed and realised that people in the two pens had been either killed or injured. When, six minutes after the start, the match was abandoned he tried to find his brothers. He failed to do so. He stopped up all night waiting for news. At 6 a.m. he

learnt that his family were setting off for Sheffield. At 11 a.m. he was informed by telephone that both his brothers were dead. . . .

"Mr. and Mrs. Copoc lost their son. They saw the scenes on live television. Mrs. Copoc was up all night. She was informed by police officers at 6 a.m. that her son was dead. Mr. Copoc went to Sheffield at 4 a.m. with his nephew. He was informed at 6.10 a.m. of his son's death and later identified the body. . . .

"Brenda Hennessey lost her brother. She watched television from about 3.30 p.m. and, although she then realised there had been deaths and injuries in the pens, she was not worried because she believed her brother to be in a stand seat. However, at about 5 p.m. she learnt from her brother's wife that he had a ticket in the Leppings Lane terrace. At 6 p.m. she learnt from members of the family who had gone to Sheffield that her brother was dead.

"Denise Hough lost her brother. She was 11 years older than her brother and had fostered him for several years although he no longer lived with her. She knew he had a ticket at the Leppings Lane end and would be behind the goal. She was told by a friend that there was trouble at the game. She watched television. At 4.40 a.m. she was informed by her mother that her brother was dead. Two days later, on 17 April, she went with her mother to Sheffield and confirmed an earlier identification of the body. His face was bruised and swollen.

"Stephen Jones lost his brother. He knew that his brother was at the match. He watched television and saw bodies and believed them to be dead. He did not know his brother was dead until 2.45 a.m. when, having gone to the temporary mortuary at Hillsborough, he found his parents there in tears. . . .

"Robert Alcock lost his brother-in-law. He was in the West Stand, with his nephew (the brother-in-law's son). He witnessed the scenes from the West Stand and was sickened by what he saw but was not then concerned for his brother-in-law whom he believed to be in the stand because, on the way to the match, he had swapped a terrace ticket which he held for a stand ticket. Tragically, however, the brother-in-law had, unknown to the plaintiff, returned to the terrace. After the match the plaintiff left the ground for a rendezvous with the brother-in-law, who did not arrive. He and his nephew became worried and searched without success. At about midnight they went to the mortuary, where the plaintiff identified the body, which was blue with bruising and the chest of which was red. The sight appalled him. . . .

"Catherine Jones lost a brother. She knew he was at the match and would normally be behind the goal. At 3.30 p.m. whilst shopping she heard that there was trouble at the match and at 4.30 p.m. that there were deaths. At 5.15 p.m. she went home and heard on the radio that the death toll was mounting. At 7 p.m. a friend telephoned from Sheffield to say that people at the hospital were describing someone who might be her brother. At 9 p.m. her parents set off for Sheffield. At 10 p.m. she watched recorded television in the hope of seeing her brother alive. She thought, mistakenly, she saw him collapsed on the pitch. At 5 a.m. her father returned from Sheffield and told her that her brother was dead.

> "Joseph Kehoe lost a 14-year-old grandson, the son of his daughter and her divorced husband. Unknown to the grandfather the boy had gone to the match with his father. In the afternoon the plaintiff heard on the radio that there had been deaths at Hillsborough. He later saw scenes of the disaster on recorded television. He later still learnt that his grandson was at the match. He became worried. At 3 a.m. he was telephoned by another daughter to say that both the boy and his father were dead. . . . "Alexandra Penk lost her fiance, Carl Rimmer. They had known each other for four years and recently became engaged. They planned to marry in late 1989 or at the latest early in 1990. She knew he was at the match and would be on the Leppings Lane terraces. She saw television in her sister's house and knew instinctively that her fiance was in trouble. She continued to watch in the hope of seeing him but did not do so. She was told at about 11 p.m. that he was dead.

The question of liability in negligence for what is commonly, if inaccurately, described as "nervous shock" has only twice been considered by this House, in ***Bourhill* v. *Young*** [1943 A.C. 92] and in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410]. In the latter case the plaintiff, after learning of a motor accident involving her husband and three of her children about two hours after it had happened, went to the hospital where they had been taken. There she was told that one of the children had been killed, and saw her husband and the other two in a distressed condition and bearing on their persons the immediate effects of the accident. She claimed to have suffered psychiatric illness as a result of her experience, and at the trial of her action of damages against those responsible for the accident this was assumed to be the fact. This House, reversing the Court of Appeal, held that she was entitled to recover damages. The leading speech was delivered by Lord Wilberforce. Having set out, at pp. 418 and 419, the position so far reached in the decided cases on nervous shock, he expressed the opinion that foreseeability did not of itself and automatically give rise to a duty of care owned to a person or class of persons and that considerations of policy entered into the conclusion that such a duty existed. He then considered the arguments on policy which had led the Court of Appeal to reject the plaintiff's claim, and concluded, at p. 421, that they were not of great force. He continued, at pp. 421-423:

> But, these discounts accepted, there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties - of parent and child, or husband and wife - and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot

> say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.
>
> As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. . . .
>
> Finally, and by way of reinforcement of 'aftermath' cases, I would accept, by analogy with 'rescue' situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene - normally a parent or a spouse - could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible.
>
> Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.
>
> Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In ***Hambrook* v. *Stokes Brothers*** [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in ***Abramzik* v. *Brenner*** [(1967) 65 D.L.R. (2d) 651]. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.

Lord Bridge of Harwich, with whom Lord Scarman agreed, at p. 431D-E, appears to have rested his finding of liability simply on the test of reasonable foreseeability of psychiatric illness affecting the plaintiff as a result of the consequences of the road accident, at pp. 439-443. Lord Edmund-Davies and Lord Russell of Killowen both considered the policy arguments which had led the Court of Appeal to dismiss the plaintiff's claim to be unsound (pp. 428, 429). Neither speech contained anything inconsistent with that of Lord Wilberforce.

It was argued for the plaintiffs in the present case that reasonable foreseeability of the risk of injury to them in the particular form of psychiatric illness was all that was required to bring home liability to the defendant. In the ordinary case of direct physical injury suffered in an accident at work or elsewhere, reasonable foreseeability of the risk is indeed the only test that need be applied to determine liability. But injury by psychiatric illness is more subtle, as Lord Macmillan observed in ***Bourhill* v. *Young*** [1943 A.C. 92, 103]. In the present type of case it is a secondary sort of injury brought about by the infliction of physical injury, or the risk of physical injury, upon another person. That can affect those closely connected with that person in various ways. One way is by subjecting a close relative to the stress and strain of caring for the injured person over a prolonged period, but psychiatric illness due to such stress and strain

has not so far been treated as founding a claim in damages. So I am of the opinion that in addition to reasonable foreseeability liability for injury in the particular form of psychiatric illness must depend in addition upon a requisite relationship of proximity between the claimant and the party said to owe the duty. Lord Atkin in ***Donoghue*** **v.** ***Stevenson*** [1932 A.C. 562, 580] described those to whom a duty of care is owed as being:

> persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The concept of a person being closely and directly affected has been conveniently labelled "proximity", and this concept has been applied in certain categories of cases, particularly those concerned with pure economic loss, to limit and control the consequences as regards liability which would follow if reasonable foreseeability were the sole criterion.

As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationshp which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have ben married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of pyschiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases. The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific.

In the case of those within the sphere of reasonable foreseeability the proximity factors mentioned by Lord Wilberforce in ***McLoughlin*** **v.** ***O'Brian*** [(1983) 1 A.C. 410, 422], must, however, be taken into account in judging whether a duty of care exists. The first of these is proximity of the plaintiff to the accident in time and space. For this purpose the accident is to be taken to include its immediate aftermath, which in McLoughlin's case was held to cover the scene at the hospital which was experienced by the plaintiff some two hours after the accident. In ***Jaensch*** v. ***Coffey*** [1984 55 C.L.R. 549], the plaintiff saw her injured husband at the hospital to which he had been taken in severe pain before and between his undergoing a series of emergency operations, and the next day stayed with him in the intensive care unit and thought he was going to die. She was held entitled to recover damages for the psychiatric illness she suffered as a result. Deane J. said, at p. 608:

> the aftermath of the accident extended to the hospital to which the injured person was taken and persisted for so long as he remained in the state produced by the accident up to and including immediate post-accident treatment. . . . Her psychiatric injuries

were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident at the hospital.

As regards the means by which the shock is suffered, Lord Wilberforce said in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410, 423] that it must come through sight or hearing of the event on or of its immediate aftermath. He also said that it was surely right that the law should not compensate shock brought about by communication by a third party. On that basis it is open to serious doubt whether ***Hevican* v. *Ruane*** [(1991) 3 All E.R. 65] and ***Ravenscroft* v. *Rederiaktiebolaget Transatlantic*** [(1991) 3 All E.R. 73] were correctly decided, since in both of these cases the effective cause of the psychiatric illness would appear to have been the fact of a son's death and the news of it.

Of the present plaintiffs two, Brian Harrison and Robert Alcock, were present at the Hillsborough ground, both of them in the West Stand, from which they witnessed the scenes in pens 3 and 4. Brian Harrison lost two brothers, while Robert Alcock lost a brother-in-law and identified the body at the mortuary at midnight. In neither of these cases was there any evidence of particularly close ties of love or affection with the brothers or brother-in-law. In my opinion the mere fact of the particular relationship was insufficient to place the plaintiff within the class of persons to whom a duty of care could be owed by the defendant as being foreseeably at risk of psychiatric illness by reason of injury or peril to the individuals concerned. The same is true of other plaintiffs who were not present at the ground and who lost brothers, or in one case a grandson. I would, however, place in the category to members of which risk of psychiatric illness was reasonably foreseeable Mr. and Mrs. Copoc, whose son was killed, and Alexandra Penk, who lost her fiance. In each of these cases the closest ties of love and affection fall to be presumed from the fact of the particular relationship, and there is no suggestion of anything which might tend to rebut that presumption. These three all watched scenes from Hillsborough on television, but none of these depicted suffering of recognisable individuals, such being excluded by the broadcasting code of ethics, a position known to the defendant. In my opinion the viewing of these scenes cannot be equiparated with the viewer being within "sight or hearing of the event or of its immediate aftermath," to use the words of Lord Wilberforce [(1983) 1 A.C. 410, 423B], nor can the scenes reasonably be regarded as giving rise to shock, in the sense of a sudden assault on the nervous system. They were capable of giving rise to anxiety for the safety of relatives known or believed to be present in the area affected by the crush, and undoubtedly did so, but that is very different from seeing the fate of the relative or his condition shortly after the event. The viewing of the television scenes did not create the necessary degree of proximity.

My Lords, for these reasons I would dismiss each of these appeals.

LORD ACKNER. My Lords, if sympathy alone were to be the determining factor in these claims, then they would never have been contested. It has been stressed throughout the judgments in the courts below and I would emphasise it yet again in your Lordships' House that the human tragedy which occurred on the afternoon of 15 April 1989 at the Hillsborough Stadium when 95 people were killed and more than 400 others received injuries from being crushed necessitating hospital treatment, remains an utterly appalling one.

It is, however, trite law that the defendant, the Chief Constable of South Yorkshire, is not an insurer against psychiatric illness occasioned by the shock sustained by the relatives or friends of those who died or were injured, or were believed to have died or to have been injured. This is, of course, fully recognised by the appellants, the plaintiffs in these actions, whose claims for damages to compensate them for their psychiatric illnesses are based upon the allegation that it was the defendant's negligence, that is to say his breach of his duty of care owed to them as well as to those who died or were injured in controlling the crowds at the stadium, which caused them to suffer their illnesses. The defendant, for the purposes of these actions, has admitted that he owed a duty of care only to those who died or were injured and that he was in breach of only that duty. He has further accepted that each of the plaintiffs has suffered some psychiatric illness. Moreover for the purpose of deciding whether the defendant is liable to pay damages to the plaintiffs in respect of their illnesses, the trial judge, Hidden J., made the assumption that the illnesses were caused by the shocks sustained by the plaintiffs by reason of their awareness of the events at Hillsborough. The defendant has throughout contested liability on the ground that, in all the circumstances, he was not in breach of any duty of care owed to the the plaintiffs.

Since the decision of your Lordships' House in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410], if not earlier, it is established law that (1) a claim for damages for psychiatric illness resulting from shock caused by negligence can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear of personal injury; (2) a claim for damages for such illness can be made when the shock results: (a) from death or injury to the plaintiff's spouse or child or the fear of such death or injury and (b) the shock has come about through the sight or hearing of the event, or its immediate aftermath.

To succeed in the present appeals the plaintiffs seek to extend the boundaries of this cause of action by: (1) removing any restrictions on the categories of persons who may sue; (2) extending the means by which the shock is caused, so that it includes viewing the simultaneous broadcast on television of the incident which caused the shock; (3) modifying the present requirement that the aftermath must be "immediate."

A recital of the cases over the last century show that the extent of the liability for shock-induced psychiatric illness has been greatly expanded. This has largely been due to a better understanding of mental illness and its relation to shock. The extension of the scope of this cause of action sought in these appeals is not on any such ground but, so it is contended, by the application of established legal principles.

Mr. Hytner for the plaintiffs relies substantially upon the speech of Lord Bridge of Harwich in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410, 431], and on the judgment of Brennan J. in the Australian High Court decision ***Jaensch* v. *Coffey***, [155 C.L.R. 549, 558], for the proposition that the test for establishing liability is the unfettered application of the test of reasonable foreseeability - viz. whether the hypothetical reasonable man in the position of the defendant, viewing the position ex post facto, would say that the shock-induced psychiatric illness was reasonably foreseeable. Mr. Woodward for the defendant relies upon the opinion expressed by Lord Wilberforce supported by Lord Edmund-Davies in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410, 420F], that foreseeability does not of itself, and automatically, lead to a duty of care:

> foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation.

He also relies on similar views expressed by Gibbs C.J. and Deane J. in ***Jaensch* v. *Coffey*** [155 C.L.R. 549, 552, 578]. The nature of the cause of action In ***Bourhill* v. *Young*** [(1943) A.C. 92, 103], Lord Macmillan said:

> in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of the legal liability.

It is now generally accepted that an analysis of the reported cases of nervous shock establishes that it is a type of claim in a category of its own. Shock is no longer a variant of physical injury but a separate kind of damage. Whatever may be the pattern of the future development of the law in relation to this cause of action, the following propositions illustrate that the application simpliciter of the reasonable foreseeability test is, today, far from being operative.

(1) Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as from the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages. Brennan J. in ***Jaensch* v. *Coffey*** [155 C.L.R. 549, 569], gave as examples, the spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result, but who, nevertheless, goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result also has no claim against the tortfeasor liable to the child.

(2) Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable. In ***Bourhill* v. *Young*** [(1943) A.C. 92, 103], Lord Macmillan only recognised the action lying where the injury by shock was sustained "through the medium of the eye or the ear without direct contact." Certainly Brennan J. in his judgment in ***Jaensch* v. *Coffey*** [155 C.L.R. 549, 567] recognised:

> A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential.

That seems also to have been the view of Bankes L.J. in ***Hambrook* v. *Stokes Brothers*** [(1925) 1 K.B. 141, 152]. I agree with my noble and learned friend, Lord Keith of Kinkel, that the validity of each of the recent decisions at first instance of ***Hevican* v. *Ruane*** [(1991) 3 All E.R. 65] and ***Ravenscroft* v. *Rederiaktiebolaget Transatlantic*** [(1991) 3 All E.R. 73] is open to serious doubt.

(3) Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages. To fill this gap in the law a very limited category of relatives are given a statutory right by the Administration of Justice Act

1982, section 3 inserting a new section 1A into the Fatal Accidents Act 1976, to bring an action claiming damages for bereavement.

(4) As yet there is no authority establishing that there is liability on the part of the injured person, his or her estate, for mere psychiatric injury which was sustained by another by reason of shock, as a result of a self-inflicted death, injury or peril of the negligent person, in circumstances where the risk of such psychiatric injury was reasonably foreseeable. On the basis that there must be a limit at some reasonable point to the extent of the duty of care owed to third parties which rests upon everyone in all his actions, Lord Robertson, the Lord Ordinary, in his judgment in the Bourhill case, 1941 S.C. 395, 399, did not view with favour the suggestion that a negligent window-cleaner who loses his grip and falls from a height, impaling himself on spiked railings, would be liable for a shock-induced psychiatric illness occasioned to a pregnant woman looking out of the window of a house situated on the opposite side of the street.

(5) "Shock," in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.

I do not find it surprising that in this particular area of the tort of negligence, the reasonable foreseeability test is not given a free rein. As Lord Reid said in ***McKew* v. *Holland & Hannen & Cubitts* (*Scotland) Ltd.*** [(1969) 3 All E.R. 1621, 1623]:

> A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee.

Deane J. pertinently observed in ***Jaensch* v. *Coffey***, [155 C.L.R. 549, 583]:

> Reasonable foreseeability on its own indicates no more than that such a duty of care will exist if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or limitation. It is to do little more than to state a truism to say that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence.

Although it is a vital step towards the establishment of liability, the satisfaction of the test of reasonable foreseeability does not, in my judgment, ipso facto satisfy Lord Atkin's well known neighbourhood principle enunciated in ***Donoghue* v. *Stevenson*** [(1932 A.C. 562, 580]. For him to have been reasonably in contemplation by a defendant he must be:

> so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The requirement contained in the words “so closely and directly affected . . . that” constitutes a control upon the test of reasonable foreseeability of injury. Lord Atkin was at pains to

stress, at pp. 580-582, that the formulation of a duty of care, merely in the general terms of reasonable foreseeability, would be too wide unless it were "limited by the notion of proximity" which was embodied in the restriction of the duty of care to one's "neighbour."

The three elements

Because "shock" in its nature is capable of affecting such a wide range of persons, Lord Wilberforce in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410, 422], concluded that there was a real need for the law to place some limitation upon the extent of admissible claims and in this context he considered that there were three elements inherent in any claim. It is common ground that such elements do exist and are required to be considered in connection with all these claims. The fundamental difference in approach is that on behalf of the plaintiffs it is contended that the consideration of these three elements is merely part of the process of deciding whether, as a matter of fact, the reasonable foreseeability test has been satisfied. On behalf of the defendant it is contended that these elements operate as a control or limitation on the mere application of the reasonable foreseeability test. They introduce the requirement of "proximity" as conditioning the duty of care.

The three elements are (1) the class of persons whose claims should be recognised; (2) the proximity of such persons to the accident - in time and space; (3) the means by which the shock has been caused.

I will deal with those three elements seriatim.

(1) The class of persons whose claim should be recognised When dealing with the possible range of the class of persons who might sue, Lord Wilberforce in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410) contrasted the closest of family ties - parent and child and husband and wife - with that of the ordinary bystander. He said that while existing law recognises the claims of the first, it denied that of the second, either on the basis that such persons must be assumed to be possessed with fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. He considered that these positions were justified, that other cases involving less close relationships must be very carefully considered, adding, at p. 422:

> The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.

I respectfully share the difficulty expressed by Atkin L.J. in ***Hambrook* v. *Stokes Brothers*** [(1925) 1 K.B. 141, 158-159] - how do you explain why the duty is confined to the case of parent or guardian and child and does not extend to other relations of life also involving intimate associations; and why does it not eventually extend to bystanders? As regards the latter category, while it may be very difficult to envisage a case of a stranger, who is not actively and foreseeably involved in a disaster or its aftermath, other than in the role of rescuer, suffering shock-induced psychiatric injury by the mere observation of apprehended or actual injury of a third person in circumstances that could be considered reasonably foreseeable, I see no reason in principle why he should not, if in the circumstances, a reasonably strong-nerved person would have been so shocked. In the course of argument your

Lordships were given, by way of an example, that of a petrol tanker careering out of control into a school in session and bursting into flames. I would not be prepared to rule out a potential claim by a passer-by so shocked by the scene as to suffer psychiatric illness.

As regards claims by those in the close family relationships referred to by Lord Wilberforce, the justification for admitting such claims is the presumption, which I would accept as being rebuttable, that the love and affection normally associated with persons in those relationships is such that a defendant ought reasonably to contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psychiatric illness. While as a generalisation more remote relatives and, a fortiori, friends, can reasonably be expected not to suffer illness from the shock, there can well be relatives and friends whose relationship is so close and intimate that their love and affection for the victim is comparable to that of the normal parent, spouse or child of the victim and should for the purpose of this cause of action be so treated. This was the opinion of Stocker L.J. in the instant appeal, ante, pp. 1084G - 1085A, and also that of Nolan L.J. who thus expressed himself, ante, p. 1092D-F:

> For my part, I would accept at once that no general definition is possible. But I see no difficulty in principle in requiring a defendant to contemplate that the person physically injured or threatened by his negligence may have relatives or friends whose love for him is like that of a normal parent or spouse, and who in consequence may similarly be closely and directly affected by nervous shock .... The identification of the particular individuals who come within that category, like that of parents and spouses themselves, could only be carried out ex post facto, and would depend upon evidence of the `relationship' in a broad sense which gave rise to the love and affection.

It is interesting to observe that when, nearly 50 years ago, the New South Wales legislature decided to extend liability for injury arising wholly or in part from "mental or nervous shock sustained by a parent or husband or wife of the person killed, injured or put in peril, or any other member of the family of such person, it recognised that it was appropriate to extend significantly the definition of such categories of claimants. Section 4(5) of the Law Reform (Miscellaneous Provisions) Act 1944 (No. 28, 1944) provides:

> Member of the family' means the husband, wife, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used. `Parent' includes father, mother, grandfather, grandmother, stepfather, stepmother and any person standing in loco parentis to another. `Child' includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis.

Whether the degree of love and affection in any given relationship, be it that of relative or friend, is such that the defendant, in the light of the plaintiffs' proximity to the scene of the accident in time and space and its nature, should reasonably have foreseen the shock-induced psychiatric illness, has to be decided on a case by case basis. As Deane J. observed in ***Jaensch* v. *Coffey***, 155 C.L.R. 549, 601:

> While it must now be accepted that any realistic assessment of the reasonably foreseeable consequences of an accident involving actual or threatened serious bodily

injury must, in an appropriate case, include the possibility of injury in the form of nervous shock being sustained by a wide range of persons not physically injured in the accident, the outer limits of reasonable foreseeability of mere psychiatric injury cannot be identified in the abstract or in advance. Much may depend upon the nature of the negligent act or omission, on the gravity or apparent gravity of any actual or apprehended injury and on any expert evidence about the nature and explanation of the particular psychiatric injury which the plaintiff has sustained.

The proximity of the plaintiff to the accident It is accepted that the proximity to the accident must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath.

Only two of the plaintiffs before us were at the ground. However, it is clear from ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410] that there may be liability where subsequent identification can be regarded as part of the "immediate aftermath" of the accident.Mr. Alcock identified his brother-in-law in a bad condition in the mortuary at about midnight, that is some eight hours after the accident. This was the earliest of the identification cases. Even if this identification could be described as part of the "aftermath", it could not in my judgment be described as part of the immediate aftermath. McLoughlin's case was described by Lord Wilberforce as being upon the margin of what the process of logical progression from case to case would allow. Mrs. McLoughlin had arrived at the hospital within an hour or so after the accident. Accordingly in the post-accident identification cases before your Lordships there was not sufficient proximity in time and space to the accident.

The means by which the shock is caused Lord Wilberforce concluded that the shock must come through sight or hearing of the event or its immediate aftermath but specifically left for later consideration whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice (see p. 423). Of course it is common ground that it was clearly foreseeable by the defendant that the scenes at Hillsborough would be broadcast live and that amongst those who would be watching would be parents and spouses and other relatives and friends of those in the pens behind the goal at the Leppings Lane end. However he would also know of the code of ethics which the television authorities televising this event could be expected to follow, namely that they would not show pictures of suffering by recognisable individuals. Had they done so, Mr. Hytner accepted that this would have been a "*novus actus*" breaking the chain of causation between the defendant's alleged breach of duty and the psychiatric illness. As the defendant was reasonably entitled to expect to be the case, there were no such pictures. Although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneous television broadcasts of what occurred cannot be equated with the "sight or hearing of the event or its immediate aftermath." Accordingly shocks sustained by reason of these broadcasts cannot found a claim. I agree, however, with Nolan L.J. that simultaneous broadcasts of a disaster cannot in all cases be ruled out as providing the equivalent of the actual sight or hearing of the event or its immediate aftermath. Nolan L.J. gave ante, p. 1094D-E, an example of a situation where it was reasonable to anticipate that the television cameras, whilst filming and

transmitting pictures of a special event of children travelling in a balloon, in which there was media interest, particularly amongst the parents, showed the balloon suddenly bursting into flames. Many other such situations could be imagined where the impact of the simultaneous television pictures would be as great, if not greater, than the actual sight of the accident.

Conclusion

Only one of the plaintiffs, who succeeded before Hidden J., namely Brian Harrison, was at the ground. His relatives who died were his two brothers. The quality of brotherly love is well known to differ widely - from Cain and Abel to David and Jonathan. I assume that Mr. Harrison's relationship with his brothers was not an abnormal one. His claim was not presented upon the basis that there was such a close and intimate relationship between them, as gave rise to that very special bond of affection which would make his shock-induced psychiatric illness reasonably foreseeable by the defendant.

Accordingly, the judge did not carry out the requisite close scrutiny of their relationship. Thus there was no evidence to establish the necessary proximity which would make his claim reasonably foreseeable and, subject to the other factors, to which I have referred, a valid one. The other plaintiff who was present at the ground, Robert Alcock, lost a brother-in-law. He was not, in my judgment, reasonably foreseeable as a potential sufferer from shock-induced psychiatric illness, in default of very special facts and none was established. Accordingly their claims must fail, as must those of the other plaintiffs who only learned of the disaster by watching simultaneous television. I, too, would therefore dismiss these appeals.

LORD JAUNCEY OF TULLICHETTLE - My Lords, for some 90 years it has been recognised that nervous shock sustained independently of physical injury and resulting in psychiatric illness can give rise to a claim for damages in an action founded on negligence. The law has developed incrementally. In ***Dulieu* v. *White & Sons*** [(1901) 2 K.B. 669], a plaintiff who suffered nervous shock as a result of fears for her own safety caused by the defendant's negligence was held to have a cause of action. However Kennedy J. said, at p. 675, that if nervous shock occasioned by negligence was to give a cause of action it must arise "from a reasonable fear of immediate personal injury to oneself." In ***Hambrook* v. *Stokes Brothers*** [(1925) 1 K.B. 141], Kennedy J.'s foregoing limitation was disapproved by the majority of the Court of Appeal who held that a mother who had sustained nervous shock as a result of fear for the safety of her three children due to the movement of an unmanned lorry had a cause of action against the owner of the lorry. Until 1983 however there had in England been no case in which a plaintiff had been able to recover damages for nervous shock when the event giving rise to the shock had occurred out of sight and out of earshot. I use the word "event" as including the accident and its immediate aftermath. In ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410], a wife and a mother suffered nervous shock after seeing her husband and children in a hospital to which they had been taken after a road accident. The wife was not present at the locus but reached the hospital before her husband and son and daughter had been cleaned up and when they were all very distressed. This was the first case in the United Kingdom in which a plaintiff who neither saw nor heard the accident nor saw its

aftermath at the locus successfully claimed damages for nervous shock. These appeals seek to extend further the circumstances in which damages for nervous shock may be recovered.

I start with the proposition that the existence of a duty of care on the part of the defendant does not depend on foreseeability alone. Reasonable foreseeability is subject to controls. In support of this proposition I rely on the speech of Lord Wilberforce in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410, 420F-421A] and on the carefully reasoned judgment of Deane J. in the High Court of Australia in ***Jaensch* v. *Coffey*** [155 C.L.R. 549, 578-586]. In a case of negligence causing physical injury to an employee or to a road user reasonable foreseeability may well be the only criterion by which liability comes to be judged. However in the case of negligence causing shock different considerations apply because of the wide range of people who may be affected. For this reason Lord Wilberforce said in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410, 421-422]:

> there remains . . . a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons who claim should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused.

The class of persons with recognisable claims will be determined by the law's approach as to who ought according to its standards of value and justice to have been in the defendant's contemplation: again ***McLoughlin* v. *O'Brian***, per Lord Wilberforce, at p. 420F. The requisite element of proximity in the relation of the parties also constitutes an important control on the test of reasonable foreseeability: ***Jaensch* v. *Coffey*** [155 C.L.R. 549, 578-586] per Deane J. The means by which the shock is caused constitutes a third control, although in these appeals I find it difficult to separate this from proximity.

The present position in relation to recognisable claims is that parents and spouses have been held entitled to recover for shock caused by fear for the safety of their children or the other spouse. No remoter relative has successfully claimed in the United Kingdom. However a rescuer and a crane driver have recovered damages for nervous shock sustained as a result of fear for the safety of others in circumstances to which I must now advert.

In ***Dooley* v. *Cammell Laird & Co. Ltd***. [(1951) 1 Lloyd's Rep. 271], Donovan J. awarded damages to a crane driver who suffered nervous shock when a rope connecting a sling to the crane hooks snapped causing the load to fall into the hold of a ship in which men were working. The nervous shock resulted from the plaintiff's fear that the falling load would injure or kill some of his fellow workmen. Donovan J. drew the inference that the men in the hold were friends of the plaintiff and later stated, at p. 277:

> Furthermore, if the driver of the crane concerned fears that the load may have fallen upon some of his fellow workmen, and that fear is not baseless or extravagant, then it is, I think, a consequence reasonably to have been foreseen that he may himself suffer a nervous shock.

Although Donovan J. treated the matter simply as one of reasonable foreseeability, I consider that the case was a very special one. Unlike the three cases to which I have referred in which the plaintiff was merely an observer of the accident or its immediate aftermath, Dooley was operating the crane and was therefore intimately involved in, albeit in no way responsible for,

the accident. In these circumstances the defendants could readily have foreseen that he would be horrified and shocked by the failure of the rope and the consequent accident which he had no power to prevent. I do not consider that this case is of assistance where, as here, the plaintiffs were not personally involved in the disaster. In ***Chadwick* v. *British Railways Board*** [(1967) 1 W.L.R. 912], the plaintiff recovered damages for nervous shock sustained as a result of his prolonged rescue efforts at the scene of a serious railway accident which had occurred near his home. The shock was caused neither by fear for his own safety nor for that of close relations. The position of the rescuer was recognised by Cardozo J. in ***Wagner* v. *International Railway Co***., [232 N.Y. 176, 180]:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.

Lord Wilberforce in ***McLoughlin* v. *O'Brian*** [(1983) 1 A.C. 410, 419B] considered that the principle of rescuers ought to be accepted. This is a particular instance where the law not only considers that the individual responsible for an accident should foresee that persons will come to the rescue and may be shocked by what they see but also considers it appropriate that he should owe to them a duty of care. I do not however consider that either of these cases justify the further development of the law sought by the plaintiffs.

Of the six plaintiffs who were successful before Hidden J. only one, who lost two brothers, was present at the ground. The others saw the disaster on television, two of them losing a son and the remaining three losing brothers. Of the four plaintiffs who were unsuccessful before the judge, one who lost his brother-in-law was at the ground, one who lost her fiance saw the disaster on television, another who lost her brother heard initial news while shopping and more details on the wireless during the evening and a third who lost a grandson heard of the disaster on the wireless and later saw a recorded television programme. Thus all but two of the plaintiffs were claiming in respect of shock resulting from the deaths of persons outside the categories of relations so far recognised by the law for the purposes of this type of action. It was argued on their behalf that the law has never excluded strangers to the victim from claiming for nervous shock resulting from the accident. In support of this proposition the plaintiffs relied on ***Dooley* v. *Cammell Laird & Co. Ltd.*** and **Chadwick v. *British Railways Board*** as well as upon the following passage from the judgment of Atkin L.J. in ***Hambrook* v. *Stokes Brothers*** [(1925) 1 K.B. 141, 157]:

> Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party.

However the suggested inclusion of the bystander has not met with approval in this House. In ***Bourhill* v. *Young*** [(1943) A.C. 92, 117], Lord Porter said:

> It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such

> incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.

In ***McLoughlin* v. *O'Brian*** ***Lord Wilberforce*** said, at p. 422B, that existing law denied the claims of the ordinary bystander:

> either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large.

While it is not necessary in these appeals to determine where stands the ordinary bystander I am satisified that he cannot be prayed in aid by the plaintiffs.

Should claims for damages for nervous shock in circumstances such as the present be restricted to parents and spouses or should they be extended to other relatives and close friends and, if so, where, if at all, should the line be drawn? In ***McLoughlin* v. *O'Brian*** Lord Wilberforce in the context of the class of persons whose claim should be recognised said, at p. 422:

> As regards the class of persons, the possible range is between the closest of family ties - of parent and child, or husband and wife -and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second . . . In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.

I would respectfully agree with Lord Wilberforce that cases involving less close relatives should be very carefully scrutinised. That, however, is not to say they must necessarily be excluded. The underlying logic of allowing claims of parents and spouses is that it can readily be foreseen by the tortfeasor that if they saw or were involved in the immediate aftermath of a serious accident or disaster they would, because of their close relationship of love and affection with the victim be likely to suffer nervous shock. There may, however, be others whose ties of relationship are as strong. I do not consider that it would be profitable to try and define who such others might be or to draw any dividing line between one degree of relationship and another. To draw such a line would necessarily be arbitrary and lacking in logic. In my view the proper approach is to examine each case on its own facts in order to see whether the claimant has established so close a relationship of love and affection to the victim as might reasonably be expected in the case of spouses or parents and children. If the claimant has so established and all other requirements of the claim are satisfied he or she will succeed since the shock to him or her will be within the reasonable contemplation of the tortfeasor. If such relationship is not established the claim will fail.

I turn to the question of proximity which arises in the context of those plaintiffs who saw the disaster on television either contemporaneously or in later recorded transmissions and of

those who identified their loved ones in the temporary mortuary some nine or more hours after the disaster had taken place. I refer once again to a passage in the speech of Lord Wilberforce in ***McLoughlin* v. *O'Brian***, at p. 422D:

> As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in ***Benson*** v. ***Lee*** [(1972) V.R. 879] was correct and indeed inescapable. It was based, soundly, upon 'direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath . . .' (p. 880)" Lord Wilberforce expressed the view, at p. 422H, that a "strict test of proximity by sight or hearing should be applied by all courts".

Later, he said, at p. 423A:

> The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.

My Lords, although Lord Wilberforce in ***McLoughlin* v. *O'Brian*** did not close the door to shock coming from the sight of simultaneous television I do not consider that a claimant who watches a normal television programme which displays events as they happen satisfies the test of proximity. In the first place a defendant could normally anticipate that in accordance with current television broadcasting guidelines shocking pictures of persons suffering and dying would not be transmitted. In the second place, a television programme such as that transmitted from Hillsborough involves cameras at different viewpoints showing scenes all of which no one individual would see, edited pictures and a commentary superimposed. I do not consider that such a programme is equivalent to actual sight or hearing at the accident or its aftermath. I say nothing about the special circumstances envisaged by Nolan L.J. in his judgment in this case, ante, p. 1094D-E. If a claimant watching a simultaneous television broadcast does not satisfy the requirements of proximity it follows that a claimant who listens to the wireless or sees a subsequent television recording falls even further short of the requirement.

My Lords, what constitutes the immediate aftermath of an accident must necessarily depend upon the surrounding circumstances. To essay any comprehensive definition would be a fruitless exercise. In ***McLoughlin* v. *O'Brian*** the immediate aftermath extended to a time somewhat over an hour after the accident and to the hospital in which the victims were waiting to be attended to. It appears that they were in very much the same condition as they would have been had the mother found them at the scene of the accident. In these appeals the visits to the mortuary were made no earlier than nine hours after the disaster and were made not for the purpose of rescuing or giving comfort to the victim but purely for the purpose of identification. This seems to me to be a very different situation from that in which a relative goes within a short time after an accident to rescue or comfort a victim. I consider that not

only the purpose of the visits to the mortuary but also the times at which they were made take them outside the immediate aftermath of this disaster.

My Lords only two plaintiffs, Mr. and Mrs. Copoc, lost a son, but they saw the disaster on television and Mr. Copoc identified the body on the following morning having already been informed that his son was dead. No plaintiff lost a spouse. None of the other plaintiffs who lost relatives sought to establish that they had relationships of love and affection with a victim comparable to that of a spouse or parent. In any event only two of them were present in the ground and the remainder saw the scenes on simultaneous or recorded television. In these circumstances none of the plaintiffs having satisfied both the tests of reasonable foreseeability and of proximity I would dismiss all the appeals.

LORD LOWRY. My Lords, I have enjoyed the advantage of reading in draft the speeches of your Lordships, all of whom have reached the same conclusion, namely, that these appeals should be dismissed. Concurring as I do in that conclusion, I do not consider that it would be helpful to add further observations of my own to what has already been said by your Lordships.

ORDER

Appeal dismissed.

Defendants' costs in House of Lords and Court of Appeal (so far as related to legally aided plaintiffs) to be paid out of Legal Aid Fund.

Order for costs suspended for four weeks to allow Legal Aid Board to object, if they wished.

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REMOTENESS OF DAMAGES

In Re an Arbitration between Polemis and Furness, Withy & Co.

(1921) 3 KB 560 : (1921) All ER Rep. 40

This was a dispute between the charterers and owners of a ship which was destroyed while under charter. At Casablanca, the charterers had employed Arab stevedores to unload the cargo. One of them dropped a heavy plank into the hold, which was full of petrol vapour. On impact, the plank caused a spark, the spark ignited the vapour, and the ship was destroyed. The arbitrator found that it was careless to drop the plank, that some damage to the ship was foreseeable, but that the causing of the spark and the ensuing fire were not. He awarded the owners damages of £ 196,165 odd (the equivalent of twenty months hire). Sankey J. confirmed the award, and so did the Court of Appeal.

BANKES L. J. – In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendant's servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellants' junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipation of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

WARRINGTON, L.J. – The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Sufficient authority for the proposition is afforded by ***Smith*** v. ***London and South Western Ry.*** [(1870) L.R. 6 C.P. 14], in the Exchequer Chamber and particularly by the judgments of Channell B. and Blackburn J.

SCRUTTON L.J. – The second defence is that the damage is too remote from the negligence as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well-known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the

original cause of action to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. And as to many cases of fact in which the distinction has been drawn, it is difficult to see why one case should be decided one way and one another. Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that someone finding the cheque should commit forgery; ***London Stock Bank* v. *Macmillan*** [(1918) A.C. 777]; while if someone negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled**:** ***Weld-Blundell* v. *Stephens*** [(1920) A.C. 956]. In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer Chamber in ***Smith*** v. ***London and South Western Rly***., and by the majority of the Court in Banc in ***Rigby* v. *Hewitt*** and ***Greenland*** v. ***Chaplin*** [(1850) 5 Ex. 240, 243; 155 E.R. 103, 104], and approved recently by Lord Sumner in ***Weld-Blundell* v. *Stephens*** and Sir Samuel Evans in ***H.M.S. London*** [(1914) p. 76]. In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to the workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused.

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Overseas Tankship [U.K.] Ltd. v. *Morts Dock & Engineering Co.*

[The Wagon Mound]

(1961) 1 All ER 404

A large quantity of oil was carelessly allowed to spill from *The Wagon Mound*, a ship under the defendant's control, during bunkering operations in Sydney Harbour on October 30, 1951. This oil spread to the plaintiff's wharf about 200 yards away, where a ship, *The Corrimal*, was being repaired. The plaintiff asked whether it was safe to continue welding, and was assured (in accordance with the best scientific opinion) that the oil could not be ignited when spread on water. On November 1, a drop of molten metal fell on a piece of floating waste; this ignited the oil, and the plaintiff's wharf was consumed by fire.

Kinsella J. found that the destruction of the wharf by fire was a direct but unforeseeable consequence of the carelessness of the defendant in spilling the oil, but that some damage by fouling might have been anticipated. He gave judgment for the plaintiff (1958) 1 Lloyd's Rep. 575. The Full Court of the Supreme Court of New South Wales affirmed his decision (1959) 2 Lloyd's Rep. 697. The defendant appealed to the Judicial Committee of the Privy Council, and the appeal was allowed.

VISCOUNT SIMONDS – The authority of ***Polemis*** has been severely shaken though lip service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial forseeable damage the actor should be liable for all consequences however unforseeable and however grave, so long as they can be said to be "direct." It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in ***Polemis***. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality it is judged by the standard of the reasonable man that he ought to have foreseen them. Thus it is that over and over again it has happened that in different judgments in the same case, and sometimes in a single judgment, liability for a consequence has been imposed on the ground that it was reasonably foreseeable or, alternatively, on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in ***Polemis***. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held

responsible … and all are agreed that some limitation there must be why should that test (reasonable foreseeability) be rejected which, since he is judged by; what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the "direct" consequence) be substituted which leads to nowhere but the never-ending and insoluble problems of causation. "The lawyer," said Sir Frederick Pollock, "cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." Yet this is just what he has most unfortunately done and must continue to do if the rule in ***Polemis*** is to prevail. A conspicuous example occurs when the actor seeks to escape liability on the ground that the "chain of causation" is broken by a "*nova causa*" or; "*novus actus interveniens*."

The validity of a rule or principle can sometimes be tested by observing it in operation . Let the rule in ***Polemis*** be tested in this way. In the case of the ***Liesbosh*** [(1933) A.C. 449] the appellants, whose vessel had been fouled by the respondents, claimed damages under various heads. The respondents were admittedly at fault; therefore, said the appellants, invoking the rule in ***Polemis,*** they were responsible for all damage whether reasonably foreseeable or not. Here was the opportunity to deny the rule or to place it secure upon its pedestal. But the House of Lords took neither course; on the contrary, it distinguished ***Polemis*** on the ground that in that case the injuries suffered were the "immediate physical consequences" of the negligent act. It is not easy to understand why a distinction should be drawn between "immediate physical" and other consequences, nor where the line is to be drawn. It was perhaps this difficulty which led Denning L**.** in ***Roe* v. *Minister of Health*** [(1954) 2 Q.B. 66], to say that foreseeability is only disregarded when the negligence is the immediate or precipitating cause of the damage. This new word may well have been thought as good a word as another for revealing or disguising the fact that he sought loyally to enforce an unworkable rule.

In the same connection may be mentioned the conclusion to which the Full Court finally came in the present case. Applying the rule in ***Polemis*** and holding therefore that the unforeseeability of the damage by fire afforded no defence, they went on to consider the remaining question. Was it a "direct" consequence? Upon this Manning J. said: "Notwithstanding that, if regard is had separately to each individual occurrence in the chain of events that led to this fire, each ocurrence was improbable and, in one sense, improbability was heaped upon improbability, I cannot escape from the conclusion that if the ordinary man in the street had been asked, as a matter of common sense, without any detailed analysis of the circumstances, to state the cause of the fire at Mort's Dock, he would unhesitatingly have assigned such cause to spillage of oil by the appellant's employees." Perhaps he would, and probably he would have added: "I never should have thought it possible." But with great respect to the Full Court this is surely irrelevant, or, if it is relevant, only serves to show that the ***Polemis*** rule works in a very strange way. After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility. The ***Polemis*** rule by substituting "direct" for "reasonably foreseeable" consequence leads to a conclusion equally illogical and unjust.

It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a

breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but; the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. Suppose an action brought by A for damage caused by the carelessness (neutral word) of B, for example, a fire caused by the careless spillage of oil. It may, of course, become relevant to know what duty B owed to A, but the only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. If as admittedly it is B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened - the damage in suit? And, if that damage is unforeseeable so as to displace liability at large, how can the liability; be restored so as to make compensation payable?

But, it is said, a different position arises if B's careless act has been shown to be negligent and has caused some foreseeable damage to A. Their Lordships have already observed that to hold B liable for consequences however unforeseeable of a careless act, if but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary. For the same fallacy is at the root of the proposition. It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacare. Again, suppose a claim by A for damage by fire by the careless act of B. Of what relevance is it to that claim that he has another claim arising out of the same careless act? It would surely not prejudice his claim if that other claim failed : it cannot assist it if it succeeds. Each of them rests on its own bottom, and will fail if it can be established that the damage could not reasonably be foreseen. We have come back to the plain common sense stated by Lord Russell of Killowen in ***Bourhill* v. *Young*** [(1943) A.C. 92, 101]. As Denning L.J. said in ***King* v. *Phillips*** [(1953) 1 Q.B. 429, 441] "there can be no doubt since ***Bourhill* v. *Young*** that the test of liability for shock is foreseeability of injury by shock". Their Lordships substitute the word "fire" for "shock " and endorse this statement of the law.

Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct." In doing so they have inevitable insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in ***Donoghue* v. *Stevenson***: "The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay." It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural "consequence of the precedent act. Who knows or can be assumed to know all the processes

of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct " or " natural, " equally it would be wrong that he should escape liability, however " indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done (cf ***Woods* v. *Duncan***). Thus foreseeability becomes the effective test. In reasserting this principle, their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in ***Blyth* v. *Birmingham Waterworks Co.*** [(1856) 11 Exch. 781]:

> It is proper to add that their Lordships have not found it necessary to consider the so-called rule of "strict liability" exemplified in ***Rylands* v. *Fletcher*** [(1868) L.R. 3 H.L. 330], and the cases that have followed or distinguished it. Nothing that they have said is intended to reflect on that rule...

Their Lordships will humbly advise Her Majesty that this appeal should be allowed, and the respondents' action so far as it related to damage caused by the negligence of the appellants be dismissed with costs, but that the action so far as it related to damage caused by nuisance should be remitted to the Full Court to be dealt with as that court may think fit.

* * * * *

Hughes v. *Lord Advocate*

(1963) AC 837 [HL]

A manhole in a street was opened for the purpose of maintaining underground telephone equipment. It was covered with a tent and, in the evening, left by the workmen unguarded but surrounded by warning paraffin lamps. An eight-year-old boy entered the tent and knocked or lowered one of the lamps into the hole. An explosion occurred causing him to fall into the hole and to be severely burned.

LORD PEARCE: The defenders are ... liable for all the foreseeable consequences of their neglect. When an accident is of a different type and kind from anything that a defender could have foreseen he is not liable for it. But to demand too great precision in the test of foreseeability would be unfair to the plaintiff since the facets of misadventure are innumerable. In the case of an allurement to children, it is particularly hard to foresee with precision the exact shape of the disaster that will arise.

The allurement in this case was the combination of a red paraffin lamp, a ladder, a partially closed tent, and a cavernous hole within it, a setting well fitted to inspire some juvenile adventure that might end in calamity.

The obvious risks were burning and conflagration and a fall. All these in fact occurred, but unexpectedly the mishandled lamp, instead of causing an ordinary conflagration, produced a violent explosion. Did the explosion create an accident and damage of a different type from the misadventure and damage that could be foreseen? In my judgment it did not. The accident was but a variant of the foreseeable. It was, to quote the words of Denning L.J. in ***Roe* v. *Ministry at Health***, 'within the risk created by the negligence'.

No unforeseeable extraneous, initial occurrence fired the train. The children's entry into the tent with the ladder, the descent info the hole, the mishandling of the lamp, were all foreseeable. The greater part of the path to injury had thus been trodden, and the mishandled lamp was quite likely at that stage to spill and cause a conflagration. Instead, by some curious chance of combustion, it exploded and no conflagration occurred, it would seem, until after the explosion.

There was thus an unexpected manifestation of the apprehended physical dangers. But it would be, I think, too narrow a view to hold that those who created the risk of fire are excused from the liability for the damage by fire, because it came by way of explosive combustion. The resulting damage, though severe, was not greater than or different in kind from that which might have been produced had the lamp spilled and produced a more normal conflagration in the hole.

LORD REID: My Lords, I have had an opportunity of reading the speech which my noble and learned friend, Lord Guest, is about to deliver. I agree with him that this appeal should be allowed and I shall only add some general observations. I am satisfied that the Post Office workmen were in fault in leaving this open manhole unattended and it is clear that if they had done as they ought to have done this accident would not have happened. It cannot be said that

they owed no duty to the appellant. But it has been held that the appellant cannot recover damages.

It was argued that the appellant cannot recover because the damage which he suffered was of a kind which was not foreseeable. That was not the ground of judgment of the First Division or of the Lord Ordinary and the facts proved do not, in my judgment, support that argument. The appellant's injuries were mainly caused by burns, and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent it was very likely that they would take one of these lamps with them. If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable.

So we have (first) a duty owed by the workmen, (secondly) the fact that if they had done as they ought to have done there would have been no accident, and (thirdly) the fact that the injuries suffered by the appellant, though perhaps different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature. The ground on which this case has been decided against the appellant is that the accident was of an unforeseeable type. Of course, the pursuer has to prove that the defender's fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way.

The explanation of the accident which has been accepted, and which I would not seek to question, is that, when the lamp fell down the manhole and was broken, some paraffin escaped, and enough was vaporised to create an explosive mixture which was detonated by the naked light of the lamp. The experts agree that no one would have expected that to happen: it was so unlikely as to be unforeseeable. The explosion caused the boy to fall into the manhole: whether his injuries were directly caused by the explosion or aggravated by fire which started in the manhole is not at all clear. The essential step in the respondent's argument is that the explosion was the real cause of the injuries and that the explosion was unforeseeable.

The only authority cited to us from which the respondent can derive any assistance is ***Glasgow Corporation* v. *Muir*** and I shall examine that case. The accident occurred in premises occupied by the corporation. The manageress had given permission for a tea urn to be brought in by visitors and had not cleared some children out of the way. For some unknown reason one of the men carrying the urn let it slip and hot tea poured out and scalded the children. On the question whether the manageress had been negligent Lords Macmillan, Wright and Clauson held that she had no reason to anticipate danger and therefore was not in breach of duty. and that was also the first ground of judgment of Lord Thankerton. So far the case is of no assistance to the present respondent because in this case there was a breach of duty.

The difficulty is caused by further observations of Lord Thankerton and by the judgment of Lord Romer. Lord Thankerton said that, even if he had held that the manageress was in breach of duty, 'I would hold that the respondents must fail here as they have not proved what the event was that caused the accident.' It may be that that should be linked to an earlier passage: 'In my opinion, it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man. I am unable to agree with Lord Carmont that the appellants could be made liable 'even if it were proved that the actual damage to the invitee happened through the tea urn being spilt in a way that could not reasonably have been anticipated." If that means that the mere fact that the way in which the accident happened could not be anticipated is enough to exclude liability although there was a breach of duty and that breach of duty in fact caused damage of a kind that could have been anticipated, then I am afraid that I cannot agree with Lord Thankerton. No authority for this was cited in ***Muir's*** case and no authority for it other than ***Muir's*** case has been cited in the present case. I find Lord Romer's judgment a little difficult to follow. I think that it is to the same effect, but towards the end of his judgment he points out, I think rightly, that if the ceiling had fallen and upset the urn the corporation could not have been liable merely because they had failed in a duty to clear the children away. The fall of the ceiling would have been the cause of the damage and not the breach of duty.

It may be that what Lord Romer, and possibly also Lord Thankerton, had in mind was that, if the cause of an accident cannot be proved, then the accident may have been due to the intrusion of some new and unforeseeable cause like the falling of a ceiling so that the damage cannot be said to have resulted from the defenders' breach of duty. If they meant no more than that, then their observations would be in line with the well-established principle that a pursuer must prove, in the sense of making it more probable than not, that the defender's breach of duty caused the accident; but then those observations would not help the respondent because we know the cause of this accident. This accident was caused by a known source of danger, but caused in a way which could not have been foreseen, and, in my judgment, that affords no defence. I would therefore allow the appeal.

LORD JENKINS: My Lords, the facts of this case have been so fully and clearly stated in the opinions of the Lord Ordinary (Lord Wheatley) and the Lord President (Lord Clyde) that I need not repeat them at length. [His Lordship stated the facts briefly and continued:] That being the nature of the accident, the next question is, who was to blame. It was originally suggested that the children were trespassers, but this was given up on a consideration of the statutory position of the Post Office, which did not include a sufficiently exclusive interest in any part of the roadway to support a claim in trespass.

Then it was said that the children were guilty of contributory negligence, but this was not pressed, the view ultimately accepted on both sides being that having regard to the children's tender years they were not to be blamed for meddling with 'allurements' such as the lamps, the tent, the hole and the ladder, disposed as they were in the public street without a watchman to guard them or a fence to keep children away.

As to the liability of the Post Office, it was not, I think, ever seriously doubted that the standard of care required of them was the well known standard thus described by Lord Atkin in ***Donoghue* v. *Stevenson***: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' In ***Bolton* v. *Stone*** Lord Porter said: 'It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it.'

In a word, the Post Office had brought upon the public highway apparatus capable of constituting a source of danger to passers-by and in particular to small and almost certainly inquisitive children. It was therefore their duty to see that such passers-by, 'neighbours,' in the language of ***Donoghue* v. *Stevenson***, were so far as reasonably practicable protected from the various obstacles, or (to children) allurements, which the workmen had brought to the site. It is clear that the safety precautions taken by the Post Office did not in this instance measure up to Lord Atkin's test.

The only remaining question appears to be whether the occurrence of an explosion such as did in fact take place in the manhole was a happening which should reasonably have been foreseen by the Post Office employees. This is the critical point in the case, and I think I should next refer to some of the observations upon it by the Lord Ordinary, the Lord President, and Lords Sorn and Guthrie.

In the present case the Lord Ordinary recognises the allurements to children provided by the Post Office gear, and suggests various attractions from their point of view, but goes on: 'What I have to consider in this case, however, is whether a reasonable man would have anticipated that a child doing these things was likely to be thrown into the hole in consequence of an explosion initiated by the lamp breaking and causing the flame to come in contact with inflammable vapour... or whether the risk of such occurrences was so small that a reasonable man would have been entitled to disregard it.' Later he said: 'In the light of the evidence, I cannot find that this danger ought reasonably to have been foreseen. The greater the degree of improbability that the explosion was caused in the manner in which I have held that it was caused (in the absence of any other reasonable explanation), the more a reasonable man must be excused for not anticipating it. The pursuer's case must accordingly fail. Even if the ordinary dangers of a child playing with a lamp and falling into an open manhole should have been reasonably foreseen, I do not consider that injuries resulting from an explosion, such as occurred, could have been reasonably foreseen - cf. ***Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd. (The Wagon Mound)***.'

The Lord President (Lord Clyde) said this: 'In these circumstances, and in the absence of any evidence to the contrary, the Lord Ordinary was well entitled to conclude that the combination of circumstances necessary to create this paraffin explosion was so unforeseeable that a reasonable man would be excused if he disregarded them and took no precautions against them. It appears to me undeniable that the cause of the present accident was the explosion. If there had been none, the pursuer would not have fallen into the hole and so sustained his injuries. For his case, both on record and in his evidence, is that, before it, he

was on the roadway, and it was the explosion which caused him to fall into the manhole and get burned. If that explosion was not a foreseeable eventuality, the pursuer's whole case fails.'

Lord Sorn said: 'Looked at in that way, it seems to me, upon the evidence, that the explosion in the present case was a thing that differed in kind from the kind of things which could be said to have been reasonably foreseeable. It was not merely an unpredictable incident in the kind of chain of events which might have been foreseen; it was an essential event outside the kinds of events which might have been foreseen.'

Lord Guthrie, after mentioning precautions which it would have been reasonable to take but were not taken, observed: 'Therefore, the defender's liability to the pursuer in damages depends on the answer to the question whether the fact that the explosion was not reasonably foreseeable is fatal to the pursuer's claim.'

Lord Carmont, who dissented, said this: 'Having provided an allurement to a child which brought about the injury, I do not think that the defender can escape liability by saying that he did not foresee the exact way in which the allurement would affect the mind of a child. Even if the exact way in which injury was caused to the child is not conclusively proved, it is certainly proved that an explosion was caused in the open manhole because the light from the lantern fired an explosive mixture of vapour in the manhole.'

I find it impossible to accept the view taken by the Lord Ordinary and the majority of the Court of Session.

It is true that the duty of care expected in cases of this sort is confined to reasonably foreseeable dangers, but it does not necessarily follow that liability is escaped because the danger actually materialising is not identical with the danger reasonably foreseen and guarded against. Each case much depends on its own particular facts. For example (as pointed out in the opinions), in the present case the paraffin did the mischief by exploding, not burning, and it is said that while a paraffin fire (caused, for example, by the upsetting of the lighted lamp or otherwise allowing its contents to leak out) was a reasonably foreseeable risk so soon as the pursuer got access to the lamp, an explosion was not.

To my mind, the distinction drawn between burning and explosion is too fine to warrant acceptance. Supposing the pursuer had on the day in question gone to the site and taken one of the lamps, and upset it over himself, thus setting his clothes alight, the person to be considered responsible for protecting children from the dangers to be found there would presumably have been liable. On the other hand, if the lamp, when the boy upset it, exploded in his face, he would have had no remedy because the explosion was an event which could not reasonably be foreseen. This does not seem to me to be right.

I think that in these imaginary circumstances the danger would be a danger of fire of some kind, for example, setting alight to his clothes or causing him bodily hurt. If there is a risk of such a fire as that, I do not think the duty of care prescribed in ***Donoghue* v. *Stevenson*** is prevented from coming into operation by the presence of the remote possibility of the more serious event of an explosion. I would allow this appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, it is within common experience and knowledge that children may be allured by and tempted to play and meddle with objects

which for others would have no special attraction. In such playing or meddling children may be heedless of danger and may bring neither method nor reason nor caution to bear. If by the exercise of reasonable foresight there can be avoidance of the risk that, as a result of being so allured, children may get themselves hurt, it is not over-exacting to require such foresight, and, where a duty is owed, such reasonable and practicable measures as foresight would prompt.

When shortly after 5 p.m. on Saturday, November 8, 1958, the appellant (then aged 8) and his companion (then aged 10) were in Russell Road, Edinburgh, they could not resist the opportunity of exploring the unattended canvas shelter. In and around it they found aids to exploration readily at hand. Within the canvas shelter or tent was the uncovered manhole. Nearby was a section of a ladder. Nearby also there were lighted lamps. Pursuing their boyish whims, they must have thought that as a place for play it was bounteously equipped. Furthermore, somewhere outside the tent they found a rope and a tin can (which apparently were no part of the Post Office material). The ladder and the rope and a lamp proved helpful in exploring the hole and the chamber below the road. In all this, however, as anyone might have surmised, was the risk that in some way one of the boys might fall down the hole or might suffer some burn from a lamp. The lamps were doubtless good and safe lamps when ordinarily handled, but in the hands of playful, inquisitive or mischievous boys there could be no assumption that they would be used in a normal way.

Exercising an ordinary and certainly not an over-exacting degree of precision the workmen should, I consider, have decided, then the tea-break came, that someone had better be left in charge who could repel the intrusion of inquisitive children. If, of, course, there was no likelihood that children might appear, different considerations would apply. But children did appear, and I find no reason to differ from the conclusion of the Lord Ordinary that the presence of children in the immediate vicinity of the shelter was reasonably to be anticipated. No question as to trespassing has been raised before your Lordships.

When the children did appear they found good scope for moments of adventure. Then came disaster for the pursuer. A risk that he might in some way burn himself by playing with a lamp was translated into reality. In fact he was very severely burned. Though his severe burns came about in a way that seems surprising, this only serves to illustrate that boys can bring about a consequence which could be expected, but yet can bring it about in a most unusual manner and with unexpectedly severe results. After the pursuer tripped against the lamp and so caused it to fall into the manhole, and after he contrived to be drawn into or to be blown into or to fall into the manhole, he was burned. His burns were, however, none the less burns although there was such an immediate combustion of paraffin vapour that there was an explosion. The circumstances that an explosion as such would not have been contemplated does not alter the fact that it could reasonably have been foreseen that a boy who played in and about the canvas shelter and played with the things that were thereabouts might get hurt and might in some way burn himself. That is just what happened. The pursuer did burn himself, though his burns were more grave than would have been expected. The fact that the features or developments of an accident may not reasonably have been foreseen does not mean that the accident itself was not foreseeable. The pursuer was, in my view, injured as a result of the type or kind of accident or occurrence that could reasonably have been foreseen.

In agreement with Lord Carmont, I consider that the defenders do not avoid liability because they could not have foretold the exact way in which the pursuer would play with the alluring objects that had been left to attract him or the exact way in which in so doing he might get hurt.

In the circumstances of ***Haynes* v. *Harwood***, Greer L.J. said: 'There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.' So in ***Carmarthenshire County Council* v. *Lewis*** it was held that it was foreseeable that a four-year-old boy who was left unattended in a nursery school might wander on to the highway through an open gate and that as a result some driver of a vehicle might suffer injury through taking action to avoid the child. But, as Lord Keith of Avonholm said: ' It is not necessary that the precise result should be foreseen.'

To the same effect were the observations of Lord Keith of Avonholm in ***Miller* v. *South of Scotland Electricity Board*** when he said: 'It has been pointed out in other cases that it is not necessary to foresee the precise accident that happened and similarly it is not necessary, in my opinion, to postulate foreseeability of the precise chain of circumstances leading up to an accident. There does not seem to me to be anything fantastic or highly improbable in the series of happenings that are alleged to have led to the accident here. If it is reasonably probable that an accident may happen from some act of neglect or commission that may be enough to discharge the initial onus on the pursuer, though it would remain, of course, to show that the pursuer was within the class of persons to whom a duty was owed. The question is: - Was what happened so remote that it could not be reasonably foreseeable? ' See also the judgments in ***Harvey* v. *Singer Manufacturing Co. Ltd***.

My Lords, in my view, there was a duty owed by the defenders to safeguard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injuries, and the defenders are not absolved from liability because they did not envisage ' the precise concatenation of circumstances which led up to the accident.' For these reasons I differ, with respect, from the majority of the First Division, and I would allow the appeal.

LORD GUEST: - My Lords, in an action by the pursuer directed against the Lord Advocate, as representing the Postmaster-General, on the ground that the accident was due to the fault of the Post Office employees in failing to close the manhole before they left or to post a watchman while they were away, the Lord Ordinary assoilzied the respondent. His judgment was affirmed by a majority of the First Division, Lord Carmont dissenting.

Before the Lord Ordinary and the Division a preliminary point was taken by the respondent that the appellant was a trespasser in the shelter and that the Post Office employees therefore owed no duty to take precautions for his safety. This point was not persisted in before this House, and it is therefore unnecessary to say anything about it.

The Lord Ordinary, after a very careful analysis of the evidence, has found that the cause of the explosion was as a result of the lamp which the appellant knocked into the hole being

so disturbed that paraffin escaped from the tank, formed vapour and was ignited by the flame. The lamp was recovered from the manhole after the accident; the tank of the lamp was half out and the wick- holder was completely out of the lamp. This explanation of the accident was rated by the experts as a low order of probability. But as there was no other feasible explanation, it was accepted by the Lord Ordinary, and this House must take it as the established cause.

The Lord Ordinary has held that the presence of children in the shelter and in the manhole ought reasonably to have been anticipated by the Post Office employees. His ground for so holding was that the lighted lamps in the public street adjacent to a tented shelter in which there was an open manhole provided an allurement which would have been an attraction to children passing along the street.

I pause here to observe that the respondent submitted an argument before the Division and repeated in this House that, having regard to the evidence, the presence of children in Russell Road on that day, which was a Saturday, could not reasonably have been anticipated. The argument received only the support of the Lord President in the court below. It was founded on the fact that Russell Road is a quiet road and has no dwelling-house fronting it, the nearest house being four hundred yards away and the evidence of the Post Office employees that they were never bothered with children. This contention was rejected by the Lord Ordinary, who was in a better position than we are to judge of its validity. Having regard to the fact that this was a public street in the heart of the city there was no necessity, in my view, for the appellant to prove the likelihood of children being present. If the respondent had to establish the unlikelihood of the presence of children, his evidence fell far short of any such situation. It was entirely dependent on the experience of the Post Office employees during the preceding five days of the week. They had no previous experience of traffic at any other time. The Lord Ordinary, in my view, was well entitled to reach the conclusion which he did.

The next step in the Lord Ordinary's reasoning was that it was reasonable to anticipate that danger would be likely to result from the children's interference with the red lamps and their entrance to the shelter. He has further held that in these circumstances 'the normal dangers of such children falling into the manhole or being in some way injured by a lamp, particularly if it fell or broke, were such that a reasonable man would not have ignored them.' This view of the evidence was not, as I read the judgments, dissented from in the Inner House. Reference may be particularly made to Lord Guthrie's remarks, where he says: 'The Lord Ordinary had held that it should have been anticipated that a boy might in the circumstances fall into the manhole and sustain injuries by burning from the paraffin lamp.' It seems to have been accepted by both parties in the hearing before the Division that burning injuries might reasonably have been foreseen. But whether this be the position, there was ample evidence upon which the conclusion could be drawn that there was a reasonable probability of burning injuries if the children were allowed into the shelter with the lamp.

The Solicitor-General endeavoured to limit the extent of foreseeability in this connection by references to certain passages in the evidence regarding the safety of the red paraffin lamps. It might very well be that paraffin lamps by themselves, if left in the Open, are not potentially dangerous even to children. But different considerations apply when they are found in connection with a shelter tent and a manhole, all of which are allurements to the

inquisitive child. It is the combination of these factors which renders the situation one of potential danger.

In dismissing the appellant's claim the Lord Ordinary and the majority of the judges of the First Division reached the conclusion that the accident which happened was not reasonably foreseeable. In order to establish a coherent chain of causation it is not necessary that the precise details leading up to the accident should have been reasonably foreseeable: it is sufficient if the accident which occurred is of a type which should have been foreseeable by a reasonably careful person [***Miller* v. *South of Scotland Electricity Board***, Lord Keith of Avonholm; ***Harvey* v. *Singer Manufacturing Co. Ltd***., Lord Patrick] or as Lord Mackintosh expressed it in the ***Harvey*** case, the precise concatenation of circumstances need not be envisaged. Concentration has been placed in the courts below on the explosion which, it was said, could not have been foreseen because it was caused in a unique fashion by the paraffin forming into vapour and being ignited by the naked flame of the wick. But this, in my Opinion, is to concentrate on what is really a non-essential element in the dangerous situation created by the allurement. The test might better be put thus: Was the igniting of paraffin outside the lamp by the flame a foreseeable consequence of the breach of duty? In the circumstances, there was a combination of potentially dangerous circumstances against which the Post Office had to protect the appellant. If these formed an allurement to children it might have been foreseen that they would play with the lamp, that it might tip over, that it might be broken, and that when broken the paraffin might spill and be ignited by the flame. All these steps in the chain of causation seem to have been accepted by all the judges in the courts below as foreseeable. But because the explosion was the agent which caused the burning and was unforeseeable, therefore the accident, according to them, was not reasonably foreseeable. In my opinion, this reasoning is fallacious. An explosion is only one way in which burning can be caused. Burning can also be caused by the contact between liquid paraffin and a naked flame. In the one case paraffin vapour and in the other case liquid paraffin is ignited by fire. I cannot see that these are two different types of accident. They are both burning accidents and in both cases the injuries would be burning injuries. Upon this view the explosion was an immaterial event in the chain of causation. It was simply one way in which burning might be caused by the potentially dangerous paraffin lamp. I adopt, with respect, Lord Carmont's observation in the present case: 'The defender cannot, I think, escape liability by contending that he did not foresee all the possibilities of the manner in which allurements - the manhole and the lantern - would act upon the childish mind.'

The respondent relied upon the case of ***Muir* v. *Glasgow Corporation*** and particularly on certain observations by Lords Thankerton and Macmillan. There are, in my view, essential differences between the two cases. The tea urn was, in that case, not like the paraffin lamp in the present circumstance, a potentially dangerous object. Moreover, the precise way in which the tea came to be spilled was never established, and, as Lord Romer said: 'It being thus unknown what was the particular risk that materialised, it is impossible to decide whether it was or was not one that should have been within the reasonable contemplation of Mrs. Alexander or of some other agent or employee of the appellants, and it is, accordingly, also impossible to fix the appellants with liability for the damage that the respondents sustained.'

I have therefore reached the conclusion that the accident which occurred and which caused burning injuries to the appellant was one which ought reasonably to have been foreseen by the Post Office employees and that they were at fault in failing to provide a protection against the appellant entering the shelter and going down the manhole.

I would allow the appeal.

LORD PEARCE: My Lords, I agree with the opinion of my noble and learned friend, Lord Guest.

The dangerous allurement was left unguarded in a public highway in the heart of Edinburgh. It was for the defenders to show by evidence that, although this was a public street, the presence of children there was so little to be expected that a reasonable man might leave the allurement unguarded. But, in my opinion, their evidence fell short of that, and the Lord Ordinary rightly so decided.

The defenders are therefore liable for all the foreseeable consequences of their neglect. When an accident is of a different type and kind from anything that a defender could have foreseen he is not liable for it [see ***The Wagon Mound***]. But to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable [see ***Miller* v. *South of Scotland Electricity Board***; ***Harvey* v. *Singer Manufacturing Co. Ltd***].. In the case of an allurement to children it is particularly hard to foresee with precision the exact shape of the disaster that will arise. The allurement in this case was the combination of a red paraffin lamp, a ladder, a partially closed tent, and a cavernous hole within it, a setting well fitted to inspire some juvenile adventure that might end in calamity. The obvious risks were burning and conflagration and a fall. All these in fact occurred, but unexpectedly the mishandled lamp instead of causing an ordinary conflagration produced a violent explosion. Did the explosion create an accident and damage of a different type from the misadventure and damage that could be foreseen? In my judgment it did not. The accident was but a variant of the foreseeable. It was, to quote the words of Denning L.J. in ***Roe* v. *Minister of Health***, 'within the risk created by the negligence.' No unforeseeable, extraneous, initial occurrence fired the train. The children's entry into the tent with the ladder, the descent into the hole, the mishandling of the lamp, were all foreseeable. The greater part of the path to injury had thus been trodden, and the mishandled lamp was quite likely at that stage to spill and cause a conflagration. Instead, by some curious chance of combustion, it exploded and no conflagration occurred, it would seem, until after the explosion. There was thus an unexpected manifestation of the apprehended physical dangers. But it would be, I think, too narrow a view to hold that those who created the risk of fire are excused from the liability for the damage by fire because it came by way of explosive combustion. The resulting damage, though severe, was not greater than or different in kind from that which might have been produced had the lamp spilled and produced a more normal conflagration in the hole. I would therefore allow the appeal.

* * * * *

NO FAULT LIABILITY – STRICT AND ABSOLUTE LIABILITY

Rylands v. *Fletcher*

(1868) L.R. 3 H.L. 330

Near Ainsworth in Lancashire the defendants had a mill whose water supply they wanted to improve. They obtained permission from Lord Wilton to construct a reservoir on his land and retained reputable engineers to do it. Unknown to the defendants, the plaintiff, who had a mineral lease from Lord Wilton, had carried his workings to a point not far distant, though separated by the land of third parties. In the course of construction the engineers came across some disused mine shafts and did not seal them properly, with the result that when the completed reservoir was filled, water flowed down those shafts and into the plaintiff's coal-mine, causing damage later agreed at £ 937.

The arbitrator stated a special case for the Court of Exchequer, which found for the defendants (Bramwell B. dissenting) [(1865) 3 H. & C. 774]. The plaintiff took a writ of error to the Court of Exchequer Chamber, which gave him judgment. The defendants' appeal to the House of Lords was dismissed.

In the House of Lords

LORD CAIRNS L.C. – The reservoir of the defendants was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants, it passed on into the workings under the close of the plaintiff, and flooded his mine causing considerable damage, for which this action was brought.

The Court of Exchequer was of the opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have

complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land – and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Blackburn J. in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

My Lords in that opinion I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH – My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Blackburn J. in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In the Court of Exchequer Chamber [(1866) L.R. 1 Ex. 265]

BLACKBURN J. – The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escapes out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, *viz.*, whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to. We think that the true rule of law is [here follows the passage cited by Lord Cairns L.C., above].

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner

knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

No case has been found in which the question as to the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed, and sold as muriaric acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the noisome vapours to arise on his premises, and suffered them to come on the plaintiff's without stating there was any want of care or skill in the defendant, and that the case of ***Tenant* v. *Goldwin*** [(1704) 2 Ld. Raym. 1089; 92 E.R. 222] showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief. But it was further said by Martin B. that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: ***Hammack* v. *White*** [(1862) 11 C.B. (N.S.) 588; 142 E.R. 926]; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, ***Scott* v. *London Dock Company*** [(1865) 3 H. & C. 596; 159 E.R. 665]; and many other similar cases may be found. But we think these cases are distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass, can be explained on the same

principle, *viz.*, that the circumstances were such as to show that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case.

We are of opinion that the plaintiff is entitled to recover.

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M.C. Mehta v. *Union of India*

AIR 1987 SC 1086

Delhi Cloth Mills Ltd. is a public limited company having its registered office in Delhi, which runs an enterprise called Shriram Foods and Fertiliser Industries and this enterprise has several units engaged in the manufacture of caustic soda, chlorine, hydrochloric acid, stable bleaching powder, superphosphate, vanaspati, soap, sulphuric acid, alum anhydrous sodium sulphate, high test hypochlorite and active earth. These various units are all set up in a single complex situated in approximately 76 acres and they are surrounded by thickly populated colonies such as Punjabi Bagh, West Patel Nagar, Karampura, Ashok Vihar, Tri Nagar and Shastri Nagar.

The Court was concerned with the caustic chlorine plant in ***M.C. Mehta* v. *Union of India*** [(1986) 2 SCC 176]. This plant was commissioned in the year 1949 and it had a strength of about 263 employees including executives, supervisors, staff and workers. Until the Bhopal tragedy, no one, neither the management of Shriram Foods and Fertiliser Industries nor the government seemed to have bothered at all about the hazardous character of caustic chlorine plant of Shriram. The Bhopal disaster shook off the lethargy of everyone and triggered off a new wave of consciousness and every government became alerted to the necessity of examining whether industries employing hazardous technology and producing dangerous commodities were equipped with proper and adequate safety and pollution control devices and whether they posed any danger to the workmen and the community living around them. The Labour Ministry of the Government of India accordingly commissioned 'Technica', a firm of consultants, scientists and engineers of United Kingdom, to visit the caustic chlorine plant of Shriram and make a report in regard to the areas of concern and potential problems relating to that plant. Dr Slater visited the caustic chlorine plant on behalf of Technica in June-July 1985 and submitted a report to the Government of India summarising the initial impressions formed during his visit and subsequent dialogue with the management. This report was not an in depth engineering study but it set out the preliminary conclusions of Dr Slater in regard to the areas of concern and potential problems.

A question was raised in Parliament in March 1985 in regard to the possibility of major leakage of liquid chlorine from the caustic chlorine unit of Shriram and of danger to the lives of thousands of workers and others. The Minister of Chemicals and Fertilizers, in answer to this question, stated on the floor of the House that the Government of India was fully conscious of the problem of hazards from dangerous and toxic processes and assured the House that the necessary steps for securing observance of safety standards would be taken early in the interest of the workers and the general public. Pursuant to this assurance, the Delhi Administration constituted an Expert Committee consisting of Shri Manmohan Singh, Chief Manager, IPCL, Baroda, as Chairman and 3 other persons as members to go into the existence of safety and pollution control measures covering all aspects such as storage, manufacture and handling of chlorine in Shriram and to suggest measures necessary for strengthening safety and pollution control arrangements with a view to eliminate community risk. The Manmohan Singh Committee submitted its report to the government. This report was a detailed

report dealing exclusively with the caustic chlorine plant. The said Committee made various recommendations in this report in regard to safety and pollution control measures with a view to minimize hazard to the workmen and the public and obviously, the caustic chlorine plant cannot be allowed to be restarted unless these recommendations are strictly complied with by the management of Shriram.

On December 4, 1985 a major leakage of oleum gas took place from one of the units of Shriram and this leakage affected a large number of persons, both amongst the workmen and the public, and, according to the petitioner in the case, an advocate practising in the Tis Hazari Courts also died on account of inhalation of oleum gas. The leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted and it created a scare amongst the people residing in that area. Hardly had the people got out of the shock of this disaster when, within two days, another leakage, though this time a minor one, took place as a result of escape of oleum gas from the joints of a pipe. The immediate response of the Delhi Administration to these two leakages was the making of an order dated December 6, 1985 by the District Magistrate, Delhi under sub-section (1) of Section 133 of the Code of Criminal Procedure, directing and requiring Shriram within two days from the date of issue of the order to cease carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super-chlorine, phosphate, etc. at their establishment in Delhi and within 7 days to remove such chemicals and gases from the said place and not again to keep or store them at the same place or to appear on December 17, 1985 in the court of the District Magistrate, Delhi to show cause why the order should not be enforced.

Since there were conflicting opinions put forward before the Court in regard to the question whether the caustic chlorine plant should be allowed to be restarted without any real hazard or risk to the workmen and the public at large, the Court thought it desirable to appoint an independent team of experts to assist the Court in this task and accordingly constituted a Committee of Experts consisting of Dr Nilay Choudhary as Chairman and Dr Aghoramurty and Mr R.K. Garg as members (known as 'Nilay Choudhary Committee') to inspect the caustic chlorine plant and submit a report to the Court.

This Committee visited the caustic chlorine plant on December 28, 1985 and after considering the reports of Dr Slater, Manmohan Singh Committee and Agarwal Committee and hearing the parties, made a report to the court setting out 14 recommendations which in its opinion were required to be complied with by the management in order to minimise the hazards due to possible chlorine leak. Nilay Choudhary Committee pointed out that it was in agreement with the recommendations made in the report of the Manmohan Singh Committee which were exhaustive in nature and obviously the recommendations made by it in its report were supplementary recommendations in addition to those contained in Manmohan Singh Committee's report.

Thus, the Court had two major reports, one of Manmohan Singh Committee and the other of Nilay Choudhary Committee, setting out the recommendations which must be complied with by the management of Shriram in order to minimise the hazard or risk which the caustic chlorine plant poses to the workmen and the public. The question was whether these recommendations have been complied with by the management of

Shriram, for it is only if these recommendations have been carried out that the Court could possibly consider whether the caustic chlorine plant should be allowed to be restarted.

There was also another report made by the Expert Committee appointed by the Lt. Governor of Delhi following the leakage of oleum gas on December 4, 1985. Since the leakage of oleum gas caused serious public concern, the Lt. Governor of Delhi constituted an Expert Committee consisting of Shri N.K. Seturaman as Chairman, and four other experts as members to go into the causes of spillage of oleum and its after-effects, to examine if inspection and safety procedures prescribed under the existing laws and rules were followed by Shriram, to fix responsibility for the leakage of oleum gas, to review the emergency plans and measures for containment of risk in the event of occurrence of such situations and for elimination of pollution, to examine any other aspects that may have a bearing on safety, pollution control and hazard to the public from the factory of Shriram, to make specific recommendations with a view to achieving effective pollution control and safety measures in the factory and to advise whether the factory should be shifted away from its present location in densely populated area. This Committee (the 'Seturaman Committee') submitted a report on January 3, 1986. This report dealt primarily with the safety procedures in the sulphuric acid plant from which there was oleum gas leakage. It contained some observations on whether the caustic chlorine plant posed any hazard to the community and what steps or measures are necessary to be taken to minimise the risk to the people living in the vicinity.

All the Expert Committees were unanimous in their view that by adopting proper and adequate safety measures the element of risk to the workmen and the public can only be minimised but it cannot be totally eliminated. The immediate question which had to be considered was whether the caustic chlorine plant of Shriram should be allowed to be reopened and if so, subject to what conditions, keeping in mind constantly that the operation of the caustic chlorine plant does involve a certain amount of hazard or risk to the community.

It was an admitted fact that the caustic chlorine plant was set up by Shriram more than 35 years ago and, owing to the growth and development of the city, there was a sizable population living in the vicinity of the plant and there was therefore hazard or risk to large numbers of people, if, on account of any accident, whether occasioned by negligence or not, chlorine gas escaped. The various Expert Committees appointed by the government as well as by the Court clearly emphasised the danger to the community living in the vicinity of the caustic chlorine plant if there was exposure to chlorine gas through an accidental release which might take place on account of negligence or other unforeseen events. It was evident from the reports of the Expert Committees that there was considerable negligence on the part of the management of Shriram in the maintenance and operation of the caustic chlorine plant and there were also defects and drawbacks in its structure and design. Dr Slater report, which was the first report in the series, clearly pointed out that the safety policies, practices and awareness on the part of the management needed to be addressed urgently and added *inter alia* that the effectiveness and availability of the design and emergency arrangements was

questionable and in the real emergency involving a major spill, the measures would probably prove ineffective in limiting serious consequences inside and outside the plant.

BHAGWATI, C. J. - This writ petition under Article 32 of the Constitution has come before us on a reference made by a Bench of three Judges. The reference was made because certain questions of seminal importance and high constitutional significance were raised in the course of arguments when the writ petition was originally heard …. The Bench of three Judges permitted Shriram Foods and Fertiliser Industries (hereinafter referred to as Shriram) to restart its power plant as also plants for manufacture of caustic soda chlorine including its by-products and recovery plants like soap, glycerine and technical hard oil, subject to the conditions set out in the judgment. That would have ordinarily put an end to the main controversy raised in the writ petition which was filed in order to obtain a direction for closure of the various units of Shriram on the ground that they were hazardous to the community and the only point in dispute which would have survived would have been whether the units of Shriram should be directed to be removed from the place where they are presently situate and relocated in another place where there would not be much human habitation so that there would not be any real danger to the health and safety of the people. But while the writ petition was pending there was escape of oleum gas from one of the units of Shriram on December 4 and 6, 1985 and applications were filed by the Delhi Legal Aid and Advice Board and the Delhi Bar Association for award of compensation to the persons who had suffered harm on account of escape of oleum gas. These applications for compensation raised a number of issues of great constitutional importance and the Bench of three Judges therefore formulated these issues and asked the petitioner and those supporting him, as also Shriram, to file their respective written submissions so that the court could take up the hearing of these applications for compensation. When these applications for compensation came up for hearing it was felt that since the issues raised involved substantial questions of law relating to the interpretation of Articles 21 and 32 of the Constitution, the case should be referred to a larger Bench of five Judges and this is how the case has now come before us.

28. Shriram is required to obtain a licence under the Factories Act and is subject to the directions and orders of the authorities under the Act. It is also required to obtain a licence for its manufacturing activities from the Municipal authorities under the Delhi Municipal Act, 1957. It is subject to extensive environment regulation under the Water (Prevention and Control of Pollution) Act, 1974 and as the factory is situated in an air pollution control area, it is also subject to the regulation of the Air (Prevention and Control of Pollution) Act, 1981. It is true that control is not exercised by the government in relation to the internal management policies of the company. However, the control is exercised on all such activities of Shriram which can jeopardize public interest. This functional control is of special significance as it is the potentiality of the fertilizer industry to adversely affect the health and safety of the community and its being impregnated with public interest which perhaps dictated the policy decision of the government to ultimately operate this industry exclusively and invited functional control. Along with this extensive functional control, we find that Shriram also receives sizeable assistance in the shape of loans and overdrafts running into several crores of rupees from the government through various agencies. Moreover, Shriram is

engaged in the manufacture of caustic soda, chlorine etc. Its various units are set up in a single complex surrounded by thickly populated colonies. Chlorine gas is admittedly dangerous to life and health. If the gas escapes either from the storage tank or from the filled cylinders or from any other point in the course of production, the health and well-being of the people living in the vicinity can be seriously affected. Thus Shriram is engaged in an activity which has the potential to invade the right to life of large sections of people. The question is whether these factors are cumulatively sufficient to bring Shriram within the ambit of Article 12. *Prima facie* it is arguable that when the State's power as economic agent, economic entrepreneur and allocator of economic benefits is subject to the limitations of fundamental rights, [*vide* ***Erusian Equipment and Chemicals Ltd***. **v.** ***State of West Bengal*** [AIR 1975 SC 266], ***Rashbehari Panda* v.** ***State*** [AIR 1969 SC 1081], ***Ramanna Shetty* v.** ***International Airport Authority*** [AIR 1979 SC 1628], and ***Kasturilal Reddy* v.** ***State of Jammu & Kashmir*** [AIR 1980 SC 1992] why should a private corporation under the functional control of the State engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest and which the State ultimately proposes to exclusively run under its industrial policy, not be subject to the same limitations. But we do not propose to decide this question and make any definite pronouncement upon it for reasons which we shall point out later in the course of this judgment.

29. We were, during the course of arguments, addressed at great length by counsel on both sides on the American doctrine of State action. The learned counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the courts in order to thwart racial discrimination by private parties devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. This historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianized and harmoniously blended with our constitutional jurisprudence.

31. We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in ***Rylands* v.** ***Fletcher*** [(1861-73) All ER 1] apply or is there any other principle on which the liability can be determined. The rule in ***Rylands* v.** ***Fletcher*** was evolved in the year 1866 and it provides that a person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do

harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority [*vide* **Halsbury's *Laws of England,*** Vol. 45, para 1305]. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry as part of the developmental programme, this rule evolved in the 19th century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in the context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence and we cannot countenance an argument that merely because the law in England does not recognise the rule of strict and absolute liability in cases of hazardous or inherently dangerous activities or the rule laid down in ***Rylands* v. *Fletcher*** *as* developed in England recognises certain limitations and exceptions, we in India must hold back our hands and not venture to evolve a new principle of liability since English courts have not done so. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous

activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on the condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resources to discover and guard against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-a-vis* the tortious principle of strict liability under the rule in ***Rylands* v. *Fletcher***.

32. We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

33. Since we are not deciding the question as to whether Shriram is an authority within the meaning of Article 12 so as to be subjected to the discipline of the fundamental right under Article 21, we do not think it would be justified in setting up a special machinery for investigation of the claims for compensation made by those who allege that they have been the victims of oleum gas escape. But we would direct that Delhi Legal Aid and Advice claim to have suffered on account of oleum gas and to file actions on their behalf in the appropriate Court for claiming compensation against Shriram. Such actions claiming compensation may be filed by the Delhi Legal Aid and Advice Board with two months from today and the Delhi Administration is directed to provide the necessary funds to the Delhi Legal Aid and Advice Board for the purpose of filing and prosecuting such actions. The High Court will nominate one or more Judges as may be necessary for the purpose of trying such actions so that they may be expeditiously disposed of. So far as the issue of relocation and other issues are concerned the writ petition will come up for the hearing on 3rd February, 1987.

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M.P. Electricity Board v. *Shail Kumar*

AIR 2002 SC 551

THOMAS, J. – 3. One Jogendra Singh, a workman in a factory, aged 37, was riding on a bicycle on the night of 23.8.1997 while returning from his factory, without any premonition of the impending disaster awaiting him en-route. The disaster was lying on the road in the form of a live electric wire. There was rain and hence the road was partially inundated with water. The cyclist did not notice the live wire on the road and hence he rode the vehicle over the wire which twitched and snatched him and he was instantaneously electrocuted. He fell down and died within minutes.

4. When the action was brought by his widow and minor son, nobody disputed the fact that Jogendra Singh died at the place and time mentioned by the claimants. Nor has it been disputed that he was electrocuted by the live wire lying on the road. The main contention advanced by the appellant Board is that one Hari Gaikwad (third respondent) had taken a wire from the main supply line in order to siphon the energy for his own use and the said act of pilferage was done clandestinely without even the notice of the Board, and that the line got unfastened from the hook and it fell on the road over which the cycle ridden by the deceased slided resulting in the instantaneous electrocution.

7. It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human being, who gets unknowingly trapped into it, the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief by siphoning such energy of his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps.

8. Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertaking. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of negligence or fault in this way i.e. the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where

the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions.

9. The doctrine of strict liability has its origin in English Common Law when it was propounded in the celebrated case of ***Rylands* v. *Fletcher*** [1868 Law Reports (3) HL 330]. Blackburn J., the author of the said rule had observed thus in the said decision: "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does so he is prima facie answerable for all the damage which is the natural consequence of its escape."

10. There are seven exceptions formulated by means of case law to the doctrine of strict liability. It is unnecessary to enumerate those exceptions barring one which is, "Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule does not apply."

12. In ***M.C. Mehta* v. *Union of India*** [AIR 1987 SC 1086] this Court has gone even beyond the rule of strict liability by holding that "where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused on any one on account of the accident in the operation of such activity, the enterprise is strictly and absolutely liable to compensate those who are affected by the accident, such liability is not subject to any of the exceptions to the principle of strict liability under the rule in ***Rylands* v. *Flectcher***.

13. In the present case, the Board made an endeavour to rely on the exception to the rule of strict liability (***Rylands* v. *Fletcher***) being "an act of stranger". The said exception is not available to the Board as the act attributed to the third respondent should reasonably have been anticipated or at any rate its consequences should been prevented by the appellant-Board. In ***North-Western Utilities, Ltd.* v. *London Guarantee and Accident Company. Ltd.*** [1936 AC 108], the Privy Council repelled the contention of the defendant based on the aforecited exception. In that case a hotel belonging to the plaintiff was destroyed in a fire caused by the escape and ignition of natural gas. The gas had percolated into the hotel basement from a fractured welded joint in an intermediate pressure main situated below the street level and belonging to the defendants which was a public utility company. The fracture was caused during the construction involving underground work by a third party. The Privy Council held that the risk involved in the operation undertaken by the defendant was so great that a high degree of care was expected of him since the defendant ought to have appreciated the possibility of such a leakage.

16. In the light of the above discussion we do not think that the Board has any reasonable prospect of succeeding in this appeal. Hence even without issuing notice to the respondents we dismiss this appeal.

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VICARIOUS LIABILITY

State of Rajasthan v. *Vidhyawati*

AIR 1962 SC 933

SINHA, C. J. - This appeal, on a certificate granted by the High Court of Rajasthan under Article 133(l)(c) of the Constitution, raises a question of considerable importance, namely, the extent of the vicarious liability of Government for the tortious acts of its employees, acting in the course of their employment as such. The trial court dismissed the claim for compensation as against the State of Rajasthan, which was the second defendant in the suit for damages for tortious act of the first defendant, Lokumal, who is not a party to this appeal. On appeal by the plaintiffs against the judgment and decree of the trial court, the High Court of Rajasthan passed a decree in favour of the plaintiffs allowing compensation of Rs 15,000 against the State of Rajasthan also, which is the appellant in this Court.

2. The facts of this case may shortly be stated as follows: The first defenant, Lokumal, was a temporary employee of the appellant State, as a motor driver on probation. In February 1952, he was employed as the driver of a government jeep car, registered as No. RUM 49, under the Collector of Udaipur. The car had been sent to a workshop for necessary repairs. After repairs had been carried out, the first defendant, while driving the car back along a public road, in the evening of February 11, 1952, knocked down one Jagdishlal, who was walking on the footpath by the side of the public road in Udaipur city, causing him multiple injuries, including fractures of the skull and backbone, resulting in his death three days later, in the hospital where he had been removed for treatment. The plaintiffs, who are Jagdishlal's widow and a minor daughter, aged three years, through her mother as next friend, sued the said Lokumal and the State of Rajasthan for damages for the tort aforesaid. They claimed the compensation of Rs 25,000 from both the defendants. The first defendant remained ex parte. The suit was contested only by the second defendant on a number of issues. But in view of the fact that both the Courts below have agreed in finding that the first defendant was rash and negligent in driving the jeep car resulting in the accident and the ultimate death of Jagdishlal, it is no more necessary to advert to all the questions raised by way of answer to the suit, except the one on which the appeal has been pressed before us. The second defendant … contested the suit chiefly on the ground that it was not liable for the tortious act of its employee.

3. In support of the appeal, counsel for the appellant raised substantially two questions, namely, (*1*) that under Article 300 of the Constitution, the State of Rajasthan was not liable, as the corresponding Indian State would not have been liable if the case had arisen before the Constitution came into force; and (*2*) that the jeep car, the rash and negligent driving of which led to the claim in the suit, was being maintained "in exercise of sovereign powers" and not as part of any commercial activity of the State. The second question may shortly be disposed of before we address ourselves to the first question, which is the more serious of the two raised before us. Can it be said that when the jeep car was being driven back from the repair shop to the Collector's place, when the accident took place, it was doing anything in connection with the exercise of sovereign powers of the State? It has to be remembered that the injuries

resulting in the death of Jagdishlal were not caused while the jeep car was being used in connection with the sovereign powers of the State. On the findings of the courts below, it is clear that the tortious act complained of had been committed by the first defendant in circumstances wholly dissociated from the exercise of sovereign powers. The trial court took the view that as the car was being maintained for the use of the Collector, in the discharge of his official duties, that circumstance alone was sufficient to take the case out of the category of cases where vicarious liability of the employer could arise, even though the car was not being used at the time of the occurrence for any purposes of the State.

On appeal, the High Court disagreed with the trial court on the legal issue. Its finding on this issue is in these words:

> In our opinion, the State is in no better position insofar as it supplies cars and keeps drivers for its civil service. It may be clarified that we are not here considering the case of drivers employed by the State for driving vehicles which are utilised for military or public service.

4. In the result, the High Court granted a decree to the plaintiffs as against the second defendant also for the sum of Rs 15,000. In our opinion, the High Court has taken the correct view of the legal position, in view of the circumstances in which the occurrence took place.

5. The more important question raised on this appeal rests upon the true construction and effect of Article 300(1) of the Constitution, which is in these terms:

> 300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may 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.

It will be noticed that this article consists of three parts, namely, (*1*) the first part provides for the form and the cause-title in a suit and says that a State (omitting any reference to the Government of India) may sue or be sued by the name of the State, and (*2*) that a State may sue or be sued in relation to its affairs in like cases as the corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted; and (*3*) that the second part is subject to any provisions which may be made by an Act of the legislature of the State concerned, in due exercise of its legislative functions, in pursuance of powers conferred by the Constitution. The learned Advocate-General for the State of Rajasthan argued that the second part of the article has reference to the extent of the liability of a State to be sued, and that, therefore, we have to determine the question of the liability of the State in this case in terms of the article. On the other hand, it has been argued on behalf of the plaintiffs-respondents that … Article 300 is confined to only the question in whose name suits and proceedings may be commenced, in which the Government of a State may figure as plaintiff or as defendant, and that the article is not concerned with defining the extent of liability of a State. In other words, it was contended that Article 300 was irrelevant for determining the vicarious liability of the defendant State in this case, and that there was nothing in this article definitive of that liability. In our opinion, it is not correct to argue that

the provisions of Article 300 are wholly out of the way for determining the liability of the appellant State. It is also true that the first part of Article 300, as already indicated, deals only with the nomenclature of the parties to a suit or proceeding, but the second part defines the extent of liability by the use of the words "in the like cases" and refers back for the determination of such cases to the legal position before the enactment of the Constitution. That legal position is indicated in the Government of India Act, Section 176(1) of which is in these words:

> The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State-in-council might have sued or been sued if this Act had not been passed.

6. It will be noticed that the provisions of Article 300(1) and Section 176(1) are mutatis mutandis substantially the same. Section 176(1) refers back to the legal position as it obtained before the enactment of that Act, that is to say, as it emerged on the enactment of Section 32 of the Government of India Act, 1915. Sub-sections (1) and (2), which only are relevant for our present purposes, are in these words:

> (1) The Secretary of State-in-Council may sue and be sued by the name of the Secretary of State-in-Council, as a body corporate.
> (2) Every person shall have the same remedies against the Secretary of State-in-Council as he might have had against East India Company if the Government of India Act, 1858, and this Act had not been passed.

7. As compared to the terms of Article 300, it will be noticed that Part (*1*) of that article corresponds to sub-section (1) of Section 32 above, Part (*2*) roughly, though not exactly, corresponds to sub-section (2), and Part (*3*) of the article, as indicated above, does not find a place in Section 32. Sub-section (2) of Section 32 has specific reference to "remedies", and has provided that the remedies against the Secretary of State-in-Council shall be the same as against East India Company, if the Government of India Act of 1858, and the Government of India Act, 1915, had not been passed. We are, thus, referred further back to Act 21 & 22 Victoria Chapter CVI, entitled "An Act for the better Government of India". As this Act transferred the Government of India to Her Majesty, it had to make provisions for succession of power and authority, rights and liabilities. Section 65 of the Act of 1858 is in these terms:

> The Secretary of State-in-Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State-in-Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State-in-Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company.

It will thus be seen that by the chain of enactments, beginning with the Act of 1858 and ending with the Constitution, the words "shall and may have and take the same suits, remedies and proceedings" in Section 65 above, by incorporation, apply to the Government of a State to the same extent, as they applied to East India Company.

8. The question naturally arises: What was the extent of liability of East India Company for the tortious acts of its servants committed in course of their employment as such? The exact question now before us arose in a case in Calcutta, before the Supreme Court of Calcutta, in the case of ***Peninsular and Oriental Steam Navigation Company*** **v.** ***Secretary of State for India***, [Decided in 1861 and reported in the Newspaper Englishman of October 23, 1861, and republished in Appendix 'A' to the Bombay High Court Reports, Vol. V, of the year 1868-69.] … It was a case decided by a Full Bench, consisting of Peacock, C.J., and Jackson and Wells, JJ., of the Supreme Court of Calcutta. The case, as stated to the Supreme Court, was to the following effect: A servant of the plaintiffs was proceeding on a highway in Calcutta driving a carriage drawn by a pair of horses belonging to the plaintiffs. The accident, which took place on the highway, was caused by the servants of the Government, employed in the government dockyard at Kidderpore, acting in a negligent and rash manner. As a result of the negligent manner in which the government employees in the dockyard were carrying a piece of iron funnel, one of the horses drawing the plaintiffs' carriage was injured. The plaintiff Company claimed damages against the Secretary of State for India for the damage thus earned. The learned Small Cause Court Judge came to the finding that the defendant's servants were wrongdoers in carrying the iron funnel in the centre of the road, and were, thus, liable for the consequences of what occurred. But he was in doubt as to the liability of the Secretary of State for the tortious acts of the government servants concerned in the occurrence in which the injury was caused to the plaintiffs' horse. So the question, which was referred to the court for its answer, was whether the Secretary of State was liable for the damage occasioned by the negligence of the government servants, assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable.

9. Before the Supreme Court of Calcutta, it was contended by the learned Advocate-General, on behalf of the defendant, that the State cannot be liable for damages occasioned by the negligence of its officers or of persons in its employment. It was pointed out, "it is true that it is an attribute of sovereignty that a State cannot be sued in its own courts without its consent". "In England, the Crown," it was further pointed out, "cannot be made liable for damages for the tortious acts of its servants either by petition of right or in any other manner, as laid down by Lord Lyndhurst in the case of ***Viscount Canterbury*** **v.** ***Attorney-General*** [1 Phillips 327]" That decision was based upon the principle that the King cannot be guilty of personal negligence or misconduct, and consequently cannot be responsible for the negligence or misconduct of his servants. … East India Company itself could not have claimed any such immunity as was available to the sovereign. This view was based on the opinion expressed by Grey, C.J., in the case of ***Bank of Bengal*** **v. East** ***India Company***, [Bignell Rep p. 120] that "the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns".

10. This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the

Constitution we have established a welfare state, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them. Insofar as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. In this respect, the present set up of the Government is analogous to the position of East India Company, which functioned not only as a Government with sovereign powers, as a delegate of the British Government, but also carried on trade and commerce, as also public transport like railways, post and telegraphs and road transport business. It was in the context of those facts that the Supreme Court of Calcutta repelled the argument advanced on behalf of the Secretary of State in these terms:

> We are further of opinion that East India Company were not sovereigns, and, therefore, could not claim all the exemption of a sovereign; and that they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons; but they were a Company to whom sovereign powers were delegated, and who traded on their own account and for their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government, and partly on their own account, which without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them: ***Moodaley* v. *East India Company*** and ***Same* v. *Morton***[1 Bro.C.C. 469]

12. … The Court, after an elaborate consideration of all possible arguments in favour of the Secretary of State, came to the following conclusion, which is rightly summed up in the headnote in these words:

> The Secretary of State-in-Council of India is liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as. would render an ordinary employer liable.

13. But it was further argued that Article 300 speaks of "like cases" with reference to the liability of the corresponding Indian States. In this connection, it was further argued that the plaintiff, in order to succeed in his action against the State of Rajasthan, must prove that the State of Udaipur, which would be deemed to be the corresponding State, would have been liable in similar circumstances before the Constitution was enacted. The State of Rajasthan has not shown that the Rajasthan Union, its predecessor, was not liable by any rule of positive enactment or by common law. It is clear from what has been said above that the Dominion of India, or any constituent Province of the Dominion, would have been liable in view of the provisions aforesaid of the Government of India Act, 1858. We have not been shown any provision of law, statutory or otherwise, which would exonerate the Rajasthan Union from vicarious liability for the acts of its servant, analogous to the common law of England. It was impossible, by reason of the maxim "The King can do no wrong," to sue the Crown for the

tortious act of its servant. But it was realised in the United Kingdom that that rule had become outmoded in the context of modern developments in state craft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up. Section 2(1) of the Act provides that the Crown shall be subject to all those liabilities, in tort, to which it would be subject if it were a private person of full age and capacity, in respect of torts committed by its servants or agents, subject to the other provisions of the Act. As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also. It has not been claimed before us that the common law of the United Kingdom before it was altered by the said Act with effect from 1948, applied to the Rajasthan Union in 1949, or even earlier.

15. Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India. 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 in public interest, that the State should not be held liable vicariously for the tortious act of its servant. This Court has deliberately departed from the common law rule that a civil servant cannot maintain a suit against the Crown. In the case of ***State of Bihar*** **v.** ***Abdul Majid*** [(1954) SCR 786] this Court has recognised the right of a government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause of action in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the various liability of the State. Article 300 of the Constitution itself has saved the right of Parliament or the legislature of a State to enact such law as it may think fit and proper in this behalf. But so long as the legislature has not expressed its intention to the contrary, it must be held that the law is what it has been ever since the days of East India Company.

16. In view of these considerations, it must be held that there is no merit in this appeal, and it is accordingly dismissed with costs.

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Kasturi Lal Ralia Ram Jain v. *State of U.P.*

AIR 1965 SC 1039

GAJENDRAGADKAR, C.J. - The short question of law which arises in this appeal is whether the respondent, the State of Uttar Pradesh, is liable to compensate the appellant, M/s Kasturilal Ralia Ram Jain for the loss caused to it by the negligence of the police officers employed by the respondent. This question arises in this way. The appellant is a firm which deals in bullion and other goods at Amritsar. It was duly registered under the Indian Partnership Act. Ralia Ram was one of its partners. On 20th September, 1947 Ralia Ram arrived at Meerut by the Frontier Mail about midnight. His object in going to Meerut was to sell gold, silver and other goods in the Meerut market. Whilst he was passing through the Chaupla Bazar with this object, he was taken into custody by three police constables. His belongings were then searched and he was taken to Kotwali police station. He was detained in the police lock-up there and his belongings which consisted of gold, weighing 103 tolas 6 mashas and 1 ratti, and silver weighing 2 maunds and 6½ seers, were seized from him and kept in police custody. On 21st September, 1947 he was released on bail, and some time thereafter the silver seized from him was returned to him. Ralia Ram then made repeated demands for the return of the gold which had been seized from him, and since he could not recover the gold from the police officers, he filed the present suit against the respondent in which he claimed a decree that the gold seized from him should either be returned to him, or, in the alternative, its value should be ordered to be paid to him. The alternative claim thus made by him consisted of Rs 11,075-10-0 as the price of the gold and Rs 355 as interest by way of damages as well as future interest.

2. This claim was resisted by the respondent on several grounds. It was urged that the respondent was not liable to return either the gold, or to pay its money value. The respondent alleged that the gold in question had been taken into custody by one Mohammad Amir, who was then the Head Constable, and it had been kept in the police Malkhana under his charge. Mohd. Amir, however, misappropriated the gold and fled away to Pakistan on 17th October, 1947. He had also misappropriated some other cash and articles deposited in the Malkhana before he left India. The respondent further alleged that a case under section 409 of the Indian Penal Code as well as section 29 of the Police Act had been registered against Mohd. Amir, but nothing effective could be done in respect of the said case because in spite of the best efforts made by the police department, Mohd. Amir could not be apprehended. Alternatively, it was pleaded by the respondent that this was not a case of negligence of the police officers, and that even if negligence was held proved against the said police officers, the respondent State could not be said to be liable for the loss resulting from such negligence.

3. On these pleadings, two substantial questions arose between the parties; one was whether the police officers in question were guilty of negligence in the matter of taking care of the gold which had been seized from Ralia Ram, and the second was whether the respondent was liable to compensate the appellant for the loss caused to it by the negligence of the public servants employed by the respondent. The trial court found in favour of the appellant on both these issues, and since the gold in question could not be ordered to be returned to the appellant, a decree was passed in its favour for Rs 11,430-10-0.

4. The respondent challenged the correctness of this decree by an appeal before the Allahabad High Court and it was urged on its behalf that the trial court was in error in regard to both the findings recorded by it in favour of the appellant. These pleas have been upheld by the High Court. It has found that no negligence had been established against the police officers in question and that even if it was assumed that the police officers were negligent and their negligence led to the loss of gold, that would not justify the appellant's claim for a money decree against the respondent. The appellant then moved for and obtained a certificate from the said High Court and it is with the said certificate that it has come to this Court by an appeal. On behalf of the appellant, Mr M.K. Sastri has urged that the High Court was in error in both the findings recorded by it in favour of the respondent. The first finding is one of fact and the second is one of law.

5. In dealing with the question of negligence, it is necessary to refer to the evidence adduced in this case. The material facts leading to the seizure of gold are not in dispute. The only question which calls for our decision on this part of the case is whether the loss of gold can be legitimately attributed to the negligence of the police officers in charge of the police station where the gold and silver had been kept in custody.

8. It is necessary to refer to some of the relevant provisions in regard to the custody of the goods seized in the course of police investigation. Section 54(1)(*iv*) of the Code of Criminal Procedure provides that any police officer may, without an order from a Magistrate and without a warrant, arrest any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing. It is under this provision that Ralia Ram was arrested at midnight. It was apprehended by the police officers that the gold and silver articles which he was carrying with him might be stolen property, and so, his arrest can be said to be justified under section 54(l)(*iv*). Section 550 confers powers on police officers to seize property suspected to be stolen. It provides, *inter alia*, that any police officer may seize property which may be suspected to have been stolen; and so, gold and silver in the possession of Ralia Ram were seized in exercise of the powers conferred on the police officers under section 550 of the Code. After Ralia Ram was arrested and before his articles were seized, he was searched, and such a search is justified by the provisions of Section 51 of the Code. Having thus arrested Ralia Ram and searched his person and seized gold and silver articles from him under the respective provisions of the code, the police officers had to deal with the question of the safe custody of these goods. Section 523 provides for the procedure in that behalf. It lays down, inter alia, that the seizure by any police officer of property taken under section 51 shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property. These are the relevant provisions of the Code in respect of property seized from a person who has been arrested on suspicion that he was carrying stolen property.

9. That takes us to the U.P. Police Regulations. Chapter XIV of these Regulations deals with the custody and disposal of property. Regulation 165 provides a detailed procedure for dealing with the disposal of movable property of which the police takes possession. It is not

necessary to refer to these provisions; it would be enough to state that these provisions indicate that when property is seized by the police officers, meticulous care is required to be taken for making a proper list of the property seized, describing it, weighing it, and taking all reasonable steps to ensure its safety. Clause (5) of Regulation 165 provides that when the property consists of gold, silver, jewellery or other valuables, it must be sent in a sealed packet after being weighed, and its weight must be noted in the general diary and on the list which accompanies the packet. It requires that a set of weights and scales should be kept at each police station. Regulation 166 is important for our purpose. It reads thus:

> Unless the Magistrate otherwise directs, property of every description, except cash exceeding Rs 100 and property of equal value and property pertaining to cases of importance, which will be kept by the Prosecuting Inspector in a separate box under lock and key in the treasury, will remain in the custody of the malkhana moharrir under the general control and responsibility of the Prosecuting inspector until it has been finally disposed of.

The wording of the Regulation is somewhat complex and confusing, but its purpose and meaning are clear. In substance, it provides that property of every description will remain in the custody of the malkhana moharrir under the general control and responsibility of the Prosecuting Inspector until it has been finally disposed of. This provision is subject to the instructions to the contrary which the Magistrate may issue. In other words, unless the Magistrate directs otherwise, the normal rule is that the property should remain in the Malkhana. But this rule does not apply to cash exceeding Rs. 100 and property of equal value and property pertaining to cases of importance. Property falling under this category has to be kept by the Prosecuting Inspector in a separate box under lock and key in the treasury. If the Magistrate issues a direction that property not falling under this category should also be kept in the treasury, that direction has to be followed and the property in such a case cannot be kept in the custody of the malkhana moharrir. It is thus clear that gold and silver which had been seized from Ralia Ram had to be kept in a separate box under lock and key in the Treasury; and that admittedly, was not done in the present case.

10. Thus considered, there can be no escape from the conclusion that the police officers were negligent in dealing with Ralia Ram's property after it was seized from him. Not only was the property not kept in safe custody in the treasury, but the manner in which it was dealt with at the Malkhana shows gross negligence on the part of the police officers. A list of articles seized does not appear to have been made and there is no evidence that they were weighed either. It is true that the respondent's case is that these goods were misappropriated by Head Constable Mohd. Amir; but that would not assist the respondent in contending that the manner in which the seized property was dealt with at the police station did not show gross negligence. Therefore, we are satisfied that the trial court was right in coming to the conclusion that the loss suffered by the appellant by the fact that the gold seized from Ralia Ram has not been returned to it, is based on the negligence of the police officers employed by the respondent; and that raises the question of law which we have set out at the commencement of our judgment.

11. Mr M.S.K. Sastri for the appellant has argued that once he is able to establish negligence of the police officers, there should be no difficulty in our decreeing the appellant's

claim against the respondent, because he urges that in passing a decree against the respondent in the present case, we would merely be extending the principle recognised by this Court in ***State of Rajasthan* v. *Mst. Vidhyawati*** [(1962) Supp 2 SCR 989]. In that case, Respondent 1's husband and father of minor Respondent 2 had been knocked down by a Government jeep car which was rashly and negligently driven by an employee of the State of Rajasthan. The said car was, at the relevant time, being taken from the repair shop to the Collector's residence and was meant for the Collector's use. A claim was then made by the respondents for damages against the State of Rajasthan and the said claim was allowed by this Court. In upholding the decision of the High Court which had granted the claim, this Court observed that the liability of the State for damages in respect of a tortious act committed by its servant within the scope of his employment and functioning as such was the same as that of any other employer. In support of this conclusion, this Court observed that the immunity of the Crown in the United Kingdom on which basically the State of Rajasthan resisted the respondents' claim, was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. Such a notion, it was said, was inconsistent with the Republican form of Government in our country, particularly because in pursuit of their welfare and socialistic objectives, States in India undertook various industrial and other activities and had to employ a large army of servants. That is why it was observed that there would be no justification, in principle, or in public interest, why the State should not be held liable vicariously for the tortious acts of its servants. It is on these observations that Mr M.K. Sastri relies and contends that the said observations as well as the decision itself can be easily extended and applied to the facts in the present case.

12. It must be conceded that there are certain observations made in the case of ***State of Rajasthan* v. *Mst. Vidhyawati,*** which support Mr Sastri's argument and make it prima facie attractive. But, as we shall presently point out, the facts in the case of the *State of Rajasthan* falls in a category of claims which is distinct and separate from the category in which the facts in the present case fall; and that makes it necessary to examine what the true legal position is in regard to a claim for damages against the respondent for loss caused to a citizen by the tortious acts of the respondent's servants.

13. This question essentially falls to be considered under Article 300(1) of the Constitution. It would be noticed that this article consists of three parts. The first part deals with the question about the form and the cause-title for a suit intended to be filed by or against the Government of India, or the Government of a State. The second part provides, inter alia, that a State may sue or be sued in relation to its affairs in cases like those in which a corresponding Province might have sued or been sued if the Constitution had not been enacted. In other words, when a question arises as to whether a suit can be filed against the Government of a State, the enquiry has to be : could such a suit have been filed against a corresponding Province if the Constitution had not been passed? The third part of the article provides that it would be competent to the Parliament or the Legislature of a State to make appropriate provisions in regard to the topic covered by Article 300(1). Since no such law has been passed by the respondent in the present case, the question as to whether the respondent is liable to be sued for damages at the instance of the appellant, has to be determined by

reference to another question and that is, whether such a suit would have been competent against the corresponding Province.

14. This last enquiry inevitably takes us to the corresponding preceding provisions in the respective Constitution Acts of India; they are Section 65 of the Government of India Act, 1858, Section 32 of the Government of India Act, 1915 and Section 176 of the Government of India Act, 1935. It is unnecessary to trace the pedigree of this provision beyond Section 65 of the Act of 1858, because the relevant decisions bearing on this point to which we will presently refer, are ultimately found to be based on the effect of the provisions contained in the said section. The first decision which is treated as a leading authority on this point was pronounced by the Supreme Court at Calcutta in 1861 in the case of the ***Peninsular and Oriental Steam Navigation Company*** **v.** ***Secretary of State for India*** [5 Bom HCR Appendix A. p.1]. It is a remarkable tribute to the judgment pronounced by Chief Justice Peacock in that case that eversince, the principles enunciated in the judgment have been consistently followed by all judicial decisions in India, and except on one occasion, no dissent has been expressed in respect of them. It seems somewhat ironical that the judgment of this importance should not have been reported in due course in Calcutta, but found a place in the Law Reports in 5 Bom HCR 1868-69.

15. Let us then consider what this case decided. It appears that a servant of the plaintiff Coy was proceeding on a highway in Calcutta driving a carriage which was drawn by a pair of horses belonging to the plaintiff. The accident which gave rise to the action took place on the highway, and it was caused by the negligence of the servants of the Government who had been employed in the Government dockyard at Kidderpore. The said servants were carrying a piece of iron funnel, and the manner in which they were carrying the said funnel caused an injury to one of the horses that were drawing the plaintiffs carriage. It is this injury caused by the negligence of the servants of the Government employed in the Government dockyard that gave rise to the action. The plaintiff company claimed damages against the Secretary of State for India for the damage caused by the said accident. The suit was tried by the Small Cause Court Judge at Calcutta. He found that the defendant's servants were wrongdoers inasmuch as they carried the iron funnel in the centre of the road. According to the learned Judge, the servants were thus liable for the injury caused by their negligence. He was, however, not clear on the question of law as to whether the defendant Secretary of State could be held liable for the tortious act of the government servants which led to the accident. That is why he referred the said question to the Supreme Court of Calcutta, and the Supreme Court held that the Secretary of State in Council of India would be liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable.

16. This question was considered by the Supreme Court in the light of Section 65 of the Act of' 1858. "The main object of that section" observed Peacock, C.J., "was to transfer to Her Majesty the possession and the Government of the British territories in India, which were then vested in the fast India Company in trust for the Crown, but it does not appear to have been the intention of the legislature to alter the nature or extent of liabilities with which the revenue of India should be chargeable". The learned Chief Justice then considered the scheme of the other relevant provisions of the said Act and posed the question thus: would the East

India Company have been liable in the present action, if the 21st & 22nd Vict., clause 106 had not been passed? Dealing with this question, the learned Chief Justice observed that "the origin and progress of the East India Company are too well-known to require any detail for the purpose of the present case. It is sufficient to state that after the passing of the 3rd & 4th Wm. IV, clause 85, they not only exercised powers of the Government, but also carried on trade as merchants." It was then observed by the learned C.J. that in determining the question whether the East India Company would, under' the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force, because he concurred entirely in the opinion expressed by Chief Justice Grey in the earlier case of ***Bank of Bengal* v. *East India Company*** that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns. That is one aspect of the matter which was emphasised in that judgment.

19. It is in respect of this aspect of the matter that the Chief Justice enunciated a principle which has been consistently followed in all subsequent decisions. Said the learned C.J., "there is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them". Having thus enunciated the basic principle, the Chief Justice stated another proposition as flowing from it. He observed that "where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by sovereign, or private individual delegated by a sovereign to exercise them, no action will lie". And, naturally it follows that where an act is done, or a contract is entered into, in the exercise of powers which cannot be called sovereign powers, action will lie. That, in brief, is the decision of the Supreme Court of Calcutta in the case of the ***Peninsular and Oriental Steam Navigation Co.***

20. Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. 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 mind in discussing questions of the State's liability arising from tortious acts committed by public servants. That is why the clarity and precision with which this distinction was emphasised by

Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject.

22. In ***Shivabhajan Durgaprasad* v. *Secretary of State for India,*** [ILR 28 Bom 314] this point arose for the decision of the Bombay High Court. In that case, a suit had been instituted against the Secretary of State in Council to recover damages on account of the negligence of a Chief Constable with respect to goods seized; and the plaintiff's claim was resisted by the Secretary of State in Council on the ground that no action lay. The High Court upheld the plea raised by the defence on the ground that the Chief Constable seized the goods not in obedience to an order of the executive Government, but in performance of a statutory power vested in him by the Legislature. The principle on which this decision was based was stated to be that where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. In discussing this point, Jenkins, C.J. referred to the decision in the case of ***Peninsular and Oriental Steam Navigation Co.*** and observed that though he entertained some doubt about its correctness, the said view had stood so long unchallenged that he thought it necessary to accept it as an authority binding on the Court. It is on this solitary occasion that a whisper of dissent was raised by Chief Justice Jenkins, but ultimately, the learned C.J. submitted to the authority of the said decision.

23. In the ***Secretary of State for India in Council* v. *A. Cockcraft*** [ILR 39 Mad 351] a claim for damages against the Secretary of State arose in respect of injuries sustained by the plaintiff in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a road which was stated in the plaint to be a military road maintained by the Public Works Department of the Government. The Madras High Court held that the plaintiff had in law no cause of action against the Secretary of State for India in Council in respect of acts done by the East India Company in the exercise of its sovereign powers. This conclusion was based on the finding that the provision and maintenance of roads, especially a military road, is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on by private persons.

25. In ***Uma Prasad* v. *Secretary of State*** [18 Lah 380] certain property which had been stolen from the plaintiff was recovered by the police and was thereafter kept in the Malkhana under orders of the Magistrate during the trial of the thieves. It appears that the receiver, H.A., the man in charge of the Malkhana, absconded with it. That led to a suit by the plaintiff for the recovery of the property, or in the alternative, for its price. The Lahore High Court held that the liability in the case having clearly arisen under the provisions of the Criminal Procedure Code, the defence plea that the act was an act of State could not succeed. Even so, the Court came to the conclusion that the Secretary of State could be held liable only under circumstances in which a private employer can be rendered liable. The Court then examined the question as to whether in circumstances like those which led to the claim for damages in the case before it, a private employer could have been made liable; and this question was answered in the negative on the ground that no liability attached to the Secretary of State on account of the criminal act of the man in charge of the Malkhana; the said act was a felonious act unauthorised by his employer. We would like to add that some of the reasons given by the High Court in support of its conclusion may be open to doubt, but, in substance, the decision

can be justified on the basis that the act which gave rise "to the claim for damages had been done by" a public servant who was authorised by a statute to exercise his powers, and the discharge of the said function can be referred to the delegation of the sovereign power of the State, and as such the criminal act which gave rise to the action, could not validly sustain a claim for damages against the State. It will thus be clear that the basic principle enunciated by Peacock, C.J. in 1861 has been consistently followed by judicial decisions in dealing with the question about the State's liability in respect of negligent or tortious acts committed by public servants employed by the State.

26. Reverting then to the decision of this Court in the case of ***State of Rajasthan*** it would be recalled that the negligent act which gave rise to the claim for damages against the State of Rajasthan in that case, was committed by the employee of the State of Rajasthan while he was driving the jeep car from the repair shop to the Collector's residence, and the question which arose for decision was: did the negligent act committed by the Government employee during the journey of the jeep car from the workshop to the Collector's residence for the Collector's use give rise to a valid claim for damages against the State of Rajasthan or not? With respect, we may point out that this aspect of the matter has not been clearly or emphatically brought out in discussing the point of law which was decided by this Court in that case. But when we consider the principal facts on which the claim for damages was based, it is obvious that when the Government employee was driving the jeep car from the workshop to the Collector's residence for the Collector's use, he was employed on a task or an undertaking which cannot be said to be referable to, or ultimately based on, the delegation of sovereign or governmental powers of the State. In dealing with such cases, it must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants, the area of employment referable to sovereign powers 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 or employment which is referable to the exercise of sovereign power, or to the exercise of delegated sovereign power; and in the case of the State of Rajasthan1, this Court took the view that the negligent act in driving the jeep car from the workshop to the Collector's bungalow for the Collector's use could not claim such a status. In fact, the employment of' a driver to drive the jeep car for the use of a Civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all. That is the basis on which the decision must be deemed to have been founded; aid it is this basis which is absent in the case before us.

27. It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal; the Government of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such

claims must be limited; and this is exactly what has been done by this Court in its decision in the case of ***State of Rajasthan***.

28. In the present case, the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained; and so, we inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable.

29. Before we part with this appeal, however, we ought to add that it is time that the legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim from immunity in cases like this on the same lines as has been done in England by the Crown Proceedings Act, 1947. It will be recalled that this doctrine of immunity is based on the common law principle that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and as such cannot be responsible for the negligence of misconduct of his servants. Another aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent. This legal position has been substantially altered by the Crown Proceedings Act, 1947 … Our only point in mentioning this Act is to indicate that the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State in regard to claims made against it for tortious acts committed by its servants, was really based on the common law principle which prevailed in England; and that principle has now been substantially modified by the Crown Proceedings Act. In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a Court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the legislature.

30. The result is, the appeal fails, but in the circumstances of this case, we direct that the parties should bear their own costs throughout.

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N. Nagendra Rao & Co. v. *State of A.P.*

(1994) 6 SCC 205

R.M. SAHAI, J.- Is the State vicariously liable for negligence of its officers in discharge of their statutory duties, was answered in the negative by the High Court of Andhra Pradesh on the ratio laid down by this Court in ***Kasturi Lal Ralia Ram Jain*** **v.** ***State of U.P.*** [AIR 1965 SC 1039] while reversing the decree for payment of Rs 1,06,125.72 towards value of the damaged stock with interest thereon at the rate of 6% granted by the trial court for loss suffered by the appellant due to non-disposal of the goods seized under various control orders issued under the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act'). Although the claim of the appellant was negatived mainly on the sovereign power of the State, but, that was only one of the reasons, as the High Court further held that the goods of the appellant having been seized in the exercise of statutory power for violation of the Control Orders and the seizure having been found, by the appropriate authorities, to be valid at least for part, no compensation was liable to be paid to the appellant for the goods which were directed to be returned. The further questions, therefore, that arise for consideration are, whether seizure of the goods in exercise of statutory powers under the Act immunises the State, completely, from any loss or damage suffered by the owner. Whether confiscation of part of the goods absolves the State from any claim for the loss or damage suffered by the owner for the goods which are directed to be released or returned to it.

2. The appellant carried on business in fertiliser and foodgrains under licence issued by the appropriate authorities. Its premises were visited by the Police Inspector, Vigilance Cell on 11-8-1975 and huge stocks of fertilisers, foodgrains and even non-essential goods were seized. On the report submitted by the Inspector, the District Revenue Officer (in brief 'the DRO') on 31-8-1975, in exercise of powers under Section 6-A of the Act, directed the fertiliser to be placed in the custody of Assistant Agricultural Officer (in brief 'AAO') for distribution to needy ryots and the foodgrains and non-essential goods in the custody of Tehsildar for disposing it of immediately and depositing the sale proceeds in the Treasury. The AAO did not take any steps to dispose of the fertiliser. Therefore, the appellant made applications on 17-9-1975 and 21-9-1975 before the DRO and on 11-2-1976 before AAO that since no steps were being taken the fertiliser shall deteriorate and shall be rendered useless causing huge loss to the appellant. Request was made for diverting the fertiliser either to the places mentioned by the appellant as the demand was more there or to release it in its favour for disposal and deposit of the sale price. But neither any order was passed by the DRO nor any action was taken by the AAO. On 29-6-1976 the proceedings under Section 6-A of the Act were decided and the stock of horsegram (foodgrain) was confiscated as the appellant's licence had been cancelled. As regards fertiliser it was held that the explanation of the appellant for difference in stock was not satisfactory. The only violation of Control Orders found was improper maintenance of accounts. In consequence of this finding, rather in absence of any material to prove that the appellant was guilty of any serious infringement such as black marketing or adulteration or selling at higher price than the controlled price, the Collector was left with little option except to direct confiscation of part of the stock and the rest was released in favour of the appellant.

3. Despite Collector's order and the order passed in appeal by the Sessions Judge, the AAO did not release the stock and the efforts of the appellant with the Chief Minister, Revenue Minister, Agriculture Minister and various other departmental heads did not yield any result. However, the AAO issued a notice in the last week of March 1977 to the appellant to take delivery of the stock released in its favour. But when the appellant went to take delivery it found that the stock had been spoilt both in quality and quantity. Therefore, after getting its objection endorsed by the officer concerned the appellant came back and made a demand for value of the stock released by way of compensation. When no response came it gave notice and filed the suit for recovery of the amount which has given rise to this appeal. The suit was contested amongst other grounds on sovereign immunity of the State, discharge of statutory duty in good faith, absence of any right to claim damages when seizure has been found to be valid for part of the goods, absence of any right to claim value of the goods as the only right an owner of the goods has to get back the stock irrespective of its condition etc.

6. This appeal is primarily concerned with nature of power exercised by the Collector under sub-section (2) of section 6-A of the Act the purpose and objective of which is to make interim arrangement of the goods which are seized. When a statute gives a power and requires the authority to exercise it in public interest then the person exercising the power must be vigilant and should take it as a duty to discharge the obligation in such a manner that the object of the enactment is carried into effect. The purpose of sub-section (2) is for protecting the goods seized by the Collector whether they are eatables or they are foodstuffs or they are iron and steel, as, if they are spoilt or they deteriorate then it is a loss not only to the owner but to the society. Loss in value of goods or its deterioration in quality and quantity would be in violation of the purpose and spirit of the Act. Once goods are seized, they are held by the State through the Collector and his agents as *custodia societus*, unless it is found that the detention was illegal in which case it shall be deemed to have been held for the benefit of the person from whom it was seized. In either case, its proper maintenance and early disposal is statutory duty. It is more so as the proceedings do not come to an end quickly. The rationale of the provision appears to be that penalise the person who acts in contravention of the order but protect the goods as they are essential for the society. Loss in value of the goods in quality or quantity is neither in public nor in society's interest. Therefore, the Collector has to form an opinion if the goods seized are of one or the other category and once he comes to conclusion that they fall in one of the categories mentioned in the sub-section then he has no option but to direct their disposal or selling of in the manner provided. This interim arrangement comes to an end once an order of confiscation is passed.

7. But what happens when the goods seized are not confiscated. That has been provided for by sub-section (2) of section 6-C.

8. This sub-section ensures that a person who has been prosecuted or whose goods have been confiscated does not suffer if the ultimate order either in appeal or in any proceeding is in his favour. It is very wide in its import as it statutorily obliges the Government to return the goods seized or to pay the value of the goods if for any reason it cannot discharge its obligation to return it.

This provision cuts across the argument of the State that where even part is confiscated the person whose goods are seized is not liable to be compensated for the remaining. The

section is clear that if only part of the goods are confiscated then the remaining has to be returned. The very first part of the sub-section indicates that where the order of confiscation is modified in appeal meaning thereby if confiscation is confined to part only the Government is bound to release or return the remaining or pay the value thereof. But what is more significant of this sub-section which widens its reach is the expression "and in either case it is not possible for any reason to return the essential commodity seized" then the State shall be liable to pay the market price of the value with interest. The liability to return the goods seized does not stand discharged by offering them in whatever condition it was. Confiscation of part of the goods thus could not affect the right of owner to claim return of the remaining goods. Nor the owner is bound to accept the goods in whatever condition they are. The claim of the respondent, therefore, that the appellant was bound to accept the goods in whatever condition they were is liable to be rejected.

9. Having discussed the scheme of the Act, the stage is now set for examining whether the High Court was justified, in reversing the decree of the trial court for compensation, and dismissing the suit of the appellant, as the seizure of the goods having been effected under the statutory provisions it was an exercise of sovereign powers, thus, squarely covered by the ratio laid down by this Court in ***Kasturi Lal***. Immunity of the State from compensating its citizens for a wrong done by it or its officers either for its activities of commercial or private nature or for acts of State or for those for which suit could be brought into Municipal Courts has been through various stages due to reflection of English juristic philosophy that King can do no wrong, and its extension and application to our system of governance. In England it was recognised that the King could not be sued. In illustrating the doctrine that the "Queen can do no wrong" Prof. Dicey gives what he describes as an "absurd example", "if Queen were herself to shoot the Prime Minister through the head", he says, "no court in England could take cognizance of the act". The basis for it in England was both substantive and procedural. The former flowed from the divine right of the Kings and the latter from the feudal principle that the King could not be sued in his own courts. Yet it did not mean that he was above law. The true meaning of the expression "that King can do no wrong" meant "that the King has no legal power to do wrong". Therefore, the institution of the petition of rights was founded upon the theory that the King, of his own free will, graciously orders right to be done. But the petition lay only, to recover unliquidated damages for breach of contract by the Crown. It was not extended by the courts to claims arising out of torts. In ***Viscount Canterbury*** **v.** ***Attorney General*** [41 English Reports Chancery p. 648], one of the questions that arose was whether the Crown was liable to make good the loss for the fire which had been caused by the personal negligence of the Commissioners. The answer given was, that even though the officer who was guilty of negligence was liable personally, the liability did not extend to the Crown. This immunity peculiar to the English system found its way in our system of governance through various judgments rendered during British period, more particularly after 1858, even though the maxim "*lex non protest peccare*" that is the King can do no wrong had no place in ancient India or in medieval India as the Kings in both the periods subjected themselves to the rule of law and system of justice prevalent like the ordinary subjects of the States. According to Manu, it was the duty of the King to uphold the law and he was as much subject to the law as any other person. "In the Vedic period kingship was purely secular institution. Ancient Indian philosophers were not prepared to recognise the

divinity of the unworthy Kings." [G. P. Verma, *State Liability in India*]. It was said by Brihaspati "Where a servant commissioned by his master does any improper act, for the benefit of his master, the latter shall be held responsible for it." Even during Muslim rule the fundamental concept under Muslim law like Hindu law was that the authority of King was subordinate to that of the law. It was no different during British rule. The courts leaned in favour of holding the State responsible for the negligence of its officers. [See ***Narayan Krishna Laud* v. *Gerard Norman, Collector of Bombay*** [5 Bom. H.C. Rep. 1868 – 69 p. 1), a decision which has been approved in ***State of Rajasthan* v. *Vidhyawati*** (AIR 1962 SC 933)].

10. This principle was statutorily recognised when East India Company was taken over by the Crown. Section 68 of the Government of India Act, 1858 permitted the Secretary of the State in Council to sue or be sued. It was a departure from the English common law that no proceedings, civil or criminal, could be filed against the Crown. In ***Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India*** [5 Bombay High Court Reports 1868 – 69 Appendix A, p. 1], which came up before the Supreme Court of Calcutta, on a reference made by the Subordinate Judge, on the liability of the State for negligence of its officers, Chief Justice Peacock held that since East India Company was not a sovereign, its liability for negligence of its officers would be same as of an employer for acts of its employee. It was observed that there was a "clear distinction between acts done in exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them".

In ***Nobin Chunder Dey* v. *Secretary of State of India*** [ILR 1 Cal. 11 (1876)], the English principle of sovereign immunity of the Crown was applied and plaintiff's claim for recovery of damages against the State for non-issuing of the excise pass and in the alternative for refund of the auction money was rejected as it was an act done by the Government in exercise of sovereign power of the State. This decision and its application in numerous cases led to denial of relief to citizens and different principles were evolved but each revolving round basic doctrine of sovereign immunity. It was dissented to by the Madras High Court in ***Secretary of State for India in Council* v. *Hari Bhanji*** [ILR V5 Mad 273 (1882) and it was observed that ***Nobin Chunder Dey*** did not properly comprehend the law laid down in ***Peninsular*.** The Chief Justice of the Madras High Court, after dealing with ***Peninsular*** and its erroneous application in ***Nobin Chunder Dey***, observed that defence of sovereign immunity was available in those limited cases where the State could not be sued for its acts, such as making war or peace, in Municipal Courts. The doctrine or the defence by the "act of State", is not the same as 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.

11. When the law was in this fluid state, the Constitution was enforced and in ***Province of Bombay* v. *Khushaldas S. Advani*** [AIR 1950 SC 222] Justice Mukherjea, observed:

> It is true that the East India Company was invested with powers and functions of a two-fold character. They had on the one hand powers to carry on trade as merchants; on the other hand they had delegated to them powers to acquire, retain and govern territories to raise and maintain armies and to make peace and war with native powers in India. But the liability of the East India Company to be sued was not

> restricted altogether to claims arising out of undertakings which might be carried on by private persons; but other claims if not arising out of acts of State could be entertained by civil courts, if the acts were done under sanction of municipal law and in exercise of powers conferred by such law. The law on this point was discussed very ably by the Madras High Court in ***Secretary of State* v. *Hari Bhanji***.

But it was not till 1962 that an occasion arose for this Court to examine the tortuous act by servant of the State and whether a citizen who was wronged by it was entitled to claim compensation. In ***Vidhyawati***. this Court after examining in detail the scope of Article 300 of the Constitution of India and the earlier provisions in the Government of India Act beginning from Section 65 of the Act of 1858, approved decision in ***Narayan Krishna Laud*** and observed that the decision in ***Viscount Canterbury*** being based upon the principle that "the King cannot be guilty of personal negligence or misconduct and consequently cannot be responsible for the negligence or misconduct of his servants" was not applicable as held in ***Peninsular*** case as the liability of the Secretary of State in place of East India Company was specifically provided for.

But this Constitution Bench decision was distinguished in ***Kasturi Lal*** by another Constitution Bench as, "the facts in ***Vidhyawati*** case fall in a category of claims which is distinct and separate from the category in which the facts of the present case fall".

> Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. 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 mind in discussing questions of the State's liability arising from tortious acts committed by public servants.

12. However, since 1965 when this decision was rendered the law on vicarious liability has marched ahead. The ever increasing abuse of power by public authorities and interference with life and liberty of the citizens arbitrarily, coupled with transformation in social outlook with increasing emphasis on human liberty resulted in more pragmatic approach to the individual's dignity, his life and liberty and carving out of an exception by the court where the abuse of public power was violative of the constitutional guarantee. Such infringements have been held to be wrong in public law which do not brook any barrier and the State has been

held liable to compensate the victims. In ***Nilabati Behera*** v. ***State of Orissa,*** [AIR 1993 SC 1960] Hon'ble Mr Justice J.S. Verma 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 the same decision, it was observed by Hon'ble Dr. Justice A.S. Anand :

> The purpose of public law is not only to civilize power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights.

13. Sovereign immunity as a defence was, thus, never available where the State was involved in commercial or private undertaking nor it is available where its officers are guilty of interfering with life and liberty of a citizen not warranted by law. In both such infringements the State is vicariously liable and bound, constitutionally, legally and morally, to compensate and indemnify the wronged person. But the shadow of sovereign immunity still haunts the private law, primarily, because of absence of any legislation even though this Court in ***Kasturi Lal*** had expressed dissatisfaction on the prevailing state of affairs in which a citizen has no remedy against negligence of the officers of the State and observed :

> In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature.

Necessity of the legislation apart, which shall be adverted later, it is necessary to mention that in subsequent decisions rendered by this Court the field of operation of the principle of sovereign immunity has been substantially whittled down. In ***Shyam Sunder*** **v.** ***State of Rajasthan*** [AIR 1974 SC 890] where the question of sovereign immunity was raised and reliance was placed on the ratio laid down in ***Kasturi Lal*** case, this Court after considering the principle of sovereign immunity as understood in England and even applied in America observed that there was no "logical or practical" ground for exempting the sovereign from the suit for damages. In ***Pushpa Thakur*** **v.** ***Union of India*** [1984 ACJ SC 559], this Court while reversing a decision of the Punjab & Haryana High Court (***Union of India*** **v.** ***Pushpa Thakur***) which in its turn placed reliance on a Full Bench decision of that very Court in ***Baxi Amrik Singh*** **v.** ***Union of India*** [1973 ACJ 105] held that where the accident was caused by negligence of the driver of military truck the principle of sovereign immunity was not available to the State.

14. That apart, the doctrine of sovereign immunity has no relevance in the present-day context when the concept of sovereignty itself has undergone drastic change. Further, whether there was any sovereign in the traditional sense during British rule of our country was not examined by the Bench in ***Kasturi Lal*** though it seems it was imperative to do so, as the

Bench in ***Vidhyawati*** had not only examined the scope of Article 300 of the Constitution, but after examining the legislative history had observed :

> It will thus be seen that by the chain of enactments beginning with the Act of 1858 and ending with the Constitution, the words 'shall and may have and take the same suits, remedies and proceedings' in Section 65 above, by incorporation, apply to the Government of a State to the same extent as they applied to the East India Company.

18. 'Sovereignty' and 'acts of State' are thus two different concepts. The former vests in a person or body which is independent and supreme both externally and internally whereas latter may be act done by a delegate of sovereign within the limits of power vested in him which cannot be questioned in a Municipal Court. The nature of power which the Company enjoyed was delegation of the "act of State". An exercise of political power by the State or its delegate does not furnish any cause of action for filing a suit for damages or compensation against the State for negligence of its officers. Reason is simple. Suppose there is a war between two countries or there is outbreak of hostilities between two independent States in course of which a citizen suffers damage. He cannot sue for recovery of the loss in local courts as the jurisdiction to entertain such suit would be barred as the loss was caused when the State was carrying on its activities which are politically and even jurisprudentially known as 'acts of State'. But that defence is not available when the State or its officers act negligently in discharge of their statutory duties. Such activities are not acts of State.

23. In the modern sense the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modern notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

24. But there the immunity ends. No civilised 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. The concept of public interest has changed with structural change in the society. 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 the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in

nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or 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. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in ***Viscount Canterbury***. But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.

25. In the light of what has been discussed, it can well be said that the East India Company was not a sovereign body and therefore, the doctrine of sovereign immunity did not apply to the activities carried on by it in the strict sense. Since it was a delegate of the Crown and the activities permitted under the Charter to be carried on by it were impressed with political character, the State or its officers on its analogy cannot claim any immunity for negligence in discharge of their statutory duties under protective cover of sovereign immunity. The limited sovereign power enjoyed by the Company could not be set up as defence in any action of torts in private law by State. Since the liability of the State even today is same as was of the East India Company, the suit filed by any person for negligence of officers of the State cannot be dismissed as it was in exercise of sovereign power. Ratio of ***Kasturi Lal*** is available to those rare and limited cases where the statutory authority acts as a delegate of such function for which it cannot be sued in court of law. In ***Kasturi Lal*** case the

property for damages of which the suit was filed was seized by the police officers while exercising the power of arrest under Section 54(1)(*iv*) of the Criminal Procedure Code. The power to search and apprehend a suspect under Criminal Procedure Code is one of the inalienable powers of State. It was probably for this reason that the principle of sovereign immunity in the conservative sense was extended by the Court. But the same principle would not be available in large number of other activities carried on by the State by enacting a law in its legislative competence.

26. A law may be made to carry out the primary or inalienable functions of the State. Criminal Procedure Code is one such law. A search or seizure effected under such law could be taken to be an exercise of power which may be in domain of inalienable function. Whether the authority to whom this power is delegated is liable for negligence in discharge of duties while performing such functions is a different matter. But when similar powers are conferred under other statute as incidental or ancillary power to carry out the purpose and objective of the Act, then it being an exercise of such State function which is not primary or inalienable, an officer acting negligently is liable personally and the State vicariously. Maintenance of law and order or repression of crime may be inalienable function, for proper exercise of which the State may enact a law and may delegate its functions, the violation of which may not be sueable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modern sense. The Act deals with persons indulging in hoarding and black marketing. Any power for regulating and controlling the essential commodities and the delegation of power to authorised officers to inspect, search and seize the property for carrying out the object of the State cannot be a power for negligent exercise of which the State can claim immunity. No constitutional system can, either on State necessity or public policy, condone negligent functioning of the State or its officers. The rule was succinctly stated by Lord Blackburn in ***Geddis* v. *Proprietors of Bonn Reservoir*** [(1878) 3 AC 430 at p. 435]:

> No action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised if it be done negligently.

27. Matter may be examined from yet another angle. [Article 300 of the Constitution of India was re-produced]. In ***Vidhyawati*** it was held that this article consisted of three parts :

(1) that the State may sue or be sued by the name of the State;
(2) that the State may sue or be sued in relation to its affairs in like cases as the corresponding Provinces or the corresponding Indian States might have sued or been sued if the Constitution had not been enacted; and
(3) that the second part is subject to any provisions which may be made by an Act of the Legislature of the State concerned, in due exercise of its legislative functions, in pursuance of powers conferred by the Constitution.

In ***Vidhyawati*** and ***Kasturi Lal*** it was held that since no law had been framed by the legislature, the liability of the State to compensate for negligence of officers was to be

decided on general principle. In other words, if a competent legislature enacts a law for compensation or damage for any act done by it or its officers in discharge of their statutory duty then a suit for it would be maintainable. It has been explained earlier that the Act itself provides for return of the goods if they are not confiscated for any reason. And if the goods cannot be returned for any reason then the owner is entitled for value of the goods with interest.

28. In this case after conclusion of proceedings the authorities intimated the appellant to take the goods as they having not been confiscated, he was entitled for return of it. The appellant in response to the intimation went there but it refused to take delivery of it as, according to it, the commodity had deteriorated both in quality and quantity. This claim has been accepted by the lower courts. What was seized by the authority was an essential commodity within the meaning of clause (*d*) of sub-section (2) [*sic* Section 2(*a*)]. What the law requires under sub-section (2) of Section 6-C to be returned is also the essential commodity. Any commodity continues to be so, so long as it retains its characteristic of being useful and serviceable. If the commodity ceased to be of any use or is rendered waste due to its deterioration or rusting, it ceases to be commodity much less essential commodity. Therefore, if the commodity of the appellant which was seized became useless due to negligence of the officers it ceased to be an essential commodity and the appellant was well within its rights to claim that since it was not possible for the authorities to return the essential commodity seized by them, it was entitled to be paid the price thereof as if the essential commodity had been sold to the Government. The fiction of sale which is incorporated in sub-section (2) is to protect the interest of the owner of the goods. It has to be construed liberally and in favour of the owner. The respondents were thus liable to pay the price of the fertiliser with interest, as directed by the trial court.

29. In ***State of Gujarat*** **v.** ***Memon Mahomed Haji Hasam*** [AIR 1967 SC 1885] where the confiscation by the customs authorities was set aside in appeal and the goods were directed to be returned which order could not be complied as the goods had been disposed of under order of a Magistrate passed under Section 523 of Criminal Procedure Code, it was held by this Court that the suit for recovery of the goods or value thereof was maintainable and it was held:

> On the facts of the present case, the State Government no doubt seized the said vehicles pursuant to the power under the Customs Act. But the power to seize and confiscate was dependent upon a customs offence having been committed or a suspicion that such offence had been committed. The order of the Customs Officer was not final as it was subject to an appeal and if the appellate authority found that there was no good ground for the exercise of that power, the property could no longer be retained and had under the Act to be returned to the owner. That being the position and the property being liable to be returned there was not only a statutory obligation to return but until the order of confiscation became final an implied obligation to preserve the property intact and for that purpose to take such care of it as a reasonable person in like circumstances is expected to take. Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure

> and confiscation were not sustainable. There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. This was precisely the cause of action on which the respondent's suit was grounded. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it.

30. Similarly, in ***Basavva Kom Dyamangouda Patil*** **v.** ***State of Mysore*** [AIR 1977 SC 1749] the question arose regarding powers of the Court in indemnifying the owner of the property which is destroyed or lost whilst in the custody of the Court. The goods were seized from the possession of the accused. They were placed in the custody of the Court. When the appeal of the accused was allowed and goods were directed to be returned it was found that they had been lost. The Court, in the circumstances, held:

> It is common ground that these articles belonged to the complainant/appellant and had been stolen from her house. It is, therefore, clear that the articles were the subject-matter of an offence. This fact, therefore, is sufficient to clothe the Magistrate with the power to pass an order for return of the property. Where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property. We do not agree with the view of the High Court that once the articles are not available with the Court, the Court has no power to do anything in the matter and is utterly helpless.

31. Therefore, where the goods confiscated or seized are required to be returned either under orders of the court or because of the provision in the Act, this Court has not countenanced the objection that the goods having been lost or destroyed the owner of the goods had no remedy in private law and the court was not empowered to pass an order or grant decree for payment of the value of goods. Public policy requires the court to exercise the power in private law to compensate the owner where the damage or loss is suffered by the negligence of officers of the State in respect of cause of action for which suits are maintainable in civil court. Since the seizure and confiscation of appellant's goods was not in exercise of power which could be considered to be act of State of which no cognizance could be taken by the civil court, the suit of the appellant could not be dismissed. In either view of the matter, the judgment and order of the High Court cannot be upheld.

32. Before parting with this case, the Court shall be failing in its duty if it is not brought to the attention of the appropriate authority that for more than hundred years, the law of vicarious liability of the State for negligence of its officers has been swinging from one direction to other. Result of all this has been uncertainty of law, multiplication of litigation,

waste of money of common man and energy and time of the courts. Federal of Torts Claims Act was enacted in America in 1946. Crown Proceedings Act was enacted in England in 1947. As far back as 1956 the First Law Commission in its Report on the liability of the State in tort, after exhaustive study of the law and legislations in England, America, Australia and France, concluded:

> In the context of a Welfare State it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State. While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizen. For the establishment of a just economic order industries are nationalised. Public utilities are taken over by the State. The State has launched huge irrigation and flood control schemes. The production of electricity has practically became a Government concern. The State has established and intends to establish big factories and manage them. The State carries on works departmentally. The doctrine of laissez-faire - which leaves everyone to look after himself to his best advantage has yielded place to the ideal of a Welfare State - which implies that the State takes care of those who are unable to help themselves.

The Commission after referring to various provisions in the Legislation of other countries observed:

> The old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the State. As Professor Friedman observes:
>
> 'It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental functions, but the nature and form of the activity in question'.

Yet unfortunately the law has not seen the light of the day even though in wake of ***Kasturi Lal*** "Government (Liability in Tort) Bill, 1965" was introduced but it was withdrawn and reintroduced in 1967 with certain modifications suggested in it by the Joint Committee of Parliament but it lapsed. And the citizens of the independent nation who are governed by its own people and Constitution and not by the Crown are still faced, even after well-nigh fifty years of independence, when they approach the court of law for redress against negligence of officers of the State in private law, with the question whether the East India Company would have been liable and, if so, to what extent for tortuous acts of its servants committed in course of its employment. Necessity to enact a law in keeping with the dignity of the country and to remove the uncertainty and dispel the misgivings, therefore, cannot be doubted.

33. For these reasons, the appeal succeeds and is allowed. The judgment and order of the High Court is set aside and that of the trial court decreeing the suit of the appellant is restored with costs.

* * * * *

Chairman Railway Board v. *Chandrima Das*

(2000) 2 SCC 465

S. SAGHIR AHMAD, J. – 2. Mrs. Chandrima Das, a practising advocate of the Calcutta High Court, filed a petition under Article 226 of the Constitution against the Chairman, Railway Board; claiming compensation for the victim, Smt. Hanuffa Khatoon, a Bangladeshi national who was gang-raped by many including employees of the Railways in a room at Yatri Niwas at Howrah Station of the Eastern Railway regarding which GRPS Case No. 19 of 1998 was registered on 27-2-1998. Mrs. Chandrima Das also claimed several other reliefs including a direction to the respondents to eradicate anti-social and criminal activities at Howrah Railway Station.

4. The High Court awarded a sum of Rs. 10 lakhs as compensation for Smt. Hanuffa Khatoon as the High Court was of the opinion that the rape was committed at the building (Rail Yatri Niwas) belonging to the Railways and was perpetrated by the railway employees.

5. In the present appeal, we are not concerned with the many directions issued by the High Court. The only question argued before us was that the Railways would not be liable to pay compensation to Smt. Hanuffa Khatoon who was a foreigner and was not an Indian national. It is also contended that commission of the offence by the person concerned would not make the Railways or the Union of India liable to pay compensation to the victim of the offence. It is contended that since it was the individual act of those persons, they alone would be prosecuted and on being found guilty would be punished and may also be liable to pay fine or compensation, but having regard to the facts of this case, the Railways, or, for that matter, the Union of India would not even be vicariously liable. It is also contended that for claiming damages for the offence perpetrated on Smt. Hanuffa Khatoon, the remedy lay in the domain of private law and not under public law and, therefore, no compensation could have been legally awarded by the High Court in proceedings under Article 226 of the Constitution and, that too, at the instance of a practising advocate who, in no way, was concerned or connected with the victim.

6. We may first dispose of the contention raised on behalf of the appellants that proceedings under Article 266 of the Constitution could not have been legally initiated for claiming damages from the Railways for the offence of rape committed on Smt. Hanuffa Khatoon and that Smt. Hanuffa Khatoon herself should have approached the court in the realm of private law so that all the questions of fact could have been considered on the basis of the evidence adduced by the parties to record a finding whether all the ingredients of the commission of "tort" against the person of Smt. Hanuffa Khatoon were made out, so as to be entitled to the relief of damages. We may also consider the question of *locus standi* as it is contended on behalf of the appellants that Mrs. Chandrima Das, who is a practising advocate of the High Court of Calcutta, could not have legally instituted these proceedings.

7. The distinction between "public law" and "private law" was considered by a three-Judge Bench of this Court in ***Common Cause, A Regd. Society*** **v.** ***Union of India*** [AIR 1999 SC 2979] in which it was *inter alia*, observed as under:

> 39. Under Article 226 of the Constitution, the High Court has been given the power and jurisdiction to issue appropriate writs in the nature of mandamus, certiorari, prohibition, quo warranto and habeas corpus for the enforcement of fundamental rights or for any other purpose. Thus, the High Court has jurisdiction not only to grant relief for the enforcement of fundamental rights but also for 'any other purpose' which would include the enforcement of public duties by public bodies. So also, the Supreme Court under Article 32 has the jurisdiction to issue prerogative writs for the enforcement of fundamental rights guaranteed to a citizen under the Constitution.
>
> 40. Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of that rule. With the expanding horizon of Article 14 read with other articles dealing with fundamental rights, every executive action of the Government or other public bodies, including instrumentalities of the Government, or those which can be legally treated as 'authority' within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under Article 32 or the High Courts under Article 226 and can be validly scrutinised on the touchstone of the constitutional mandates.

9. Various aspects of the public law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The public law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Government. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from ***Rudul Sah* v. *State of Bihar*** [AIR 1983 SC 1086].

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law.

12. In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. This Court in ***Bodhisattwa Gautam* v. *Subhra Chakraborty*** [(1996) 1 SCC 490] has held "rape" as an offence which is violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. The Court observed as under:

> Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is violative of the victim's most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

13. Rejecting, therefore, the contention of the learned counsel for the appellants that the petition under public law was not maintainable, we now proceed to his next contention relating to the *locus standi* of the respondent, Mrs. Chandrima Das, in filing the petition.

14. The main contention of the learned counsel for the appellants is that Mrs. Chandrima Das was only a practising advocate of the Calcutta High Court and was, in no way, connected or related to the victim, Smt. Hanuffa Khatoon and, therefore, she could not have filed a petition under Article 226 for damages or compensation being awarded to Smt. Hanuffa Khatoon on account of the rape committed on her. This contention is based on a misconception. Learned counsel for the appellants is under the impression that the petition filed before the Calcutta High Court was only a petition for damages or compensation for Smt. Hanuffa Khatoon. As a matter of fact, the reliefs which were claimed in the petition included the relief for compensation. But many other reliefs as, for example, relief for eradicating anti-social and criminal activities of various kinds at Howrah Railway Station were also claimed. The true nature of the petition, therefore, was that of a petition filed in public interest.

18. Having regard to the nature of the petition filed by respondent Mrs. Chandrima Das and the relief claimed therein it cannot be doubted that this petition was filed in public interest which could legally be filed by the respondent and the argument that she could not file that petition as there was nothing personal to her involved in that petition must be rejected.

19. It was next contended by the learned counsel appearing on behalf of the appellants that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under public law could be granted to her as there was no violation of the fundamental rights available under the Constitution. It was contended that the fundamental rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of fundamental rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons: first, on the ground of domestic jurisprudence based on constitutional provisions and secondly, on the ground of human rights jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the "Moral Code of Conduct" having been adopted by the General Assembly of the United Nations.

28. The fundamental rights are available to all the "citizens" of the country but a few of them are also available to "persons". While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non-citizen", both, Article 15 speaks only of "citizen" and it is specifically provided therein that there shall be no discrimination against any "citizen" on the ground only of religion, race, caste, sex, place of birth or any of them nor shall any citizen be subjected to any disability, liability, restriction or condition with

regard to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort on the aforesaid grounds. Fundamental right guaranteed under Article 15 is, therefore, restricted to "citizens". So also, Article 16 which guarantees equality of opportunity in matters of public employment is applicable only to "citizens". The fundamental rights contained in Article 19, which contains the right to "basic freedoms", namely, freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practise any profession, or to carry on any occupation, trade or business, are available only to "citizens" of the country.

30. In ***Anwar* v. *State of J&K*** (AIR 1971 SC 337) it was held that the rights under Articles 20, 21 and 22 are available not only to "citizens" but also to "persons" which would include "non-citizens".

31. Article 20 guarantees right to protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty while Article 22 guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with Article 3, Article 7 and Article 9 of the Universal Declaration of Human Rights, 1948.

33. Let us now consider the meaning of the word "LIFE" interpreted by this Court from time to time. In ***Kharak Singh* v. *State of U.P.*** [AIR 1963 SC 1295] it was held that the term "life" indicates something more than mere animal existence. The inhibitions contained in Article 21 against its deprivation extend even to those faculties by which life is enjoyed. In ***Bandhua Mukti Morcha*** v. ***Union of India*** [AIR 1984 SC 802] it was held that the right to life under Article 21 means the right to live with dignity, free from exploitation.

34. On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have a right to "life" in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens.

36. It has already been pointed out above that this Court in ***Bodhisattwa*** case has already held that "rape" amounts to violation of the fundamental right guaranteed to a woman under Article 21 of the Constitution.

37. Now, Smt. Hanuffa Khatoon, who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as "right to life" was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of government employees who outraged her modesty. The right available to her under Article 21 was thus violated. Consequently, the State was under a constitutional liability to pay compensation to her. The judgment passed by the Calcutta High Court, therefore, allowing compensation to her for having been gang-raped, cannot be said to suffer from any infirmity.

38. Learned counsel for the appellants then contended that the Central Government cannot be held vicariously liable for the offence of rape committed by the employees of the Railways. It was contended that the liability under the law of torts would arise only when the act complained of was performed in the course of official duty and since rape cannot be said to be an official act, the Central Government would not be liable even under the law of torts. The argument is wholly bad and is contrary to the law settled by this Court on the question of vicarious liability in its various decisions.

41. The theory of sovereign power which was propounded in ***Kasturi Lal*** case has yielded to new theories and is no longer available in a Welfare State. It may be pointed out that functions of the Government in a Welfare State are manifold, all of which cannot be said to be the activities relating to exercise of sovereign powers. The functions of the State not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to sovereign power.

42. Running of the Railways is a commercial activity. Establishing the Yatri Niwas at various railway stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. *Kasturi Lal decision* therefore, cannot be pressed into aid. Moreover, we are dealing with this case under the public law domain and not in a suit instituted under the private law domain against persons who, utilising their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed.

43. The appeal having no merit is dismissed with the observation that the amount of compensation shall be made over to the High Commissioner for Bangladesh in India for payment to the victim, Smt. Hanuffa Khatoon.

* * * * *

Prof. Imtiaz Ahmad vs. Durdana Zamir

(2009) 109 DRJ 357

JUSTICE SHIV NARAYAN DHINGRA 1. This suit has been filed by the plaintiff for damages on account of defamation and for permanent injunction on the ground that defendant filed a complaint before the Crime Against Women (CAW) Cell allegedly making defamatory allegations against him. The plaintiff claimed damages to the tune of Rs.20 lac from the defendant.

2. The excerpts of the complaint, which, according to the plaintiff amounted to his defamation and entitled him to damages, are as follows: "(i) On the issue of dowry, my husband's mother Jamila Begum, Nand (husband's sister Rakahanda), Second Nand (Rafia), my husband's Khala Hasina and second Khala Sabina and Khaloo Imtiaz Ahmad raised considerable noise (Hangama) and they were calm down by efforts of my relatives. (ii) In my in-laws' house, my husband's Khala (Aunt) and Khaloo(uncle), who lives in JNU, Prof. Imtiaz Ahmad and his wife Sabina has considerable influence (dakhal). (iii) You are requested to help me to see that there is no interference in my family affairs of my husband's aunt and uncle who live in JNU".

3. It is contended by the plaintiff that plaintiff was a highly reputed person. He was a professor of Sociology at JNU. He was internationally known and was visiting professor in number of universities in USA, Canada, Italy and UK. He was a man of international academic standards and had taken part in number of national and international conferences and was a familiar voice on AIR, BBC, NDTV, ETV etc. He stated that he had no contact with the defendants family or with the family of her husband except that he had attended the marriage. At one point of time, the relations between defendant and her husband became estranged and she had come to his house accompanied by her father, mother and brother and asked him to interfere in the matter. However, since he was not willing to take any interest or intervene in the matter, he refused. He stated that on the basis of the complaint made by the defendant, an FIR No.611 under Sections 406,498A and 34 Indian Penal Code was registered by the police and he had to obtain anticipatory bail.

4. It is submitted by plaintiff that in the complaint made by defendant, he has been portrayed as a perpetrator of dowry demand and in his name Ansari CS (OS)569.06 Prof. Imtiaz Ahmad vs. Durdana Zamir has been deliberately added since Ansaris belong to lower community viz Julaha. He claimed that he was renowned social psychologist and because of the assertions made by the defendant in her complaint to CAW Cell and other authorities, his reputation received severe dent in academic circles and among his colleagues and also towards the mammoth work that he has done for the betterment of the society in general.

5. Defendant has made the instant application under Order 7 Rule 11 of CPC stating therein that the plaint does not disclose any cause of action and was liable to be dismissed. The claim of the plaintiff was based upon the facts stated in a complaint made by the defendant to lawful

authorities regarding her grievance against her in-laws. The FIR lodged by her was under investigation and it has not been held by any Court that the allegations made by the complainant (defendant herein) were false.

6. During arguments, it was also submitted that even if the allegations are taken per se correct, no case for defamation of the plaintiff was made out from the averments made in the complaint. Learned counsel for the plaintiff, however, denied that the plaint does not disclose any cause of action and submitted that the allegations made in the complaint by the defendant has lowered the image of the plaintiff in the eyes of society.

7. Under law of defamation, the test of defamatory nature of a statement is its tendency to incite an adverse opinion or feeling of other persons towards the Plaintiff. A statement is to be judged by the standard of the ordinary, right-thinking members of the society at the relevant time. The words must have resulted in the Plaintiff to be shunned or evaded or CS (OS) 569.06 Prof. Imtiaz Ahmad vs. Durdana Zamir regarded with the feeling of hatred, contempt, ridicule, fear, dislike or dis- esteem or to convey an imputation to him or disparaging him or his office, profession, calling, trade or business. The defamation is a wrong done by a person to another's reputation. Since, it is considered that a man's reputation, in a way, is his property and reputation may be considered to be more valuable than any other form of property. Reputation of a man primarily and basically is the opinion of friends, relatives, acquaintance or general public about a man. It is his esteem in the eyes of others. The reputation spread by communication of thought and information from one to another. Where a person alleges that his reputation has been damaged, it only means he has been lowered in the eyes of right thinking persons of the society or his friends/relatives. It is not enough for a person to sue for words, which merely injure his feeling or cause annoyance to him. Injury to feeling of a man cannot be made a basis for claiming of damages on the ground of defamation. Thus, the words must be such, which prejudice a man’s reputation and are so offensive so as to lower a man's dignity in the eyes of others. Insult in itself is not a cause of action for damages on the ground of defamation.

8. Where the words are used without giving impression of an oblique meaning but the Plaintiff pleads an innuendo, asking the Court to read the words in a manner in which the Plaintiff himself understands it, the Plaintiff has top lead that the libel was understood by the readers with the knowledge of subject or extensive facts as was being understood by the Plaintiff.

9. The plaintiffs submissions that adding of caste "Ansari" against his name was per say defamatory is very strange. The plaintiff claims to be the professor of sociology working for the betterment of the society. If a professor CS (OS)569.06 Prof. Imtiaz Ahmad vs. Durdana Zamir of sociology has a notion and thought that "Ansari" was a caste of lower class since it represents "Julaha” community, I can only take pity upon such highly respected and qualified professors. Julaha means weavers. If those who weave clothes so that men may dress themselves, are of lower caste than those who get dressed and are ungrateful must be of much lower caste, even if they are professors. The allegations of the plaintiff, who is a professor, are painful. The

Constitution of India does not recognize that caste of any person confers any superiority or inferiority on him vis-a-vis others. The Constitution only recognizes deprived classes under which Scheduled Castes or Scheduled Tribes fall and mandates positive action only to bring them at par with the other members of the society so that they are not discriminated by so-called high castes people. If a professor of sociology in our country has this standard of social betterment, then God help this society.

10. The other imputations made to the defendant are also not defamatory in nature. It is not the case of the plaintiff that he was not present at the marriage. It is the case of the plaintiff himself that he attended the marriage of the defendant. If it is stated that a Hungama was created by many from in-laws of the defendant, including the plaintiff, that does not mean that the defendant made defamatory imputations against the plaintiff or the defendant made a statement to cause an adverse opinion or hatred feelings of other persons towards the plaintiff. As has already been observed above the statements to be judged by the standard of an ordinary person. The alleged words must have resulted in the plaintiff to be shunned or evaded or inculcated a feeling of hatred and condemn. The plaintiff continues to be the professor in JNU and he continues to a known voice at different TV Channels. It is not the case that people have abandoned him or boycotted him because CS (OS) 569.06 Prof.Imtiaz Ahmad vs. Durdana Zamir of this imputation. The plaintiff has not named a single person who had changed his opinion after filing of the complaint by the defendant.

11. Moreover, the defendant had a right to make complaints of her grievances to the authorities. Whenever a person makes a complaint against someone to the lawful authorities and in that complaint he makes imputations against the person complained of, it cannot be considered that the person has publicized or publicly made defamatory averments against a person. If a prosecution is initiated against the person on the basis of such averments and the person is acquitted holding that the complaint was false, then only a cause of action arises against the complainant for launching a case for false prosecution or for damages on other grounds. Until and unless a competent court holds that complaint was false, no cause of action arises. Approaching a competent authority and praying that the authority should come to the rescue of the complainant and prevent inference of the plaintiff in the family affairs of the defendant cannot amount to a defamatory imputation per se and even if it is published, it does not tend to show that the defendant had intended to lower the reputation of the plaintiff.

12. In view of the foregoing facts and circumstances, I consider that the plaint, even if taken to be true, does not disclose any cause of action against the plaintiff. The suit of the plaintiff is liable to be dismissed and is hereby dismissed.

* * * * *

DEFAMATION

Tushar Kanti Ghosh v. *Bina Bhowmick*

(1953) 57 CWN 378

The appeal arises out of a suit for damages brought by two plaintiffs against three defendants for the publication of an alleged libel in the issue of an English daily paper, know as the "Amrit Bazar Patrika", for the 18th September,1948. The first defendant, Tushar Kanti Ghose, is the Editor of the paper, the second defendant, Nirmal Kanti Ghose, is its printer and publisher, and the third defendant, Amirt Bazar Patrika Limited, is a limited liability company by which the paper is owned.

There were originally two plaintiffs, each suing in a dual capacity. The first plaintiff, Mrs. Bina Bhowmick, sued "for self and as President, Amrit Bazar Patrika Press Workers' Union", and the second plaintiff, Tarak Nath Thakur, sued for "for self and as Secretary and on behalf of the members" of the said Union. In so far as the suit was a representative suit on behalf of the members of the Union, the requisite leave of the Court under Order I, r. 8 of the Civil Procedure Code was taken.

It appears that as soon as the case was opened before the learned trial Judge, an objection was taken on behalf of the Defendants that in view of section 13 of the Indian Trade Unions Act, a suit on behalf of a registered Trade Union, such as the Amrit Bazar Patrika Press Workers' Union was, could be brought only in the name of the Union itself and that a representative suit by and in the name of the President or the Secretary was not maintainable. The learned Judge gave effect to that contention and by a decree passed on the 24th April, 1951, he dismissed the suit so far as it was a representative suit. At the same time he ruled that in spite of such dismissal the suit, so far as it concerned an alleged libel on the first Plaintiff Mrs. Bina Bhowmick in her personal capacity, might proceed. The effect of the decision was that the second plaintiff, Tarak Nath Thakur, was eliminated from the suit and the claim of the Union or its members, whether made through the first plaintiff or the second, also disappeared. The first plaintiff having agreed to limit her claim to such damages as he could recover personally from the Defendants, the suit proceeded on that basis and ultimately the learned Judge passed a decree in her favour for Rs. 5,000 as costs and also granted an injunction against the Defendants, retraining them from further publishing the libellous words complained of or other words of like effect concerning the first Plaintiff. It is against that decree that the defendants have appealed.

The libellous matter complained of was published in the issue of the Amrit Bazar Patrika, dated the 18th September, 1948. It consisted of the following head-lines and paragraphs:

PATRIKA AND JUGANTAR COPIES LOOTED HAZRA ROAD INCIDENT

Another Daylight Robbery by Discharged Employees.

The management of the "Amrit Bazar Patrika" have issued the following: another daylight robbery was committed by Mrs. Bina Bhowmik's Union

members and their hirelings early yesterday (Friday) morning when our van containing thousands of copies of "Patrika" and "Jugantar" was looted at the Hazra Road Jn. Distributing Centre. As soon as copies of "Patrika" and "Jugantar" were taken out of the van 20 to 25 men pounced upon them, destroyed some and carried away the rest presumably for selling them and pocketing the ill-gotten gains.

This is the second occasion when our Van has been attacked and papers looted at the Hazra Road distributing centre.

SHRI DEO'S ADVICE DEFIED

We have always held the view that Mrs. Bhowmik's Union is not a B.P.N.T.U.C Union at all but that it was deliberately affiliated to the B.P.N.T.U.C as a subterfuge by some designing men. It is not at all surprising, therefore, that its members should have totally defied the appeal, published on Thursday, by Shri Sankar Rao Deo, General Secretary of the A.I.C.C. to observe non-violence, and resorted to violence. This is another conclusive proof that the Union is neither B.P.N.T.U.C nor non-violent in its ideals and methods. We understand, some of our dismissed employees were arrested on the spot in this connection.

On the merits, the learned Judge held that the publication in question did contain defamatory statements concerning the plaintiff personally. He held further that the plea of justification must, on the evidence, fail. He also held that the Defendants had overstepped the limits of fair comment and had been actuated by malice in publishing the libel complained of. He remarked on the dignity and restraint with which the plaintiff had put her case in the course of her evidence and as her object in bringing the suit had only been to vindicate herself and not to make money, he thought that sum of Rs. 5,000 would be fair compensation for the injury done to her reputation.

Against that decision of the learned Judge, three points were urged before us by Mr Chaudhuri. He contended that the words complained of were not, on a fair construction, defamatory of the Plaintiff, that they constituted fair comment; and that, in any event, they were protected by the privilege attaching to a newspaper's duty of publishing information of public interest and to the right of the Defendants to protect their own interest with their subscribers and advertisers. No argument was addressed to us on the plea of justification and matters of fact were referred to only incidentally, so far as they were said to furnish a basis for fair comment.

In my opinion, it is impossible to say that the publication in question is not defamatory of the plaintiff in the sense of aiming at her personally and containing statements to her discredit. The Union is referred to not as the Amrit Bazar Press Workers' Union but as Mrs. Bina Bhowmicks's Union" and the point describing the Union in those terms plainly to convey the meaning that the Union is a special group, composed of the adherents of Mrs. Bina Bhowmic and that it is an organization of which she is the controller and leader. When the sentence proceeds to state that Mrs. Bina Bhowmic's Union members and their hirelings" committed "another daylight robbery" early yesterday, no reader to ordinary intelligence

would take it as leaving the plaintiff out of the charge and making no allegation so far as she herself was concerned. The plain meaning of the sentence is that an organization of men which Mrs. Bina Bhowmic at its head, had committed one or more daylight robberies in the past and they, together with some mercenaries hired by them, committed another such robbery on the previous day. To my mind, the sentence associates the plaintiff both with the commission of the robbery and the employment of hirelings by representing those misdeeds as activities of the members of the Union which she has formed and which she leads. Equally plain is the meaning of the third paragraph of the publication. There it is stated that the writers have always been of the view that "Mrs. Bina Bhowmic's Union is not a B.P.N.T.U.C Union at all, but that it was deliberately affiliated to the B.P.N.T.U.C as a subterfuge very fairly conceded that the use of the word "men" was not sufficient to exclude the plaintiff, a woman, but his contention was that there was nothing in the sentence to include the plaintiff among the designing persons who were stated to have obtained the fraudulent affiliation. That reading of the sentence, again does not commend itself to me. It will be remembered that with regard to the third paragraph of the publication, an innuendo has been pleaded, but I am not proceedings here on the basis of the innuendo. When an Association is referred to as a particular person's Association, the ordinary signification of that form of expression is that the person concerned started the Association as his own show and, if I may use a colloquial phrase, bosses over it and a reference, to the circumstances or the manner in which the Association was started, inevitably involves him. When therefore the sentence under consideration states that "Mrs Bina Bhowmic's Union" was deliberately affiliated to the B.P.N.T.U.C as a subterfuge by some designing men", it is impossible to read the sentence as meaning anything else than that certain designing persons, among them Mrs. Bina Bhowmick, deliberately got her Union affiliated to the B.P.N.T.U.C in order to use such affiliation as a cloak of good credentials, while in practice the Union indulged in activities inconsistent with the ideals of the B.P.N.T.U.C. In my opinion, there is no lack of clarity in the sentence, though there may be some lack of courage in that the plaintiff is not included among the "designing men" directly, but in a roundabout manner. Next the fourth paragraph states openly and clearly, that the so-called strike that is being conducted under the plaintiff's guidance has nothing to do with bona fide trade unionism. The plain meaning of that sentence is that the plaintiff has engineered and is continuing a strike under pretence of trade unionism, though the strike is not a genuine trade union strike at all but has been brought about by the plaintiff for other purposes and is being conducted by her in a manner foreign to trade union principles. The fifth paragraph of the publication speaks of a small minority coercing the overwhelming majority of the workers of the paper and it is clear from the context that the reference is to the strikers led by the plaintiff. In my opinion, the learned Judge was entirely right in holding that even according to the plain meaning of the words used, the publication in question accused the plaintiff of trickery, coercion and disloyalty to trade union principles and other forms of dishonorable conduct. As such, it was a clear attack on her character and credit.

Passing on now to the innuendos pleaded, it is clear that in view of the finding I have arrived at on the plain meaning of the publication, it is immaterial whether the plaintiff succeeds or fails in establishing the innuendos alleged by her. If she fails, she can treat the unproved innuendos as surplusage and still contend that the words of the publication are

defamatory in their natural and ordinary meaning. It is settled law that when the alleged libel is contained in a newspaper, the plaintiff can, in explaining its meaning, put in evidence any article or paragraph contained in the same or previous issue of the same newspaper which is connected with the subject-matter of the libel (see Gately on ***Libel and Slander***, Third Edition, pp. 619-20 and the cases there cited). In the present case, the plaintiff put in a number of such publications, although Mr. Chaudhri, who had not appeared in the Court below, had at first some doubt as to whether they had been properly admitted, he satisfied himself by reference to the records that they were included in the agreed bundle and had gone in without demur.

On the 14th August, 1948 the Amrit Bazar Patrika published a statement by the management of the Amrtia Bazar Patrik Ltd. headed "Mrs Bowmick's Activities". In the course of that statement it was said that "Mrs. Bina Bhowmick was now playing a desperate game" that on the previous day, the office van had been attacked "by some of our misguided employees and some hired men in the immediate presence of Mrs. Bina Bhowmick" that though a woman, she was "going into the thick of a fight between hawkers and her own men"; that the Union "under her leadership but more at the instigation of her communist office-bearers" was "injuring the paper in every possible way"; that "having failed in her efforts to persuade the public or the hawkers not to take our paper organized violence is now being resorted to"; that this was not trade unionism; that although Mrs. Bina Bhowmick professed not to have anything to do with Communists, she could not long deceive herself and that her associations belied her; and that she had taken a great responsibility on herself in dissuading the workers from joining the office. The plaintiff replied to that statement by a statement of her own, dated the 17th August, 1948, which seems to have been distributed in the form of handbills. On the 2nd September, there was another incident in front of the Patrika Office over picketing which, according to the plaintiff, was peaceful but, according to the defendants, violent. In connection with that incident also the plaintiff was arrested and subsequently tried, but she was again acquitted. On the 3rd September, an article appeared in the Amrit Bazar Patrika under the sub-heading "Mrs. Bina Bhowmick resorts to violent picketing" and in the course of that article it was stated that Mrs. Bina Bhowmick had "done it at last" and that having failed in her efforts to stop the circulation of the paper by first intimidating the hawker and then appealing to the public, she had taken to direct action. The article then proceeded to give details of the violence committed by the plaintiff and her pickets on the 1st and the 2nd September and of the coercion applied to willing workers. The dispute was apparently reported to Sri Sanker Rao Deo, the General Secretary of the Congress, and he, on the 15th September, 1948, issued a statement to the effect that he was in correspondence with the parties and in consultation with the I.N.T.U.C. that violence or intimidation, from whatever quarter it might come, was to be condemned and that labour should strictly observe non-violence in its actions. On the 17th September, a second incident, similar to the first, occurred at the Hazra Road crossing, but this time the plaintiff was not present. On the 18th September, the impugned publication appeared in the Amrit Bazar Patrika.

The dispute between the Partika and the Union of its workers was certainly being kept before the public eye by means of these statements and counter-statements. Besides that a

strike in the office of a well established paper was itself sufficient to engage public attention. In those circumstances, it may legitimately be presumed that the publications concerning the plaintiff, which had appeared in the Patrika on the 14th August, and the 3rd September, had been read by the readers of the paper. I have no doubt in my mind that whoever had read those publications, could not but understand of the 18th September to mean that the plaintiff herself had been concerned in the misdeeds enumerated therein, even if the plain meaning of the words of the publications was not sufficient to implicate her personally, which, I have held, is not a fact. In many respects, the publications of the 18th September has a family likeness with that of the 14th August.

I am clearly of opinion that judged both by the plain meaning of the words used, and the innuendos contained in some of them, the publication is defamatory of the plaintiff in her personal capacity. Personal capacity of a person is not limited to his character as an individual in private life, but comprises also his personal conduct in relations to the affairs of associations or concerns with which he may be connected. The publication in the present case represents the plaintiff as a person who has been guilty of trickery and employment of hirelings in conducting the affairs of the Union of which she is the President, and who has also been responsible for acts of violence, including daylight robbery, while outwardly professing to subscribe to the creed of the Congress Labour Organization. Not only is that defamatory of her, as regards her personal conduct in relation to her duties as the President of the Union, but it also defames her as regards her general character on which such allegation are bound to react.

It was contended by Mr. Chaudhuri in the second place that even so, the publication was within the defendants ' right of fair comment and if it was, slight excesses here and there would not make it actionable. It will be remembered that, in form, the Publication is a statement issued by the management of the " Amrit Bazar Patrika" and therefore so far as the first defendant is concerned, he could not claim it to be a comment by him as the editor of the paper. If the matter contained in the publication was libelous, the first defendant, by inserting it in his paper only repeated the libel. The second defendant who is the printer and publisher of the paper is also in the same position as defendant No. 1 both as regards liability and the defences available. When this difficulty was pointed out to Mr. Chaudhuri, he submitted that by publishing the statement the paper had adopted the comment of the management as its own comment and therefore the defence of fair comment was available to the editor and the publisher. I do not think that that position is correct either in fact or in law, but in view of the conclusion I have arrived at on the merits of the plea, I need not pursue the matter further and would proceed on the basis adopted by Mr. Chaudhri.

The right of fair comment is not a special privilege of newspapers, but is a right which every citizen or person has. It follows that although the publication is a statement by the management of the "Amrit Bazar Patrika" the defence of fair comment is open to the maker of the statement. I would also concede that the matte to which the publication related was a matter of public interest, which is one of the requisites for a defence of fair comment being available. But the comment must be fair in the sense that it must be based on facts truly stated and must consist in an inference, reasonably warranted by such facts and honestly drawn.

Judged by the principles set out above, the publication in the present case is not defensible as protected by the right of fair comment. The learned trial Judge did not deal with the plea of fair comment at any great length, because he found that in publishing the impugned paragraphs, the defendants had been actuated by malice. As proof of malice defeats a plea of qualified privilege as much as a plea of fair comments... But quite apart from malice, the offensive statements in the publication do not; in their very nature belong to the category of comment. Allegations that the plaintiff, as the leader of her Union, has employed hirelings or has been concerned in the commission of daylight robberies or that she got her Union affiliated to the B.P.N.T.U.C as a subterfuge are not comments, but statement of facts. So is the allegation that the members of her Union, under her leadership, resorted to violence and were coercing the larger section of the workers. Proof that such allegations are true will support a plea of justification but, in no way can such allegations be regarded as comment, fair or otherwise. The statement that strike conducted under the guidance of the plaintiff has nothing to do with bona fide trade unionism might perhaps be regarded as comment, if it was based on facts truly stated. The onus of establishing that the statements complained of protected by the right of fair comment is on the defendant. "He must not only establish that the matter which he defends as comment is comment and is comment on a matter of public interest, but also that it is not founded on misstatements on facts in the so-called comment".

Mr. Chaudhuri placed the strongest reliance on his third plea, the plea of qualified privilege. He did so naturally, because if it could be established that the circumstance were such that the plea was available, the publication would be protected even if it contained untrue and libelous statements, provided, however, the plaintiff did not dislodge the plea by proof of express malice....Broadly speaking, the law is as follows: When a person publishes statements which are false in fact and injurious to the character of another, the law regards such publication as malicious and therefore actionable, but in a case where such statements are "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned" [***Toogood*** v. ***Spyring*** (1834) I C. M . and R. 181: 40 R.R. 523], the occasion rebuts or rather excludes the initial presumption of malice and throws upon the plaintiff the burden of proving malice in fact (***Wright*** v. ***Woodgate*** [(1835) 2 C.M. and R. 573 : 41 R.R. 788]. In other words, the defendant must first prove that the occasion on which the statement was made was in fact of the above character and therefore privileged, but once he proves it, he can claim that the statement, although untrue and libelous, is protected by the privilege. The plea, however, is not available if the statements are unconnected with or irrelevant to his duty or interest concerned.

I must point out, however, that while the general argument must fail, an argument based on common interest will still apply in the present case, because it was not another newspaper which had published the statement, but the "Amrit Bazar Patrika" self, which and the readers of which, were equally and directly interested in the activities of the Union of its workers which was trying to bring about a suspension of the paper. To that extent the occasion was privilege. Along with the argument based on common interest I may also take the second branch of Mr. Chaudhuri's argument which was that the statement was made for the protection of the defendants own interest, for, the two branches of the argument are closely

allied and may conveniently be dealt with together. It can certainly be said that since the Union was trying to stop the production of the paper and interfere with its distribution and was also issuing statements against the management, the defendants had a right to explain the position from their point of view in order to protect their interest with their readers, subscribers and advertisers. The defendants were therefore so situated that a privileged occasion had arisen for their making a statement.

But the privilege, whether of making a statement to subscribers and advertisers on a matter of common interest or of making a statement in self-defence, was only a qualified privilege, limited to the necessities of the situation and carrying with it an obligation to be fair. It could not extend to any statement which exceeded the exigency of the occasion, nor justify any statement maliciously made. It is quite clear that judged by that test, almost all the offending passages will be found to fall outside the privilege. What was of common interest to the defendants and their subscribers and advertisers was the strike situation and also perhaps the reason why delivery of the paper in certain quarters of city was, on occasions, interrupted of delayed. The interest which the defendants had to protect was their good name as employers and the patronage of their subscribers and advertisers. It could not possibly be necessary, in order to serve or protect either of those interests, to state that the members of the plaintiff's Union had employed hirelings or that the Union had been affiliated to the B.P.N.T.U.C only as a subterfuge or that it was not a B.P.N.T.U.C Union at all. Nor could it be necessary to hold up the plaintiff, directly as well as by implication, as a person guilty of bad faith in her activities as a labour leader and as a person given to trickery and organized violence. It is true that statements made on privileged occasions must not be weighed in too nice a scale and some allowance must be made for excesses caused by indignation or annoyance. But nothing could justify the wholly irrelevant and grossly defamatory statements to which I have referred and no plea of qualified privilege is sustainable in respect of them.

I have reserved the question of malice for separate treatment to which I must now advert. In my opinion, there is both intrinsic and extrinsic evidence of malice in the present case, as the learned Judge has rightly held. A defamatory statement, not germane in any way to the privileged occasion and not pertinent to the defendants vindication, is itself evidence of malice, ***Adam* v. *Ward*** [per Loreburn, L.C. (1917) AC 309, 321] and it may be such evidence as to the whole of the publication (ibid). it is true that the malice, in other words, malice in fact, as distinguished from the implied malice which the law presumes from the mere publication of defamatory matter. In a case of qualified privilege, such implied malice of excluded by the nature of the occasion and in order to be able to succeed, the plaintiff must prove express malice which means an actual wrong state of the mind in which the defendant acted, not bona fide and for a reason which would make the statement privileged but from an indirect and wrong motive, such as spite, ill-will or prejudice or with knowledge that the statement was untrue or recklessly "careless whether it was true or false". One of the ways in which the plaintiff can prove such wrong state of mind is by referring to the statement itself which may, from its own nature alone, furnish evidence of express malice [per Lord Dunedin, ***Adam* v. *Ward*** [(1917) AC 329] and it does so when it is found to contain libelous statements in no way pertinent to the exigency of the occasions. So also in a case of a plea of fair comment proof of a malice defeats the plea (***Thomas* v. *Bradbury*, *Agnew and Co.*** [(1906) 2

K.B. 627, 640] and malice is proved when the publication is found to contain unproved and libelous statements of fact, recklessly made (***Morrison* v. *Belcher*** [(1863) 3 F and F, 614] and ***Hedley* v. *Barlow*** **[**(1865) 4 F and F, at p. 230] it has already been shown that the publication in the present case contains several such statements. There is again a considerable body of extrinsic evidence to show that in fact the defendants acted from malice, that is to say, not for the purpose which would excuse them but for an indirect purpose, if not also out of spite or in a vengeful spirit. "Such extrinsic evidence may be evidence of what the defendant did or said before…so long as it is evidence from which the jury may infer malice existing at the time of the publication and actuating it. Thus evidence of other defamatory statements or of a previous dispute may be extrinsic of malice", [Halsbury, Hailsham Edition, Vol. 20, p.505 and the cases there cited], I have referred to some of that evidence which the learned Judge has reviewed in detail and I entirely agree with him in his conclusion expressed in the following words:

> It is not difficult to see that the plaintiff was the life and soul of the Union and the management of the Patrika realized that the only way to crush the activities of the Union was to crush the activities of the Union was to crush Bina Bhowmick and that is the determined object with which the Patrika authorities set themselves to work and went on carrying on propaganda against the plaintiff. I have no doubt that it is with this object of alienating public sympathy towards the plaintiff that Articles were published whenever opportunity presented itself, including the Article which is the subject-matter of the suit… I hold that the defendants were actuated by malice in publishing the libel complained of.

It may be pointed out that the first defendant, who is the editor of the paper and, as such, was responsible for the publication, did not come to the box. It is true that so far as the plea of a qualified privilege was concerned, the defendants might leave the occasion to be proved by the circumstances and were also not required to prove affirmatively that they had not acted from malice. But with respect to the plea of fair comment, the onus was on the defendants to show that "the comment was fair and in so doing to negative the writing or publication of the comment being actuated by an unfair state of mind." It is impossible to remark on the fact that the first defendant did not come to the box to say what information he had on which he found his comment, if comment it was, and the sources from which that information had been obtained. I am aware that there is an exception in the case of newspapers, but in the first place, the dispute in the present case is not of the nature of an ordinary dispute between a member of the public and a newspaper which has defamed him, but a private dispute between the management of a paper and the leader of a Union of its workers. In the second place, the exception applies only to the sources of the information and not to the information itself, ***Plymouth Mutual Co-operative and Industrial Society Ltd.* v. *Traders' Publishing Association Ltd.*** [(1906) I K.B. 403 C.A.]. Besides the exception only means that a newspaper cannot be compelled to disclose the source, not that it is not excepted to disclose it even when the burden lies on it to prove that it acted with fairness. I am, however, not basing my finding in any way on the fact of the first defendants omission to offer himself as a witness but on the positive evidence, extrinsic and intrinsic, to which I have referred.

I have already held that because of the very nature of the impugned statements, neither the plea of fair privilege nor the plea of qualified privilege can be claimed in respect of them. I hold further that even if the plea were available, they have been displaced by proof of malice.

We have no materials before us to judge the merits of the industrial dispute between the parties and it is no part of our duty to do so on the present occasion. But assuming the plaintiff was unreasonable and had made itself and her Union obnoxious to the management of the paper and it become necessary to counteract her activities by stating to the public what, according to the management, the true position was, it is greatly to be regretted that the defendants who own and conduct a well- established newspaper like the "Amrit BAzar Patrika" should not have found it possible to do so with dignity and restraint, confining themselves to facts and such comments as the facts warranted but should have so far disregarded their own position and status as to descend to running down an individual by making unwarranted and unjustifiable imputations against her in her personal capacity. In my opinion, the plaintiff has provided that the accusation made against her were libelous in fact and in law and she is therefore entitled to adequate amends.

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Rustom K. Karanjia v. *K.M.D. Thackersey*

AIR 1970 Bom. 424

PALEKAR, J. – This appeal by defendants 1 and 2 arises out of a libel suit filed by the plaintiff-respondent No. 1 on the original side of this Court in respect of an article published in the English Weekly "Blitz" in its issue of 24th September 1960. The plaintiff sought to recover Rs. 3,00,000/- as general damages and prayed for an injunction. A decree has been passed for the full claim with costs and future interest against defendants 1, 2 and defendant No. 4 who is respondent no. 2 in the appeal.

2. The plaintiff is a prominent businessman and industrialist of Bombay. At the time of the suit he was a partner in a firm which had been carrying on the business of Managing Agents of four textile mills. He was a Director of the Bank of India and of several other well-known companies. He was also the Chairman of the Textile Control Board which has been set up by the Government during the last World War. He was also the Chairman of the Indian Cotton Mills Federation.

3. Defendant No. 1 is the Editor of the "Blitz" and has accepted responsibility for the Article referred to above Defendant No. 2 is a Private Limited Company which owns the newspaper. Original defendant No. 3 with whom we are no longer concerned was the printer of the issue of the "Blitz" but since at an early stage of the suit he tendered an apology, the plaintiff withdrew his suit against him. Defendant No. 4 was joined subsequently in the suit as a joint tort-feasor since it was principally upon material furnished by him and with his agreement that the article was published in "Blitz".

4. The plaintiff claimed that the Article aforesaid, which is separately exhibited as Exhibit 6 was grossly defamatory of him. The whole of the Article was reproduced in the plaint. He alleged that the allegations and imputations made in that Article along with the several innuendoes set out in detail in the plaint were false and malicious, and as a result of the same, the plaintiff was injured in his character, credit and reputation and in the way of his business and had been brought into the public hatred, contempt and ridicule. Therefore, he alleged, he had suffered damages which he assessed at Rs. 3,00,000/-. As the Article itself showed that the defendants contemplated publishing a series of similar articles, the plaintiff further asked for a permanent injunction.

5. The suit was, principally, contested by defendants 1 and 2. That the Article was defamatory was not seriously disputed. The principal defences offered were (i) justification (ii) fair comment on a matter of public interest; and (iii) qualified privilege. It was also contended that the damages claimed were excessive and disproportionate.

6. After a trial, which we are told, went on for 101 days, in which most of the evidence was produced by the defendant and very little on behalf of the plaintiff, the learned Judge negatived the three defences referred to above and holding that the plaintiff had been grossly defamed by that article and punitive damages were awardable in this case, decreed the full claim of damages of Rs. 3,00,000/- with costs. He also gave the injunction asked for.

7. It is from this decree that the present appeal has been filed by defendants 1 and 2. Learned counsel for the appellants did not press their appeal against the finding of the learned

Judge on the pleas of justification and fair comment, but confined their arguments to the plea of "qualified privilege". They also pressed the plea that the damages awarded to the plaintiff were excessively disproportionate and unreasonable.

8. The defence of "qualified privilege" is set out in the written statement at para 11A and is as follows.

> 11A. Without prejudice to the aforesaid contentions of the defendants and in the alternative these defendants say that the said Article appearing in the issue of Blitz dated 24th September 1960 is protected as being on an occasion of qualified privilege in that the defendants honestly and without any indirect or improper motive and for general welfare of society published the said Article as it was the duty as Journalists to do and believing the allegations contained in the said article to be true.

Mr. Chari in his address assured us that he would stick to this defecne as set out in the written statement. The law with regard to "qualified privilege" which holds good to, this day, has been stated by Parke B. in ***Toogood* v. *Spyring*** [(1834) 149 ER 1044 at p. 1049] as follows:

> In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society and the law has not restricted the right to make them within any narrow limits.

10. The first thing to be noted while reading the Article is that the Article is not an attack on the personal or private character of the plaintiff. The attack is directed against the business organization going by the name of "House of Thackersey" of which, it is alleged the plaintiff is the head. According to Mr. Chari the Article is not an aimless literary composition. The writer under the pen-name of "Blitz's Racket-Buster" wanted to expose in a series of articles. First, how this "House of Thackersey" that is, the business organization consisting principally of the plaintiff his brothers their wives and close relations and friends built up, thanks to the official position held by the plaintiff as the chairman of the Textile Control Broad, a vast Empire of wealth by having recourse to unlawful and questionable means, involving tax evasion on a collosal scale, financial jugglery, import-export-rackets, and customs and foreign-exchange violations. Secondly, he wanted to suggest that owing to conditions prevailing at the time and owing to the enormous power and prestige wielded by the plaintiff, investigations into the operations of the "House" got bogged down for years leaving the "House of Thackersey" free to acquire great wealth.

11. According to Mr. Chari the several individual allegations made in the article are merely incidental or subsidiary and fall squarely in the general pattern of the two purposes

mentioned above. The main part of the Article begins with a historical narration giving some details about the "House of Thackersey." It is mentioned there that the business carried on by this "House" was on the brink of disaster in 1938 but it got a boost like any other business in the early War years. The plaintiff's position in the textile trade was recognized by the Government who appointed him as the Chairman of the Textile control Board. This gave the plaintiff a chance not only to further the interest of his satellite concerns but also to exert pressure to smother investigations made with regard to the operations of the "Thackersey House" and the plaintiff's personal involvement as a Director in the affairs of the Sholapur Mills. Owing to the inaction of Government and being emboldened by such inaction, the "House of Thackersey" was left free to build its vast cartel and mint untold wealth. That was the position of the "House of Thackersey" before it embarked, according to the Article, on a career of building a financial empire.

12. This empire was built by the "House" by embarking on a new line of business in the import-export field. Bogus factories and firms were brought into existence with a view to wangle fabulous licenses for unlawfully importing art-silk yarn.This yarn was sold though the media of these bogus factories. Enormous profits were made in these transactions which were concealed by financial jugglery which enabled the "House of Thackersey" to evade income-tax which with penalty, was computed at Rs. 4.66 crores. In order to manage these operations on a large scale, bank credits were obtained from obliging banks by the two firm of China Cotton Exporters and Laxmi Cotton Traders which had been recently started. Laxmi Cotton Traders was supposed to be practically owned and managed by the ladies of the house hold who knew little business. The Article suggested that these concerns were really the concerns of the plaintiff, and enormous credits had been obtained from the banks not on the standing of the concerns themselves but on the standing of the plaintiff who had become, in the meantime, a Director in a couple of Insurance Firms, two Banks and several other concerns for this purpose.

13. That was one way how the "House of Thackersey" accumulated vast wealth in India. Another way to which they had recourse was to accumulate large funds of foreign currency in foreign countries which the "House of Thackersey" surreptitiously brought into India in violation of Customs and Foreign Exchange Regulations. This part of the case, however was reserved for the Article to be published in the next week "Blitz" promised that in the next Article it would narrate (i) how these funds were brought to India from China and even Pakistan; (ii) how the Reserve Bank, the Finance Ministry and the Special Police Establishment got the scent and started investigations way back in 1953-54, (iii) how investigations had still remained incomplete, (iv) how investigating officers were frequently transferred and (v) how one officer, just on the eve of leading a mass police raid on the "Thackersey Empire" unfortunately met with a fatal car-accident.

14. Special reference was also made to the inaction of Government with regard to tax evasion by pointing out in the first two paragraphs of the Article that though income-tax evaded together with penalty was computed at about Rs. 4.66 crores and the case had passed through the Finance Ministry during the regimes of three successive Finance Ministers, Government had not succeeded in collecting the amount. On the other hand, it is suggested in paragraph 3 that the vast industrial Empire of the Thackerseys continued to flourish and

prosper, while its supreme boss, the plaintiff as the Chairman of the Indian cotton Mills Federation lorded over the entire textile-trade and openly defied the Government's plans to reduce cloth prices.

15. Thus, on a reading of the Article, Mr Chari submits the several allegations and imputations in the Article complained of as defamatory were made in the context of dealing with two principal objects of the Article, one being to show how an influential business organization amassed wealth by unlawful and questionable means and secondly how, when a probe into their unlawful activities was under taken the investigation somehow got bogged down for years on and with no tangible results.

16. If as Mr. Chari submits these were the objects with which the Article was written and we shall assume for the purposes of his argument that it was so there is no escape from the conclusion that the subject matter of the Article was of great public interest. The public are vitally interested in being assured that great concentration of wealth which is discouraged by Clause (b) and (c) of Art. 39 of the Constitution does not take place, and if it does either because of Government' inaction or because of deliberate violation of the law on the part of any business organization the public have a legitimate interest to know about it. If again owing to corruption, inefficiency or neglect on the part of the State investigating machinery offenders are not speedily brought to book that would also be a matter of vital public interest.

17. Mr. Chari, therefore, contends that this particular situation gave the newspaper "Blitz" a privileged occasion, that is to say, an occasion giving rise to a duty on the part of the newspaper to address a communication to its readers the citizens of India who were interested in receiving the communication. Therefore, any defamatory matter incidental to the subject-matter of the communication was protected by law unless express malice was proved by the plaintiff.

18. On the other hand, it was contended by Mr. Murzban Mistry on behalf of the plaintiff, Respondent No. 1, that a privileged occasion cannot be created by a person for himself to enable him to publish a defamatory statement which he cannot sustain or justify. According to him, a man publishing without undertaking an obligation to justify that on his own investigation he had found a public officer to be corrupt cannot claim immunity from liability for defamation by saying that he published it on an occasion of qualified privilege. If the contrary were true he urged public or private life would become impossible because a journalist claiming to investigate for himself facts about an individual in his private or public affairs would be entitled to publish grossly defamatory statements about him on the ground of public interest and claim protection under the principles of qualified privilege. Matter published with any such high purpose, Mistry does not agree that the Article was but in order to meet the argument of Mr. Chari, he is prepared to assume that the Article was published in the public interest. But in his submission the law does not permit publication of a defamatory matter even in the public interest when the journalist is not in a position to show that he has any duty to communicate the defamatory matter to the general public.

19. The proposition for which Mr. Chari contends, when reduced to general terms would be that, given a subject matter of wide public interest affecting the citizens of India, a newspaper publishing to the public at large statements of facts relevant to the subject-matter,

though defamatory in content should be held to be doing so on an occasion of qualified privilege.

21. The person or the newspaper who wants to communicate to the general public must also have a duty to communicate and if no such duty, apart from the fact that the matter is one of the public interest can be spelt out in the particular circumstances of the case, the publication could not be said to be upon a privileged occasion.

25. It was, however, contended for the defendants that in a case like the present where a journalist honestly believes that the public exchequer is deprived of a large sum of money and the Government is seized with paralysis in bringing the culprit to book speedily this court, having regard to the conditions obtaining in this country should recognize in the journalist a duty to bring the facts to the notice of the public with a view to put pressure on the Government to act. In this connection, reference was made to certain passages in the Report of the Press Commission part 1 1954, particularly paragraphs 910 and 911 in Chapter 19 at page 339. The Chapter is headed "Standards and performance." We have gone through the paragraphs referred to but we find there nothing to justify the contention that such a need was felt by the Press Commission. On the other hand, after stating in paragraph 914 that the newspapers ought to be accurate and fair, it sternly condemned Yellow Journalism (paragraph929) 'Sensationalism' (Paragraph 931) and Malicious and irresponsible, attacks (paragraph 936) even when such attacks had been made on the plea that the newspapers wanted to expose evil in high places. We do not, therefore, feel the need of recognizing any such new duty because the journalist like any other citizen has the right to comment fairly and if necessary severely on a matter of public interest, provided the allegations of facts he has made are accurate and truthful, however defamatory they may be otherwise. Since his right to comment on matters of public interest is recognized by law, the journalist obviously owes an obligation to the public to have his facts right. Where the journalist himself makes an investigation he must make sure that all his facts are accurate and true, so that if challenged he would be able to prove the same. We think public interests are better served that way. In our opinion therefore the plea of qualified privilege put forward on behalf of the defendants fails.

26. Mr. Mistry, on behalf of the plaintiff, further argued that even if qualified privilege was assumed in favour of the defendants he was able to show that the attack on his client was malicious. The law is clear in the matter. Malice in law which is presumed in every false and defamatory statement stands rebutted by a privileged occasion. In such a case in order to make a libel actionable the burden of proving actual or express malice is always on the plaintiff. Malice in that sense means making use of privileged occasion for an indirect or improper motive. Such malice can be proved in a variety of ways, inter alia (i) by showing that the writer did not honestly believe in the truth of these allegations, or that he believed the same to be false; (ii) or that the writer is move by hatred or dislike or a desire to injure the subject of the libel and is merely using the privileged occasion to defame…[See ***Watt* v. *Longsdon*** (1930) 1 KB 130] and the observation of Greer L.J. at p. 154) and (iii) by showing that out of anger prejudice or wrong motive the writer casts aspersions on other people recklessly whether they are true or false.

27. In this connection he first refers to the episode of 1947 set out in the plaint itself. It appears that on 31st May 1947 defendant No. 1 printed and published an Article in the "Blitz" under bold headings

(1) "Cloth Control Boss in Black Market Swoop Thackersey Mills were involved in Bombay's Biggest Black market Swoop";
(2) "Anti Corruption Branch follows Blitz clues "Phoney" Cloth Control Proved by Latest Black Market Swoop"
(3) "Textile Control Boss, too, in Thick of it"

and alleged that certain bales of cotton cloth were found in a certain godown in a rail by the police and these bales of cloth were the product of Crown, Hindustan and Great Western Mills which are under the agency of Mr. Krishnaraj Thackersey (the plaintiff) the Chairman of the Textile Control Board. Since the plaintiff was not responsible for the destination of these cloth bales after the Mills had sold the same in accordance with the Control Order he, through his solicitors served a notice on 16th June 1947 requiring defendant No. 1 to publish a full and unqualified apology in his newspaper in a prominent manner with the approval of the plaintiffs attorneys. After receipt of this notice defendant No. 1 published in the issue of 21st June 1947 what he called an explanation. In this explanation while he made it clear that he stood by the report, he explained that only the cloth manufactured by those mills had been seized in the black-market raid and that the Mill owners and the Mills concerned were in no way engaged in or guilty of black market operations. This explanation apparently did not satisfy the plaintiff. So, he filed a criminal complaint in the Court of the Chief Presidency Magistrate for defamation. It is the case of the plaintiff that after the complaint was filed defendant No. 1 completely surrendered himself to the mercy of the plaintiff and entreated the plaintiff to accept an unconditional and unqualified apology for having wrongfully published the said statement and the Article in the "Blitz". On such apology being accepted by the plaintiff, defendant No. 1 was discharged. It is the plaintiff's submission that this episode rankled in the mind of defendant No. 1 and therefore when in 1960 some material was brought to him by defendant No. 4 the defendant no. 1 took advantage of that opportunity to write the Article in suit maliciously. Mr. Chari submitted that more than 13 years had elapsed after his episode of 1947 and that it was more natural for defendant No. 1 to treat the episode as closed after the apology than to entertain any grouse against the plaintiff. He argued that it was not unusual for journalists to publish news or reports based upon what they thought was a reliable source but later when they find that the source was unreliable they would be only too eager to make amends by apologizing for the allegations made. That is exactly what happened according to Mr. Chari in 1947. The defendant No. 1 honestly believed that the plaintiff who was the Chairman of the Textile Control Board was concerned with the black-market-operations, but when it was brought to his notice that the plaintiff after the Mills had sold the cloth had nothing to do with the destination of the those goods, defendant No. 1 made an ample apology by publishing two explanation. As the first explanation did not satisfy the plaintiff, he made the second explanation which satisfied him and therefore after the same was accepted by the plaintiff there should be nothing to rankle in the mind of defendant No. 1. The course of events, however, does not bear out Mr. Chari's plea and it appears to us that defendant No. 1must have nursed a grievance. His own written statements show that he never

surrendered himself to the mercy of the plaintiff nor had he entreated the plaintiff to accept an unconditional and unqualified apology. According to him, what really made him give the second explanation after the criminal complaint was filed was that it was the learned Chief Presidency Magistrate himself who intervened in the matter and told defendant No. 1 that as he had already published an explanation, he might as well publish another in a form desired by the plaintiff and then put an end to the matter. This, according to defendant No. 1 was the real background of what is deemed to be an apology in the criminal court. In his evidence before the court, he gives a different version. He says that when the complaint was filed against him, he had been legally advised that he had a good fighting case. The reason for the apology was that defendant No. 1 was at that time going abroad on an important mission, and he had to obtain his freedom by apologizing. He had applied to the Magistrate to postpone the hearing of the case, but since his application was opposed by the plaintiff he accepted the suggestion made by the Magistrate that it would be desirable that he should go a little further the first explanation and hence he published the second explanation. That second explanation which is called an apology by the plaintiff is at page 1674 of the paper-book. In this explanation defendant No. 1 says that no allegations or insinuations of black-marketing should (by reason of the words of expressions used by him) be read into the said report or its headings as against Mr. Thackersey personally or his group of Mills. Then he said:

> We unequivocally withdraw all such allegations and insinuations which could be so read in our said report and express our regret to him.

The evidence given by defendant No.1 now would go to show that he had made this apology not because he was really satisfied about the truth of the matter but because of other considerations. As a matter of fact, he has stated in his evidence that even at that time, that is to say, prior to the publication of the Article dated 31st May 1947 he had information which led him to believe that the plaintiff was indulging in black-marketing. It is therefore, obvious that the regret expressed in the second explanation was much against his grain. He could not have easily forgotten that he had been compelled to make an undeserved apology to a person who to his information was a black-marketer. The things which he came to know about the plaintiff after 1947 would only held to keep this memory fresh is his mind because in his evidence before the court he says at p. 398-

> I had a bad impression about the plaintiff. my impression was that he indulged in a number of malpractices, that was unscrupulous ….One of the general impressions which I had carried even prior to the reading of the article in the "Peep" was that the plaintiff was a black-marketer. From the complaint which I received prior to reading the article in the "Peep" I felt that the plaintiff was engaged in black-marketing, tax-dodging and trying to influence Government officials by underhand means that is to say, corrupting Government officials. … The information which led me to believe that he was concerned with tax-dodging and corrupting officials was received by me thereafter and before 1960… From 1947 I had heard of serious complaints being made to the then Bombay Government by one Dosh and by others about the misuse by the plaintiff of his position as Chairman of the Textile Control Broad ….
>
> It will be thus seen that although a long time had elapsed after 1947 before he wrote the article in suit, defendant No. 1 must have been very grievously conscious

that he had been made to apologize to the plaintiff in the complaint filed before the Presidency Magistrate in 1947, most undeservedly, especially, as his impression about the plaintiff as a black-marketer had been confirmed after 1947. He carried the worst impression of the plaintiff even before defendant No. 4 came to him with his material. As a matter of fact the very alacrity with defendant No. 1 decided to publish a series of articles on the plaintiff would go to show that the episode of 1947 had not been forgotten by him. His own evidence goes to show that sometime in July 1960 defendant No. 4 saw him with his material. His first interview lasted for about two hours. Most of the time was occupied in questioning defendant No. 4 and trying to understand his case. He had hardly any time to go through the voluminous documentary material that defendant No. 4 had brought. He only cursorily glanced through it. He then called his deputy, Mr. Homi Mistry and asked him to prepare a series of articles. But what is pertinent to be noted is that even at the very first interview, even before any of the material had been checked he said asked Mr. Homi Mistry to prepare a series of articles "because his mind was made up to expose the plaintiff". All this shows that the reason for writing this Article was not mere public interest.

28. That brings us to the actual defamatory allegations made in the article. Therefore although Mr. Chari has tried to put the case on a high level viz that whole article was written with a view to serve public interests, we find here that the writer himself did not intend to do so.

37. Having, therefore given our careful consideration to the article and the aspect of malice put before us by learned counsel for the plaintiff we are satisfied that the whole article was conceived in express malice and therefore, no qualified privilege can at all be claimed.

50. In the result, the appeal is partially allowed, the decree of the trial Court is confirmed with the only modification that for the amount of Rs. 3,00,000/-, Rs.1,50,000/- will be substituted.

* * * * *

Faqir Chand Gulati v. *Uppal Agencies Private Limited*

(2008) 10 SCC 345

R.V. RAVEENDRAN, J. - This appeal is against the order dated 3-2-2004 passed by the National Consumer Disputes Redressal Commission ("the Commission") in Revision Petition No. 1878 of 2000. It relates to the question whether a landowner, who enters into an agreement with a builder, for construction of an apartment building and for sharing of the constructed area, is a "consumer" entitled to maintain a complaint against the builder as a service provider under the Consumer Protection Act, 1986.

The Agreement

2. The appellant is the owner of Premises No. L-3, Kailash Colony, New Delhi. He entered into a "collaboration agreement" dated 17-5-1991 with the first respondent, the terms of which are, in brief, as follows:

(*i*) The owner shall place at the disposal of the builder, vacant possession of the premises and authorise the builder to secure necessary sanctions, permissions and approvals for demolition of the existing building and construction and completion of a new building.

(*ii*) The builder shall demolish the existing structure and construct a residential building consisting of ground, first and second floors, at its cost and expense.

(*iii*) The builder will have the right to appoint architects, contractors, sub-contractors, etc.

(*iv*) The new building to be constructed by the builder shall be of good quality as per the detailed specifications contained in Annexure 'A' to the agreement.

(*v*) On completion of construction, the landowner will be entitled to the entire ground floor (consisting of three bedrooms with attached bathrooms, one drawing-cum-dining room, one storeroom, one kitchen) with one servant room under the overhead water tank on rear terrace and one parking space, as his share in consideration of his having made available the land. The builder shall also pay a sum of Rs. 8 lakhs as non-refundable consideration to the owner.

(*vi*) The remaining part of the building (the entire first and second floors and two servant rooms and two car parking spaces) shall belong to the builder as its share of the building in consideration of having spent the cost of construction of the entire building and all other services rendered by him under the agreement.

(*vii*) The owner and the builder shall be entitled to undivided and indivisible share in the land, proportionate to their right in the building, that is, an undivided one-third share in the land shall belong to the owner and two-third share shall belong to the developer.

(*viii*) The builder shall be entitled to either retain or sell its share of the building. The owner shall execute necessary documents for transferring the share corresponding to the builder's portion of the building. The owner shall give an irrevocable power of attorney enabling the builder to execute the deed of conveyance in regard to the builder's share in the land. The builder will, however, have the option to require the owner to personally execute the sale deed in regard to the builder's share in the land instead of using such power of attorney.

(*ix*) On completion of the building, the builder shall apply for completion certificate to the authority concerned and shall be liable to pay any penalty that may be imposed or levied in regard to the deviations, if any, made in the construction of the building.

(*x*) The owner shall not interfere or obstruct the construction and completion of the work in any manner, but will have access to the construction to point out any defect in construction or workmanship or use of inferior material, so as to require the builder to rectify such defects.

(*xi*) Title deeds handed over by the owner to the builder for completing the formalities relating to the agreement shall thereafter be returned to the owner, who shall, however, make available the same for reference by the owners of the other floors.

(*xii*) The agreement and the power of attorney executed by the owner in favour of the builder are irrevocable. In the event of neglect, failure, default on the part of the owner or the builder, the affected party shall have the right to specific performance of the said agreement at the cost and risk of the defaulting party who shall also be liable to pay damages.

(*xiii*) The agreement is not a partnership and shall not be deemed to be a partnership between the owner and the builder.

The dispute and the decision

3. The appellant ("the landowner") alleges that the first respondent ("the builder") secured sanction of the plan for construction from Municipal Corporation of Delhi (for short "MCD") but made several unauthorised deviations during construction, resulting in several deviation notices from MCD. In fact, MCD passed an order dated 16-1-1991 to seal the premises, but subsequently, the premises were desealed to enable the builder to rectify the deviations. The builder delivered possession of the ground floor on 2-4-1992. The builder sold the first and second floors to four persons under sale deeds dated 18-3-1992 and 2-6-1995.

4. The delivery of the ground floor was made by the builder to the appellant's son during the appellant's absence from India. On his return, the appellant sent a letter dated 29-10-1992, pointing out several shortcomings in the construction and the violations of the sanctioned plan, and called upon the builder to rectify the deviations and defects. The builder did not comply.

5. The appellant, therefore, filed Complaint No. 1866 of 1994 before the District Consumer Disputes Redressal Forum IX, Delhi, under the Consumer Protection Act, 1986 ("the Act") seeking the following reliefs against the builder:

(*a*) Return of the title deeds relating to the premises;

(*b*) Supply of completion certificate and C&D forms from MCD; and

(*c*) Delivery of security deposit receipt for electricity meter and payment of Rs 4262.64 being the charges for change of electricity meter.

6. The District Forum dismissed the complaint by order dated 10-5-1996 as not maintainable under the Act, holding that the appellant was not a "consumer" as defined in Section 2(1)(*d*)(*ii*) of the Act. It held that the agreement between the parties created mutual rights and obligations with a provision that in the event of breach of any condition, the

affected party shall have the right of specific performance and such an agreement cannot be construed as a contract for hiring/availing a service, for consideration by a consumer.

7. The appellant filed an appeal against the order of the District Forum and the said appeal was dismissed by the State Commission, Delhi, by order dated 4-10-2000. The State Commission held that the agreement between the parties, termed as a collaboration agreement, was in the nature of a joint venture or agreement to collaborate; that the agreement contemplated "sharing" of constructed area, that is the entire ground floor of the building by the landowner and the remaining area by the builder; that the agreement did not have any element of hiring any services; and that, therefore, the appellant was not a "consumer" and the builder was not a "service-provider". It, therefore, confirmed the District Forum's decision that the petition was not maintainable. For this purpose, it also relied on the decision of the National Commission in ***C. Narasimha Rao* v. *K.R. Neelakandan*** (1994) 1 CPJ 160 and its own decision in ***Har Sarup Gupta* v. *Kailash Nath & Associates***, (1995) 2 CPJ 275 However, as the appellant was old and as the first and third reliefs (relating to delivery of title deeds and electricity meter security deposit receipt and payment of the charges for the change of electricity meter) had already been secured by the appellant and the only pending issue related to C&D forms, the State Commission proceeded to decide the appeal on merits. It noted that as the builder had already applied for the C&D forms to the competent authority and was pursuing the matter and had undertaken to hand over the same to the appellant as and when made available, nothing further was required to be done by the builder. The appeal was, therefore, dismissed as devoid of merit.

8. The appellant filed a revision petition before the National Commission. The appellant challenged the finding that the complaint was not maintainable. He also contended that as the builder had failed to secure and furnish the completion certificate and C&D forms (that is property tax assessment listing) from MCD, his complaint could not have been dismissed. He also submitted that in view of the violations, MCD had demolished certain portions of the structure and was insisting upon the other deviations which were beyond compoundable limits to be rectified; and that MCD was refusing to issue the completion certificate and C&D forms without those rectifications; and that the prayer for delivery of completion certificate and C&D forms required the builder to rectify all defects and bring the deviations within permissible limits and secured completion certificate and C&D forms. He pointed out that in the absence of completion certificate and C&D forms, he was facing threats of demolition apart from harassment from MCD. He contended that the non-completion of building as per the sanctioned plan and making deviations on a large scale resulting in non-issue of completion certificate and C&D forms amounted to deficiency in service and, therefore, his complaint ought to have been allowed.

9. The National Commission dismissed the revision petition by order dated 3-2-2004. The order extracted the relevant provisions of the agreement *in extenso* and then proceeded to reject the petition by merely observing that the agreement was in the nature of a joint venture and transaction did not have any element of hiring the services of the builder within the meaning of Section 2(1)(*d*)(*ii*) of the Act and that the District Forum and the State Commission had rightly held that the appellant was not a consumer. The said order is challenged in this appeal by special leave.

Legal provisions

10. We may briefly notice the provisions of the Act before referring to the contentions of the parties. The object of the Act is to provide for better protection of the interests of consumers. It establishes consumer disputes redressal agencies and enables persons having grievances regarding goods supplied or services provided, to file complaints before such redressal agencies. Section 14 enumerates the reliefs that can be granted by a redressal agency to the complainant if he satisfies the agency about the defect in goods or deficiency in service. Two of the reliefs that can be granted by the Forum, if it is satisfied that any of the allegations contained in the complaint about the deficiency in the service are proved, are, a direction to the opposite party to remove the deficiencies in the service in question and a direction to pay compensation to the consumer for any loss or injury suffered by him. Section 3 provides that the provisions of the Act shall be in addition and not in derogation of the provisions of any other law for the time being in force. Any allegation in writing made by the complainant that the services hired or availed of or agreed to be hired or availed of by him suffered from deficiency in any respect, with a view to obtaining any relief provided for by or under the Act, is a "complaint" under Section 2(1)(*c*) of the Act.

11. The terms "consumer", "deficiency" and "service" defined in clauses (*d*), (*g*) and (*o*) of Section 2(1) of the Act as it stood at the time when the appellant approached the District Forum in 1994 are extracted below:

> "2. (1)(*d*) "consumer" means any person who,-
>
> (*ii*) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person; * * *
>
> (*g*) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service; * * *
>
> (*o*) "service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, *housing construction*, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;" (emphasis supplied)

Contentions

12. The appellant contends that though the agreement is captioned as "collaboration agreement", it is not a joint venture as assumed by the State Commission and National Commission but an agreement under which the builder agreed to make a housing construction for the landowner and, therefore, the activity of the builder squarely falls within the definition of "service". According to him, the fact that he entered into an agreement making available

the plot for construction of a three-storeyed building and agreeing to share the building after construction and receive towards his share the ground floor of the building plus Rs 8 lakhs did not amount to entering into a joint venture to share the profits and losses. He submitted that the basic scheme of the agreement was that the builder should construct and deliver a house (ground floor of the building) to the owner and if there was any deficiency in fulfilling the obligations undertaken in connection with such construction, there would be a deficiency in service; and that, therefore, insofar as the term relating to construction of the ground floor for his benefit is concerned, the builder was a service provider and he was a consumer.

13. On the other hand, the respondent contended that the agreement was for collaboration in the nature of a joint venture which required the owner to contribute the land and the builder to contribute the funds for construction of a building and thereafter share the construction, that is, ground floor with corresponding undivided share to the owner and upper floors with corresponding undivided share to the builder, and that it was in the nature of a single business adventure under which the parties agreed to share the benefits. It is also pointed out that the builder had paid a sum of Rs. 8 lakhs to the owner as consideration in addition to agreeing to give the ground floor of the new building and, therefore, the agreement was also in the nature of the agreement of sale of undivided share in land by the owner to the builder. It was contended that the two parties to the agreement were associates to carry out a single enterprise or business adventure for mutual profit and such a venture resulting in profit for both the parties was not an agreement for providing service. The respondent submitted that there was no contract for "house construction" as such, nor for sale of a house and, therefore, it was not a "service provider". It was also pointed out that it was not only the builder who had certain obligations towards the owner, but the owner also had the following obligations towards the builder:

(*a*) The owner shall execute all documents required for effecting transfer of builder's share of the land.

(*b*) The owner shall not obstruct or interfere with the construction in any manner.

(*c*) The owner had to keep the property wholly free from encumbrances during the currency of the agreement.

(*d*) If the owner's title was found to be defective, the owner was liable to pay damages, losses and costs to the builder and its nominees.

(*e*) The owner shall do all acts, deeds and things required to keep the rights in the land subsisting.

(*f*) The owner shall not revoke or cancel the agreement or power of attorney.

14. That as each party had to discharge and fulfil certain obligations towards the other in consideration of the other party fulfilling some certain obligations, the remedy in the event of any alleged breach, according to the builder, is to sue for specific performance and/or damages in a civil court and a complaint under the Act was not maintainable.

15. On the contentions raised, two questions arise for consideration:

(*i*) Whether on the facts and circumstances, a complaint under the Consumer Protection Act, 1986 is maintainable, in regard to the agreement dated 17-5-1991 between the parties.

(*ii*) Whether a complaint is maintainable under the Act for a prayer seeking delivery of completion certificate and C&D forms in regard to a building and whether the prayer for completion certificate/C&D forms involves a prayer for rectification of the deficiencies in the building so as to secure the completion certificate and C&D forms.

Re: First question

16. The first question in fact involves examination of the following issue. When the owner of a plot of land enters into an agreement with a builder for development of the property by construction of a building and sharing the constructed area between the owner and the builder, and the developer commits any breach either by failing to deliver the owner's share of constructed area or by constructing the building contrary to specifications, or by failing to fulfil the obligations relating to completion certificate or amenities like water, electricity and drainage, whether the owner can maintain a complaint under the Consumer Protection Act and whether in such circumstances, the owner can claim that he is a consumer and the builder is the service provider.

17. In ***Lucknow Development Authority* v. *M.K. Gupta*** (1994) 1 SCC 243 referring to the nature and object of the Act, this Court observed:

> "*2.* … To begin with the Preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a Preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones and the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep

then its ambit is widened to such things which otherwise would have been beyond its natural import."

18. This Court next considered the meaning of the word "service". Thereafter, this Court dealt with the question whether "service" included housing construction, even before the inclusion of "housing construction" in the definition of "service" by Act 50 of 1993 with effect from 18-6-1993. This Court observed: (***M.K. Gupta*** case)

"*4.* What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory, etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. …

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within meaning of clause (*o*) of Section 2 of the Act as it stood prior to inclusion of the expression 'housing construction' in the definition of 'service' by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. ... If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immovable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (*ii*) of clause (*r*) of Section 2 as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit to which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. … A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of

personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993."

19. The predicament faced by the persons who deal with builders and promoters, was noticed by this Court in ***Friends Colony Development Committee* v. *State of Orissa*** [(2004) 8 SCC 733] in a different context while dealing with town planning laws:

> "*20.* … Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffer unbearable burden and is often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. *The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolition*. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorised constructions, but who failed in doing so either by negligence or connivance." (emphasis supplied)

20. There is no dispute or doubt that a complaint under the Act will be maintainable in the following circumstances:

> (*a*) Where the owner/holder of a land who has entrusted the construction of a house to a contractor, has a complaint of deficiency of service with reference to the construction.
>
> (*b*) Where the purchaser or intending purchaser of an apartment/flat/ house has a complaint against the builder/developer with reference to construction or delivery or amenities.

But we are concerned with a third hybrid category which is popularly called as "joint-venture agreements" or "development agreements" or "collaboration agreements" between a landholder and a builder. In such transactions, the landholder provides the land. The builder puts up a building. Thereafter, the landowner and builder share the constructed area. The builder delivers the "owner's share" to the landholder and retains the "builder's share". The landholder sells/transfers undivided share(s) in the land corresponding to the builder's share of the building to the builder or his nominees. As a result each apartment owner becomes the owner of the apartment with corresponding undivided share in the land and an undivided

share in the common areas of the building. In such a contract, the owner's share may be a single apartment or several apartments. The landholder who gets some apartments may retain the same or may dispose of his share of apartments with corresponding undivided shares to others. The usual feature of these agreements is that the landholder will have no say or control in the construction. Nor will he have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. His only right is to demand delivery of his share of constructed area in accordance with the specifications. The builders contend that such agreements are neither contracts for construction, nor contracts for sale of apartments, but are contracts entered for mutual benefit and profit and in such a contract, they are not "service providers" to the landowners, but a co-adventurer with the landholder in a "joint venture", in developing the land by putting up multiple-housing (apartments) and sharing the benefits of the project. The question is whether such agreements are truly joint ventures in the legal sense.

21. This Court had occasion to consider the nature of "joint-venture" in ***New Horizons Ltd.*** **v.** ***Union of India*** [(1995) 1 SCC 478]. This Court held:

> "*24.* The expression 'joint venture' is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. *It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses*. (***Black's Law Dictionary***, 6th Edn., p. 839.) According to *Words and Phrases*, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23)."
>
> (emphasis supplied)

22. The following definition of "joint venture" occurring in ***American Jurisprudence*** (2nd Edn., Vol. 46, pp. 19, 22 and 23) is relevant:

> "A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that *there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise*.
>
> Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been

to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships.

A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation." (emphasis supplied)

23. To the same effect is the definition in ***Corpus Juris Secundum*** (Vol. 48-A, pp. 314-15):

"'Joint venture', a term used interchangeably and synonymous with 'joint adventure', or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) *sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings*; (3) *community of control over, and active participation in, management and direction of business enterprise*; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement." (emphasis supplied)

24. ***Black's Law Dictionary*** (7th Edn., p. 843) defines "joint venture" thus:

"*Joint venture*.- A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (*1*) an express or implied agreement; (*2*) a common purpose that the group intends to carry out; (*3*) shared profits and losses; and (*4*) each member's equal voice in controlling the project."

25. An illustration of joint venture may be of some assistance. An agreement between the owner of a land and a builder, for construction of apartments and sale of those apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/ development and be accountable to each other for their respective acts with reference to the project.

26. We may now notice the various terms in the agreement between the appellant and the first respondent which militate against the same being a "joint venture". Firstly, there is a categorical statement in Clause 24, that the agreement shall not be deemed to constitute a partnership between the owner and the builder. The landowner is specifically excluded from management and is barred from interfering with the construction in any manner (vide Clause 15) and the builder has the exclusive right to appoint the architects, contractors and sub-contractors for the construction (vide Clause 16). The builder is entitled to sell its share of the building as it deemed fit, without reference to the landowner (vide Clauses 7 and 13). The

builder undertakes to the landowner that it will construct the building within 12 months from the date of sanction of building plan and deliver the owner's share to the landowner (vide Clauses 9 and 14). The builder alone is responsible to pay penalties in respect of deviations (vide Clause 12) and for payment of compensation under the Workmen's Compensation Act in case of accident (vide Clause 10). Secondly, there is no community of interest or common/joint control in the management, nor sharing of profits and losses. The landowner has no control or participation in the management of the venture. The requirement of each joint venturer being the principal as well as agent of the other party is also significantly absent. We are, therefore, of the view that such an agreement is not a joint venture, as understood in law.

27. What then is the nature of the agreement between the appellant and the first respondent? The appellant is the owner of the land. He wants a new house, but is not able to construct a new house for himself either on account of paucity of funds or lack of expertise or resources. He, therefore, enters into an agreement with the builder. He asks the builder to construct a house and give it to him. He says that as he does not have the money to pay for the construction and will, therefore, permit the builder to construct and own additional floor(s) as consideration. He also agrees to transfer an undivided share in the land corresponding to the additional floor(s) which falls to the share of the builder. As a result, instead of being the full owner of the land with an old building, he becomes a co-owner of the land with a one-third share in the land and absolute owner of the ground floor of the newly constructed building and agrees that the builder will become the owner of the upper floors with corresponding two-third share in the land. As the cost of the undivided two-third share in the land which the landowner agrees to transfer to the builder, is more than the cost of construction of the ground floor by the builder for the landowner, it is also mutually agreed that the builder will pay the landowner an additional cash consideration of Rs 8 lakhs.

28. The basic underlying purpose of the agreement is the construction of a house or an apartment (ground floor) in accordance with the specifications, by the builder for the owner, the consideration for such construction being the transfer of undivided share in land to the builder and grant of permission to the builder to construct two floors. Such agreement whether called as a "collaboration agreement" or a "joint venture agreement", is not, however, a "joint venture". There is a contract for construction of an apartment or house for the appellant, in accordance with the specifications and in terms of the contract. There is a consideration for such construction, flowing from the landowner to the builder (in the form of sale of an undivided share in the land and permission to construct and own the upper floors). To adjust the value of the extent of land to be transferred, there is also payment of cash consideration by the builder. But the important aspect is the availment of services of the builder by the landowner for a house construction (construction of the owner's share of the building) for a consideration. To that extent, the landowner is a consumer, the builder is a service provider and if there is deficiency in service in regard to construction, the dispute raised by the landowner will be a consumer dispute. We may mention that it makes no difference for this purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be

the same and the contract will be considered as one for house construction for consideration. The deciding factor is not the number of apartments deliverable to the landowner, but whether the agreement is in the nature of a joint venture or whether the agreement is basically for construction of certain area for the landowner.

29. It is, however, true that where the contract is a true joint venture the scope of which has been pointed out in paras 21 to 25 above, the position will be different. In a true joint venture agreement between the landowner and another (whether a recognised builder or fund provider), the landowner is a true partner or co-adventurer in the venture where the landowner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture. In such a case, the landowner is not a consumer nor is the other co-adventurer in the joint venture, a service provider. The landowner himself is responsible for the construction as a co-adventurer in the venture. But such true joint ventures are comparatively rare. What is more prevalent are agreements of the nature found in this case, which are a hybrid agreement for construction for consideration and sale and are pseudo joint ventures. Normally a professional builder who develops properties of others is not interested in sharing the control and management of the business or the control over the construction with the landowners. Except assuring the landowner a certain constructed area and/or certain cash consideration, the builder ensures absolute control in himself, only assuring the quality of construction and compliance with the requirements of local and municipal laws, and undertaking to deliver the owners' constructed area of the building with all certificates, clearances and approvals to the landowner.

30. Learned counsel for the respondent contended that the agreement was titled as "collaboration agreement" which shows an intention to collaborate and, therefore, it is a joint venture. It is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties. Therefore, the use of the words "joint venture" or "collaboration" in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses.

31. The State Commission and the National Commission have proceeded on an assumption, which appears to be clearly baseless, that wherever there is an agreement for development of a property between the property owner and builder under which the constructed area is to be divided, it would automatically amount to a joint venture and there is no question of the landholder availing the service of the builder for consideration. Reliance was placed on two decisions, the first being that of the National Commission in ***C. Narasimha Rao*** **v.** ***K.R. Neelakandan*** and the second being that of the Delhi State Commission in ***Har Sarup Gupta*** **v.** ***Kailash Nath & Associates***.

32. In ***C. Narasimha Rao*** there was an agreement between the landowners and a builder for construction of a building and sharing of the constructed area. The old building was demolished, but the builder failed to complete the construction of a new building and hand over the owner's share of flats. The landowners preferred a complaint claiming Rs

94,000 as the value of the malba (retrievable valuables from the debris of the old building) that had been removed by the builder. The National Commission held that as the claim was for recovery of the money being value of the malba removed by the builder, it does not amount to a claim based on deficiency of service and, therefore, such a claim would fall outside the scope of the Consumer Protection Act. The said decision is wholly inapplicable, as it dealt with a different question.

33. In ***Har Sarup Gupta*** the State Commission was concerned with a claim of the landowners for compensation alleging that the builder had not built the flats in terms of the contract under which the landowners were entitled to 36% and the builder was entitled to 64% of the built-up area. The State Commission held that the complaint was not maintainable on the ground that on similar facts the National Commission in *Narasimha Rao case*[1] had held that the fora under the Consumer Protection Act did not have jurisdiction. But *Narasimha Rao*[1], as noticed above, was not similar on facts, nor did it lay down any such proposition. ***Har Sarup Gupta*** is clearly wrongly decided.

34. We may notice here that if there is a breach by the landowner of his obligations, the builder will have to approach a civil court as the landowner is not providing any service to the builder but merely undertakes certain obligations towards the builder, breach of which would furnish a cause of action for specific performance and/or damages. On the other hand, where the builder commits breach of his obligations, the owner has two options. He has the right to enforce specific performance and/or claim damages by approaching the civil court. Or he can approach the Forum under the Consumer Protection Act, for relief as consumer, against the builder as a service provider. Section 3 of the Act makes it clear that the remedy available under the Act is in addition to the normal remedy or other remedy that may be available to the complainant.

35. The District Forum, the State Commission and the National Commission committed a serious error in wrongly assuming that agreements of this nature being in the nature of joint venture are outside the scope of consumer disputes.

Re: Second question

36. Under the agreement, the builder is required to construct the ground floor in accordance with the sanctioned plan, and specifications and the terms in the agreement and deliver the same to the owner. If the construction is part of a building which in law requires a completion certificate or C&D forms (relating to assessment), the builder is bound to provide the completion certificate or C&D forms. He is also bound to provide amenities and facilities like water, electricity and drainage in terms of the agreement. If the completion certificate and C&D forms are not being issued by the corporation because the builder has made deviations/violations in construction, it is his duty to rectify those deviations or bring the deviations within permissible limits and secure a completion certificate and C&D forms from MCD. The builder cannot say that he has constructed a ground floor and delivered it and, therefore, fulfilled his obligations. Nor can the builder contend that he is not bound to produce the completion certificate, but only bound to apply for completion certificate. He cannot say that he is not concerned whether the building is in accordance with the sanctioned plan or not, whether it fulfils the requirements of the municipal bye-laws or not, or whether there are

violations or deviations. The builder cannot be permitted to avoid or escape the consequences of his illegal acts. The obligation on the part of the builder to secure a sanctioned plan and construct a building, carries with it an implied obligation to comply with the requirements of municipal and building laws and secure the mandatory permissions/ certificates.

37. The surviving prayer is no doubt only for a direction to the builder to furnish the completion certificate and C&D forms. It is not disputed that a building of this nature requires a completion certificate and building assessment (C&D forms). The completion certificate and C&D forms will not be issued if the building constructed is contrary to the bye-laws and sanctioned plan or if the deviations are beyond the permissible compoundable limits. The agreement clearly contemplates the builder completing the construction and securing completion certificate. The agreement, in fact, refers to the possibility of deviations and provides that if there are deviations, the builder will have to pay the penalties, that is, do whatever is necessary to get the same regularised. Even if such a provision for providing completion certificate or payment of penalties is not found in the agreement, the builder cannot escape the liability for securing the completion certificate and providing a copy thereof to the agreement, the builder cannot escape the liability for securing the completion certificate and providing a copy thereof to the owner if the law requires the builder to obtain completion certificate for such a building.

38. A prayer for completion certificate and C&D forms cannot be brushed aside by stating that the builder has already applied for the completion certificate or C&D forms. If it is not issued, the builder owes a duty to make necessary application and obtain it. If it is wrongly withheld, he may have to approach the appropriate court or other forum to secure it. If it is justifiably withheld or refused, necessarily the builder will have to do whatever that is required to be done to bring the building in consonance with the sanctioned plan so that the municipal authorities can inspect and issue the completion certificate and also assess the property to tax. If the builder fails to do so, he will be liable to compensate the complainant for all loss/damage. Therefore, the assumption of the State Commission and the National Commission that the obligation of the builder was discharged when he merely applied for a completion certificate is incorrect.

Conclusion

39. The District Forum and the National Commission did not examine the matter with reference to facts. The State Commission held that the complaint was not maintainable but purported to consider the factual question in a half-hearted and casual manner. The matter will now have to go back to the District Forum for deciding the matter on merits. We, accordingly, allow this appeal as follows:

(*a*) The orders of the National Commission, the State Commission and the District Forum are set aside.

(*b*) The appellant's complaint is held to be maintainable.

(*c*) The District Forum is directed to consider the matter on merits and dispose of the matter in accordance with law, within six months from the date of receipt of this order.

* * * * *

Indian Medical Association v. *V. P. Shantha*

AIR 1996 SC 550

S.C. AGRAWAL, J. – 2. These appeals, special leave petitions and the writ petition raise a common question, viz., whether and, if so, in what circumstances, a medical practitioner can be regarded as rendering 'service' under section 2(1)(o) of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act'). Connected with this question is the question whether the service rendered at a hospital/nursing home can be regarded as 'service' under section 2(1)(o) of the Act. These questions have been considered by various High Courts as well as by the National Consumer Disputes Redressal Commission ('the National Commission').

10. On 9-4-1985, the General Assembly of the United Nations, by Consumer Protection Resolution No. 39/248, adopted the guidelines to provide a framework for Governments, particularly those of developing countries, to use in elaborating and strengthening consumer protection policies and legislation. The objectives of the said guidelines include assisting countries in achieving or maintaining adequate protection for their population as consumers and encouraging high levels of ethical conduct for those engaged in the production and distribution of goods and services to the consumers. The legitimate needs which the guidelines are intended to meet include the protection of consumers from hazards to their health and safety and availability of effective consumer redress. Keeping in view the said guidelines, the Act was enacted by Parliament to provide for better protection of the interests of consumers and for that purpose, to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith. The Act sets up a three-tier structure for the redressal of consumer grievances. At the lowest level, i.e., the District level, is the Consumer Disputes Redressal Forum known as "the District Forum"; at the next higher level, i.e., the State level, is the Consumer Disputes Redressal Commission known as "the State Commission" and at the highest level is the National Commission (section 9). The jurisdiction of these three Consumer Disputes Redressal Agencies is based on the pecuniary limit of the claim made by the complainant. An appeal lies to the State Commission against an order made by the District Forum (section 15) and an appeal lies to the National Commission against an order made by the State Commission on a complaint filed before it or in an appeal against the order passed by the District Forum (section 19). The State Commission can exercise revisional powers on grounds similar to those contained in section 115 CPC in relation to a consumer dispute pending before or decided by a District Forum [section 17(b)] and the National Commission has similar revisional jurisdiction in respect of a consumer dispute pending before or decided by a State Commission [Section 21(b)]. Further, there is a provision for appeal to this Court from an order made by the National Commission on a complaint or on an appeal against the order of a State Commission (section 23). By virtue of the definition of the complainant in section 2(1)(c), the Act affords protection to the consumer against unfair trade practice or a restrictive trade practice adopted by any trader, defect in the goods bought or agreed to be bought by the consumer, deficiency in the service hired or availed of or agreed to be hired or availed of by the consumer, charging by a trader price in excess of the price fixed by or under

any law for the time being in force or displayed on the goods or any package containing such goods and offering for sale to public, goods which will be hazardous to life and safety when used, in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods. … The provisions of the Act are in addition to and not in derogation of the provisions of any other law for the time being in force. (section 3)**.**

11. In this group of cases we are not concerned with goods, we are only concerned with rendering of services. Since the Act gives protection to the consumer in respect of service rendered to him, the expression 'service' in the Act has to be construed keeping in view the definition of 'consumer' in the Act. It is, therefore, necessary to set out the definition of the expression 'consumer' contained in section 2(1)(d) insofar as it relates to services and the definition of the expression 'service' contained in section 2(1)(o) of the Act. The said provisions are as follows—

"2.(1)(d) 'consumer' means any person who,—

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the service for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person." (emphasis added)

"2.(1)(o) 'service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, *but does not include rendering of any service free of charge* or under a contract of personal service;" (emphasis added)

12**.** The words "or avails of" after the word 'hires' in section 2(1)(d)(*ii*) and the words "housing construction" in section 2(1)(o) were inserted by Act 50 of 1993.

13. The definition of 'service' in section 2(1)(o) of the Act can be split up into three parts - the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service.

14. The definition of 'service' as contained in section 2(1)(o) of the Act has been construed by this Court in ***Lucknow Development Authority* v. *M.K. Gupta*** [AIR 1994 SC 787].

19. It has been contended that in law there is a distinction between a profession and an occupation and that while a person engaged in an occupation renders service which falls within the ambit of section 2(1)(o), the service rendered by a person belonging to a profession does not fall within the ambit of the said provision and, therefore, medical practitioners who

belong to the medical profession are not covered by the provisions of the Act. It has been urged that medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 and the Code of Medical Ethics made by the Medical Council of India, as approved by the Government of India under section 3 of the Indian Medical Council Act, 1956 which regulates their conduct as members of the medical profession and provides for disciplinary action by the Medical Council of India and/or State Medical Councils against a person for professional misconduct.

20. While expressing his reluctance to propound a comprehensive definition of a 'profession', Scrutton L.J. has said

> 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning. [See: ***Commissioner of Land Revenue*** v. ***Maxse***, 1919 1 KB 647 at p.657.)]

21. According to Rupert M. Jackson and John L. Powell, the occupations which are regarded as professions have four characteristics, viz.

(*i*) the nature of the work which is skilled and specialized and a substantial part is mental rather than manual;

(*ii*) commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;

(*iii*) professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; and

(*iv*) high status in the community.

22. The learned authors have stated that during the twentieth century, an increasing number of occupations have been seeking and achieving 'professional' status and that this has led inevitably to some blurring of the features which traditionally distinguish the professions from other occupations. In the context of the law relating to Professional Negligence, the learned authors have accorded professional status to seven specific occupations, namely, (*i*) architects, engineers and quantity surveyors, (*ii*) surveyors, (*iii*) accountants, (*iv*) solicitors, (*v*) barristers, (*vi*) medical practitioners and (*vii*) insurance brokers. [See: **Jackson & Powell on *Professional Negligence***, paras 1-01 and 1-03, 3rd Edn.]

23. In the matter of professional liability, professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a

certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. (See: **Jackson & Powell**, paras 1-04, 1-05 and 1-56). Immunity from suit was enjoyed by certain professions on the grounds of public interest. The trend is towards narrowing of such immunity and it is no longer available to architects in respect of certificates negligently given and to mutual valuers. Earlier, barristers were enjoying complete immunity but now even for them the field is limited to work done in court and to a small category of pre-trial work which is directly related to what transpires in court. Medical practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable skill and care.

24. It would thus appear that medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected.

27. We are, therefore, unable to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the provisions of the Act and the services rendered by medical practitioners are not covered by Section 2(1)(o) of the Act.

28. Shri Harish Salve, appearing for the Indian Medical Association, has urged that having regard to the expression "which is made available to potential users" contained in section 2(1)(o) of the Act, medical practitioners are not contemplated by Parliament to be covered within the provisions of the Act. He has urged that the said expression is indicative of the kind of service the law contemplates, namely, service of an institutional type which is really a commercial enterprise and open and available to all who seek to avail thereof. In this context, reliance has also been placed on the word 'hires' in sub-clause (*ii*) of the definition of 'consumer' contained in section 2(1)(d) of the Act. We are unable to uphold this contention. The word 'hires' in section 2(1)(d)(*ii*) has been used in the same sense as "avails of" as would be evident from the words "when such services are availed of" in the latter part of section 2(1)(d)(*ii*). By inserting the words "or avails of" after the word 'hires' in Section 2(1)(d)(*ii*) by the Amendment Act of 1993, Parliament has clearly indicated that the word 'hires' has been used in the same sense as "avails of". The said amendment only clarifies what was implicit earlier. The word 'use' also means "to avail oneself of". [See: **Black's *Law Dictionary***, 6th Edn., at p. 1541.] The word 'user' in the expression "which is made available to potential users" in the definition of 'service' in section 2(1)(*o*) has to be construed having regard to the definition of 'consumer' in section 2(1)(d)(*ii*) and, if so construed, it means "availing of services". From the use of the words "potential users" it cannot, therefore, be inferred that the services rendered by medical practitioners are not contemplated by Parliament to be covered within the expression 'service' as contained in section 2(1)(o).

29. Shri Harish Salve has also placed reliance on the definition of the expression 'deficiency' as contained in section 2(1)(*g*) of the Act which provides as follows:

> 2. (1)(*g*) 'deficiency' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

30. The submission of Shri Salve is that under the said clause, the deficiency with regard to fault, imperfection, shortcoming or inadequacy in respect of a service has to be ascertained on the basis of certain norms relating to quality, nature and manner of performance and that medical services rendered by a medical practitioner cannot be judged on the basis of any fixed norms and, therefore, a medical practitioner cannot be said to have been covered by the expression 'service' as defined in section 2(1)(o). We are unable to agree. While construing the scope of the provisions of the Act in the context of deficiency in service it would be relevant to take note of the provisions contained in section 14 of the Act which indicate the reliefs that can be granted on a complaint filed under the Act. In respect of deficiency in service, the following reliefs can be granted:

(*i*) return of the charges paid by the complainant. [clause (c)]

(*ii*) payment of such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. [clause (d)]

(*iii*) removal of the defects or deficiencies in the services in question. [clause (e)]

31. Section 14(1)(d) would, therefore, indicate that the compensation to be awarded is for loss or injury suffered by the consumer due to the negligence of the opposite party. A determination about deficiency in service for the purpose of section 2(1)(g) has, therefore, to be made by applying the same test as is applied in an action for damages for negligence.

33. It is, therefore, not possible to hold that in view of the definition of 'deficiency' as contained in section 2(1)(g), medical practitioners must be treated to be excluded from the ambit of the Act and the service rendered by them is not covered under section 2(1)(o).

39. Keeping in view the wide amplitude of the definition of 'service' in the main part of section 2(1)(o) as construed by this Court in ***Lucknow Development Authority***, we find no plausible reason to cut down the width of that part so as to exclude the services rendered by a medical practitioner from the ambit of the main part of section 2(1)(o).

41. Shri Salve has urged that the relationship between a medical practitioner and the patient is of trust and confidence and, therefore, it is in the nature of a contract of personal service and the service rendered by the medical practitioner to the patient is not 'service' under section 2(1)(o) of the Act. This contention of Shri Salve ignores the well-recognised distinction between a "contract *of* service" and a "contract *for* services". [***Dharangadhara Chemical Works Ltd.*** **v.** ***State of Saurashtra****,* AIR 1957 SC 264]. A "contract for services" implies a contract whereby one party undertakes to render services e.g. professional or technical services, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A "contract of service" implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. We entertain no doubt that Parliamentary draftsman was aware of this well-accepted distinction between "contract of service" and "contract for services" and has

deliberately chosen the expression "contract of service" instead of the expression "contract for services", in the exclusionary part of the definition of 'service' in section 2(1)(o). The reason being that an employer cannot be regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment. By affixing the adjective 'personal' to the word 'service', the nature of the contracts which are excluded is not altered. The said adjective only emphasises that what is sought to be excluded is personal service only. The expression "contract of personal service" in the exclusionary part of section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit of the expression 'service'.

42. It is no doubt true that the relationship between a medical practitioner and a patient carries within it a certain degree of mutual confidence and trust and, therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship of master and servant between the doctor and the patient, the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of 'service' contained in section 2(1)(*o*) of the Act.

43. Shri Rajeev Dhavan has, however, submitted that the expression "contract of personal service" contained in section 2(1)(o) of the Act has to be confined to employment of domestic servants only. We do not find any merit in this submission. The expression "personal service" has a well-known legal connotation and has been construed in the context of the right to seek enforcement of such a contract under the Specific Relief Act. For that purpose a contract of personal service has been held to cover a civil servant, the managing agents of a company and a professor in the University. There can be a contract of personal service if there is relationship of master and servant between a doctor and the person availing of his services and in that event the services rendered by the doctor to his employer would be excluded from the purview of the expression 'service' under section 2(1)(o) of the Act by virtue of the exclusionary clause in the said definition.

44. The other part of exclusionary clause relates to services rendered "free of charge". The medical practitioners, government hospitals/nursing homes and private hospitals/nursing homes (hereinafter called "doctors and hospitals") broadly fall in three categories:

(*i*) where services are rendered free of charge to everybody availing of the said services

(*ii*) where charges are required to be paid by everybody availing of the services and

(*iii*) where charges are required to be paid by persons availing of services but certain categories of persons who cannot afford to pay are rendered service free of charges.

There is no difficulty in respect of the first two categories. Doctors and hospitals who render service without any charge whatsoever to every person availing of the service would not fall within the ambit of 'service' under section 2(1)(o) of the Act. The payment of a token amount for registration purposes only would not alter the position in respect of such doctors and hospitals. So far as the second category is concerned, since the service is rendered on payment

basis to all the persons they would clearly fall within the ambit of section 2(1)(o) of the Act. The third category of doctors and hospitals do provide free service to some of the patients belonging to the poor class but the bulk of the service is rendered to the patients on payment basis. The expenses incurred for providing free service are met out of the income from the service rendered to the paying patients. The service rendered by such doctors and hospitals to paying patients undoubtedly falls within the ambit of section 2(1)(o) of the Act.

45. The question for our consideration is whether the service rendered to patients free of charge by the doctors and hospitals in category (*iii*) is excluded by virtue of the exclusionary clause in section 2(1)(o) of the Act. In our opinion, the question has to be answered in the negative. In this context, it is necessary to bear in mind that the Act has been enacted "to provide for the protection of the interests of '*consumers*' " in the background of the guidelines contained in the Consumer Protection Resolution passed by the U.N. General Assembly on 9-4-1985. These guidelines refer to "achieving or maintaining adequate protection for their population as consumers" and "encouraging high levels of ethical conduct for those engaged in the protection and distribution of goods and services to the consumers". The protection that is envisaged by the Act is, therefore, protection for consumers as a class. The word 'users' (in plural), in the phrase "potential users" in section 2(1)(o) of the Act also gives an indication that consumers as a class are contemplated. The definition of 'complainant' contained in section 2(1)(b) of the Act which includes, under clause (*ii*), any voluntary consumer association, and clauses (b) and (c) of section 12 which enable a complaint to be filed by any recognised consumer association or one or more consumers where there are numerous consumers, having the same interest, on behalf of or for the benefit of all consumers so interested, also lend support to the view that the Act seeks to protect the interests of consumers as a class. To hold otherwise would mean that the protection of the Act would be available to only those who can afford to pay and such protection would be denied to those who cannot so afford, though they are the people who need the protection more. It is difficult to conceive that the legislature intended to achieve such a result. Another consequence of adopting a construction, which would restrict the protection of the Act to persons who can afford to pay for the services availed of by them and deny such protection to those who are not in a position to pay for such services, would be that the standard and quality of service rendered at an establishment would cease to be uniform. It would be of a higher standard and of better quality for persons who are in a position to pay for such service while the standard and quality of such service would be inferior for a person who cannot afford to pay for such service and who avail of the service without payment. Such a consequence would defeat the object of the Act. All persons who avail of the services by doctors and hospitals in category (*iii*) are required to be treated on the same footing irrespective of the fact that some of them pay for the service and others avail of the same free of charge. Most of the doctors and hospitals work on commercial lines and the expenses incurred for providing services free of charge to patients who are not in a position to bear the charges are met out of the income earned by such doctors and hospitals from services rendered to paying patients. The government hospitals may not be commercial in that sense but on the overall consideration of the objectives and the scheme of the Act, it would not be possible to treat the government hospitals differently. We are of the view that in such a situation, the persons belonging to "poor class" who are provided services free of charge are the beneficiaries of the service

which is hired or availed of by the "paying class". We are, therefore, of the opinion that service rendered by the doctors and hospitals falling in category (*iii*) irrespective of the fact that part of the service is rendered free of charge, would nevertheless fall within the ambit of the expression 'service' as defined in section 2(1)(o) of the Act. We are further of the view that persons who are rendered free service are the 'beneficiaries' and as such come within the definition of 'consumer' under section 2(1)(d) of the Act.

46. In respect of the hospitals/nursing homes (government and non-government) falling in category (*i*), i.e., where services are rendered free of charge to everybody availing of the services, it has been urged by Shri Dhavan that even though the service rendered at the hospital, being free of charge, does not fall within the ambit of section 2(1)(o) of the Act insofar as the hospital is concerned, the said service would fall within the ambit of section 2(1)(o) since it is rendered by a medical officer employed in the hospital who is not rendering the service free of charge because the said medical officer receives emoluments by way of salary for employment in the hospital. There is no merit in this contention. The medical officer who is employed in the hospital renders the service on behalf of the hospital administration and if the service, as rendered by the hospital, does not fall within the ambit of section 2(1)(o), being free of charge, the same service cannot be treated as service under section 2(1)(o) for the reason that it has been rendered by a medical officer in the hospital who receives salary for employment in the hospital. There is no direct nexus between the payment of the salary to the medical officer by the hospital administration and the person to whom service is rendered. The salary that is paid by the hospital administration to the employee medical officer cannot be regarded as payment made on behalf of the person availing of the service or for his benefit so as to make the person availing of the service a 'consumer' under section 2(1)(d) in respect of the service rendered to him. The service rendered by the employee-medical officer to such a person would, therefore, continue to be service rendered free of charge and would be outside the purview of section 2(1)(o).

47. A contention has also been raised that even in the government hospitals/health centres/dispensaries where services are rendered free of charge to all the patients, the provisions of the Act shall apply because the expenses of running the said hospitals are met by appropriation from the Consolidated Fund which is raised from the taxes paid by the taxpayers. We do not agree.

48. The essential characteristics of a tax are that (*i*) it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law; (*ii*) it is an imposition made for public purpose *without reference to any special benefit to be conferred on the payer of the tax* and (*iii*) it is part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay. The tax paid by the person availing of the service at a government hospital cannot be treated as a consideration or charge for the service rendered at the said hospital and such service, though rendered free of charge, does not cease to be so because the person availing of the service happens to be a taxpayer.

49. Adverting to the individual doctors employed and serving in the hospitals, we are of the view that such doctors working in the hospitals/nursing homes/dispensaries, whether government or private - belonging to categories (*ii*) and (*iii*) above would be covered by the

definition of 'service' under the Act and as such are amenable to the provisions of the Act along with the management of the hospital, etc. jointly and severally.

50. There may, however, be a case where a person has taken an insurance policy for medicare whereunder all the charges for consultation, diagnosis and medical treatment are borne by the insurance company. In such a case, the person receiving the treatment is a beneficiary of the service which has been rendered to him by the medical practitioner, the payment for which would be made by the insurance company under the insurance policy. The rendering of such service by the medical practitioner cannot be said to be free of charge and would, therefore, fall within the ambit of the expression 'service' in Section 2(1)(o) of the Act. So also there may be cases where as a part of the conditions of service, the employer bears the expense of medical treatment of the employee and his family members dependent on him. The service rendered to him by a medical practitioner would not be free of charge and would, therefore, constitute service under section 2(1)(o).

56. On the basis of the above discussion, we arrive at the following conclusions:

(1) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in section 2(1)(o) of the Act.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

(3) A "contract *of* personal service" has to be distinguished from a "contract *for* personal services". In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a 'contract *of* personal service'. Such service is service rendered under a "contract *for* personal services" and is not covered by exclusionary clause of the definition of 'service' contained in section 2(1)(o) of the Act.

(4) The expression "contract of personal service" in section 2(1)(o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in section 2(1)(o) of the Act.

(5) Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer employed in a hospital/nursing home where such services are rendered free of charge to everybody, would not be 'service' as defined in section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(6) Service rendered at a non-government hospital/nursing home where no charge whatsoever is made from any person availing of the service and all patients (rich and poor) are given free service — is outside the purview of the expression 'service' as

defined in section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(7) Service rendered at a non-government hospital/nursing home where charges are required to be paid by the persons availing of such services falls within the purview of the expression 'service' as defined in section 2(1)(o) of the Act.

(8) Service rendered at a non-government hospital/nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in section 2(1)(o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be 'service' and the recipient a 'consumer' under the Act.

(9) Service rendered at a government hospital/health centre/ dispensary where no charge whatsoever is made from any person availing of the services and all patients (rich and poor) are given free service — is outside the purview of the expression 'service' as defined in section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(10) Service rendered at a government hospital/health centre/ dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing of such services would fall within the ambit of the expression 'service' as defined in section 2(1)(o) of the Act, irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be 'service' and the recipient a 'consumer' under the Act.

(11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing of the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in section 2(1)(o) of the Act.

(12) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under section 2(1)(o) of the Act.

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Laxmi Engineering Works v. *P.S.G. Industrial Institute,*

1995 SCC (3) 583

B.P.JEEVAN REDDY, J.:

1. Leave granted. Heard counsel for both the parties.

2. The definition of the expression " consumer" in clause (d) of Section 2 of the Consumer Protection Act, 1986 ex- cludes from its purview "a person who obtains such goods for resale or for any commercial purpose". The question that arises in this appeal is what is the meaning and ambit of the expression "any commercial purpose" in the said definition. By Ordinance 24 of 1993 (which has since been replaced by Amendment Act 50 of 1993) an explanation has been added to the definition of the expression "consumer" with effect from 18.6.1993. The explanation reads: "For the purposes of sub-

clause (i) "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment". The complaint herein was, however, made before the adding of the said explanation. It would be appropriate to read the definition at this stage.

"(d) "consumer" means any person who,-

(i) buys any goods, for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such good s for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii)[hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the service for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person:"

THE FACTUAL MATRIX:

3. The appellant, Laxmi Engineering Works, is a proprietary concern established under the Employment Promotion Programme. It is registered as a small scale industry with the Directorate of Industries, Maharashtra and has also obtained financial assistance from Maharashtra State Finance Corporation in the form of term loan amounting to Rs.22. 10 lakhs besides financial assistance from certain other sources. The appellant placed an order with the respondent-P.S.G. industrial institute for supply of PSG 450 CNC Universal Turing Central Machine on May 28, 1990. The appellant's case is that the respondent not only supplied the machinery six months beyond the stipulated date but supplied a defective machine. Soon after it was installed and operated, several defects came to light which the appellant brought to the notice of the respondent. A good amount of correspondence took place between the parties

and though the respondent sent some persons to rectify the de- fects, the machine could not be put in proper order. The appellant states that he was suffering serious financial loss on account of the defective functioning of the machine and accordingly he lodged a complaint (No. 116 of 1992) before the Maharashtra Consumer Disputes Redressal Commission claiming an amount of Rs.4,00,000/- on several counts from the respondent. The respondent appeared before the State Commission and denied the appellant's claim. Inter alia, it raised an objection that since the appellant has purchased the machine for commercial purposes he is not a consumer within the meaning of the said expression as defined in Section 2(d) of the Act. The commission allowed the appellant's claim partly, directing the respondent to pay to the appellant a sum of Rs.2.48 lakhs within 30 days failing which the said amount was to carry interest at the rate of 18% per annum. The respondent filed an appeal before the National Commission which allowed the said appeal on 7th December, 1993 on the only ground that the appellant is not a "consumer" as defined by the Act. The National Commission observed: "From the facts appearing on record it is manifest that the complainant is carrying on the business of manufacture of machine parts on a large scale for the purpose of earning profit and significantly one single item of machinery in respect of which the complaint petition was filed by him before the State Commission itself is of the value of Rs. 21 lakhs and odd. In the circumstances, we fail to see how the conclusion can be escaped that the machinery, in question which is alleged to be defective was purchased for a commercial purpose. Hence, the complainant is not entitled to be regarded as a consumer and the complaint petition filed by him was not maintainable before the State Commission. The order passed by the State Commission is set aside. The complaint petition is dismissed." The National Commission, however, observed that their order does not preclude the appellant from pursuing his remedy by way of ordinary civil suit.

4. The learned counsel for the appellant submits that the purpose for which the appellant has purchased the said machine cannot be called a "commercial purpose" and that the appellant cannot certainly be said to be carrying on business of manufacture of machine parts "on a large scale" for the purpose of earning profit. Learned counsel pointed out that appellant is a small scale industry and the said machine was purchased by him for the purpose of earning livelihood. Learned counsel submitted that the appellant is a proprietary concern of Shri Y.G.Joshi, who is a diploma holder in engineering and who proposed to start a small scale industry with financial assistance from public financial institutions to earn his livelihood. The appellant had entered into an agreement with Premier Automobiles for supplying certain parts required for the manufacture of cars by the said concern. But for this, the appellant has no other business, it is pointed out. On the other hand, the learned counsel for the respondent submitted that the purpose for which the appellant purchased the said machine is undoubtedly a commercial purpose as held by the National Commission consistently over the last several years.

THE ACT AND ITS SCHEME:

5. After good amount of consultations with governments and international organisations, the Secretary General of United Nations submitted draft guidelines for consumer protection to the Economic and Social Council (UNESCO) in 1983. After extensive discussions and

negotiations among governments on the scope and content of the guidelines, the General Assembly of the United Nations adopted the guidelines for consumer protection by consensus on 9th April, 1985 [General Assembly Resolution NO.39/248]. The guidelines issued are placed under four heads, viz., objectives, general principles, guidelines and international co-operation. Para 1 under the head "objectives" bears reproduction. It reads:

"I OBJECTIVES

1. Taking into account the interests and needs of consumers in all countries, par- ticularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level, and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous prod-

ucts, as well as the importance of promoting just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives:

(a)To assist countries in achieving or maintaining adequate protection for their population as consumers;

(b)To facilitate production and distribution patterns responsive to the needs and desires of consumers;

(c)To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;

(d)To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;

(e)To facilitate the development of independent consumer groups;

(f)To further international co- operation in the field of consumer protection;

(g)To encourage the development of market conditions which provide consumers with greater choice at lower prices. "

6. Under the head 'guidelines' and under the sub- heading "E. Measures enabling consumers to obtain redress", the following guidelines are set out:

"E. Measures enabling consumers to obtain redress

28.Government should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant Organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low income consumers.

29.Governments should encourage all enterprises to resolve consumer disputes in a fair, expeditious and informal manner, and to establish voluntary mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers.

30.Information on available redress and other dispute-resolving procedures should be made available to consumers."

7. In the following year, i.e., 1986, our Parliament enacted the present Act. (The United Kingdom enacted the Consumer Protection Act in 1987.) The statement of objects and reasons appended to the Bill says that the Bill is intended to provide for better protection of the interest of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes and for other matters connected therewith. Para 4 of the Statement of Objects and Reasons reads:

"4. To provide speedy and simple redressal to consumer disputes, a quasi judicial machinery is sought to be set up at the district, State and Central levels. These quasi-judicial bodies will observe the principles of natural justice and have been empowered to give reliefs of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non compliance of the orders given by the quasi-judicial bodies have also been provided."

8. The Preamble to the Act is practically on the same lines. It reads:

"An act to provide for the better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith."

9. It is significant to notice that in the Statement of Objects and Reasons as well as in the Preamble, the new forums which the Act was setting up are referred to as quasi-judicial machinery" and as "authorities" respectively but not as courts. The Act has created the dispute resolution authorities at District, State and National level called District Forum, State Commission and National Commission. Section 3 expressly states that "(T)he provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force." Chapter-Ill provides for "CONSUMER DISPUTES REDRESSAL AGENCIES." The use of the expression "agencies" is again significant. Section 9, which provides for establishment of forums at three levels, reads thus:

"9. Establishment of Consumer Disputes Redressal Agencies.-- There shall be established for the purposes of this Act- the following agencies. namely-

(a) a Consumer Disputes Redressal Forum to be known as the "District Forum" established by the State Government with the prior approval of the Central Government in each district of the State by notification:

(b) a Consumer Disputes Redressal Commission to be known as the "State Commission" established by the State Government with the prior approval of the Central Government in the State by notification; and

(c) a National Consumer Disputes Redressal Commission established by the Central Government by notification."

10.Section 13 prescribes the procedure to be followed by the District Forum on receipt of a complaint from a consumer involving value upto Rupees one lakh (after amendment in 1993, five lakhs). Inter alia it provides that the District Forum shall have the same powers as arc vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of matters specified therein. Section 15 provides an appeal from the orders of the District Forum to the State Commission. Section 17 confers original jurisdiction also upon the State

Commission in matters the value whereof exceeds Rupees one lakh but does not exceed Rupees ten lakhs (after amendment 5 lakhs and 20 lakhs re- spectively). Section 18 provides that the procedure of the State Commission shall be the same as that of the District Forum. Section 19 provides an appeal from the orders of the State Commission (made in exercise of its original jurisdiction) to the National Commission. Section 21 confers original jurisdiction upon the National Commission as well where the value of the complaint exceeds Rupees ten lakhs (after amendment in 1993, twenty lakhs). Section 24 declares that "(E)very order of a District Forum, State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final". (Section 23 provides an appeal to Supreme Court against the orders of National Commission passed in exercise of its original jurisdiction.) Section 25 provides that the orders of the District Forum, State Commission and National Commission shall be executed as if they are decrees or orders of a Court.

11. A review of the provisions of the Act discloses that the quasi-judicial bodies/authorities/agencies created by the Act known as District Forums, State Commissions and the National Commission are not courts though invested with some of the powers of a civil court. They are quasi judicial tribunals brought into existence to render inexpensive and speedy remedies to consumers. It is equally clear that these forums/commissions were not supposed to supplant but supplement the existing judicial system. The idea was to provide an additional forum providing inexpensive and speedy resolution of disputes arising between consumers and suppliers of goods and services. The forum so created is uninhibited by the requirement of court fee or the formal procedures of a court. Any consumer can go and file a complaint. Complaint need not necessarily be filed by the complainant himself, any recognized consumers' association can espouse his cause. Where a large number of consumers have a similar complaint, one or more can file a complaint on behalf of all. Even the Central Government and State Governments can act on his/their behalf The idea was to help the consumers get justice and fair treatment in the matter of goods and services purchased and availed by them in a market dominated by large trading and manufacturing bodies. Indeed, the entire Act revolves round the consumer and is designed to protect his interest. The Act provides for "business-to-consumer' disputes and not for "business-to- business" disputes. This scheme of the Act in our opinion, is relevant to and helps in interpreting the words that fall for consideration in this appeal.

SECTION 2(d)(i) AND THE EXPLANATION ADDED BY 1993 AMENDMENT ACT:

12.Now coming back to the definition of the expression 'consumer' in Section 2(d), a consumer means in so far as is relevant for the purpose of this appeal, (i) a person who buys any goods for consideration; it is immaterial whether the consideration is paid or promised, or partly paid and partly promised, or whether the payment of consideration is deferred; (ii) a person who uses such goods with the approval of the person who buys such goods for consideration

(iii) but does not include a person who buys such goods for resale or for any commercial purpose. The expression "resale" is clear enough. Controversy has, however, arisen with respect to meaning of the expression "commercial purpose". It is also not defined in the Act.

In the absence of a definition, we have to go by its ordinary meaning. "Commercial" denotes "pertaining to commerce" (Chamber's Twentieth Century Dictionary); it means "connected with, or engaged in commerce; mercantile; having profit as the main aim" (Collins English Dictionary) whereas the word "commerce" means "financial transactions especially buying and selling of merchandise, on a large scale" (Concise Oxford Dictionary). The National Commission appears to have been taking a consistent view that where a person purchases goods "with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit" he will not be a "consumer" within the meaning of Section 2(d)(i) of the Act. Broadly affirming the said view and more particularly with a view to obviate any confusion the expression "large-scale" is not a very precise expression the Parliament stepped in and added the explanation to Section 2(d)(i) by Ordinance/Amendment Act, 1993. The explanation excludes certain purposes from the purview of the expression "commercial purpose" - a case of exception to an exception. Let us elaborate: a person who buys a typewriter or a car and uses them for his personal use is certainly a consumer but a person who buys a typewriter or a car for typing others' work for consideration or for plying the car as a taxi can be said to be using the typewriter/car for a commercial purpose. The explanation however clarifies that in certain situations, purchase of goods for "commercial purpose" would not yet take the purchaser out of the definition o expression "consumer". If the commercial use is by the purchaser himself for the purpose of earing his livelihood by means of self-employment, such purchaser of goods is yet a "consumer". In the illustration given above, if the purchaser himself works on typewriter or plies the car as a taxi himself, he does not cease to be a consumer. In other words, if the buyer of goods uses them himself, i.e., by self- employment, for earning his livelihood, it would not be treated as a "commercial purpose" and he does not cease to be a consumer for the purposes of the Act. The explanation reduces the question, what is a "commercial purpose", to a question of fact to be decided in the facts of each case. It is not the value of the goods that matters but the purpose to which the goods bought are put to. The several words employed in the explanation, viz., "uses them by himself", "exclusively for the purpose of earning his livelihood" and "by means of self-employment" make the intention of Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood. A few more illus- trations would serve to emphasis what we say. A person who purchases an auto-rickshaw to ply it himself on hire for earning his livelihood would be a consumer. Similarly, a purchaser of a truck who purchases it for plying it as a public carrier by himself would be a consumer. A person who purchases a lathe machine or other machine to operate it himself for earning his livelihood would be a consumer. (In the above illustrations, if such buyer takes the assistance of one or two persons to assist/help him in operating the vehicle or machinery, he does not cease to be a consumer.) As against this a person who purchases an auto-rickshaw, a car or a lathe machine or other machine to be plied or operated exclusively by another person would not be a consumer. This is the necessary limitation flowing from the expressions "used by him", and "by means of self-employment" in the explanation. The ambiguity in the meaning of the words "for the purpose of earning his livelihood" is explained and clarified by the other two sets of words.

13.It is argued by the learned counsel for the appellant that such a narrow construction may not be warranted by the scheme and object of the enactment. He says that there may be a widow or an old or invalid man who may have no other means of livelihood and who purchases an auto-rickshaw or a car or other machinery to be plied or operated by another person either on payment of consideration on a daily, weekly or monthly basis or as a servant or agent. While there is certainly some logic in the said submission it cannot be accepted in view of the language of the explanation. We are also of the opinion that the definition of the expression " person" in Section 2(m) as including a firm (whether registered or not), a Hindu undivided family, a co-operative society or any other association of persons (whether registered under the Societies Registration Act, 1860 or not) makes no difference to the above interpretation. If a firm purchases the goods, the members of the firm should themselves ply, operate or use the goods purchased. Same would be the case of purchase by Hindu Undivided Family, cooperative society or any other association of persons. Reference in this behalf may be made to the definition of the expression "consumer" in Section 20(6) of the Consumer Protection Act, 1987 of United Kingdom. It reads thus: who might wish to be supplied with the goods for his own private use or consumption;

(b) in relation to any services or facilities, means any person who might wish to be provided with the services of facilities otherwise than for the purposes of any business of his; and

(c) in relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his:"

14. This definition is undoubtedly narrower than the definition in our Act. The English Act requires that to be a consumer in relation to any goods, a person must put the goods for his own private use or consumption. Notwithstanding this difference in definition, the object of both the enactments appears to be the same, to protect the consumer from the exploitative and unfair practices of the trading and manufacturing bodies and to provide him with an easily accessible, inexpensive and speedy remedy for the wrong suffered by him.

THE NATURE AND POWERS OF THE AUTHORITIES CREATED BY THE ACT:

15. Having dealt with the meaning of the expression 'any commercial purpose' in Section 2(d) in the light of the scheme of the enactment,it may be necessary to append a clarification to obviate any confusion. Section 24 declares that "(E)very order of a District Forum, the State Com- mission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final". This Section has to be read along with sub-section (3) of Section 13. Section 13 prescribes the procedure to be followed by the District Forum on receipt of a complaint. Sub-section (3) of Section 13 says that "(N)o proceedings complying with the procedure laid down in sub- section (1) and (2) shall be called in question in any Court on the ground that the principles of natural justice have not been complied with." By virtue of Section 18 the procedure prescribed in Section 13 applies to State Commission as well. From the above provisions, it is clear that the orders of the District Forum, State Commission and National Commission are final as declared in Section 24 and cannot be questioned in a civil court. The Issues decided by the said authorities under the Act cannot be re-agitated in a civil court. The said provisions make it equally clear that the Forums created

by the Act fall in the second category of Tribunals mentioned in The Queen v. Commissioner for Special Purposes of the Income-tax, (1888) 21 Q.B.D. 313 at P.319) which decision has been repeatedly affirmed and applied by this Court which means that the Forums/Commissions under the Act have jurisdiction to determine whether the complainant before them is a "consumer" and whether he has made out grounds for grant of relief Even if the Forum/Commission decides the said questions wrongly, their orders made following the procedure prescribed in sub-sections (1) and (2) of Section 13 cannot be questioned in a civil court - except of course, in situations pointed out in Dhulabhai v. State of M.P. (1968 (3) S.C.R. 662). They can and must be questioned, only in the manner provided by the Act.

THE EXPLANATION IS CLARIFICATORY:

16. Yet another clarification; the Explanation, in our opinion is only explanatory; it is more in the nature of a clarification a fact which would become evident if one examines the definition (minus the explanation) in the context and scheme of the enactment. As indicated earlier, the explanation broadly affirms the decisions of the National Commission. It merely makes explicit what was implicit in the Act. It is not a.-, if the law is changed by the said explanation; it has been merely made clearer. RELEVANT DECISIONS:

17.....

18.In Morgan Stanley Mutual Fund v. Kartick Das (1994 (4) SCC 225), a Bench of this Court (M.N.Venkatachaliah, CJ, S.Mohan and Dr.A.S.Anand,JJ.) stated the meaning of the expression "consumer" in the following words:

"The consumer as the terms implies is one who consumes. As per the definition, consumer is the one who purchases goods for private use or consumption. The meaning of the word 'consumer' is broadly stated in the above definition so as to include anyone who consumes goods or services at the end of the chain of production. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. The consumer deserves to get that he pays for in real quantity and true quality. In every society, consumer remains the centre of gravity of all business and industrial activity. He needs protection from the manufacturer, producer, supplier, wholesaler and retailer. "

19. In Morgan Stanley, the question was whether a prospective investor in the shares of a company is a "consumer" as defined in Section 2(f). It was held that he was not.

20.Reference to the decisions cited by the learned counsel for the parties would be in order at this stage. In Synco Textiles Private Limited v. Greaves Colton and Co.Ltd. (1991 (1) CPJ 499), the appellant purchased from the respondent three generating sets at a total cost of Rs.5,53,000/ - for use in his factory. His case was that the generating sets supplied by the respondent-company were defective and that on that account he suffered substantial business losses. He applied to the State Commission for recovery of the cost of the machines as well as a sum of Rupees four lakhs by way of damages. The State Commission first took up the question whether the complainant can be called a "consumer" as defined in the Act. (The case arose before the explanation was added by the 1993 Amendment Act.) The State Commission held that since the generators were purchased by the appellant for generating electricity in its factory to be used for operating the machinery in the factory for the purpose of commercial

production, the appellant cannot be called a "consumer". When the matter came to the National Commission by way of appeal, Balakrishna Eradi,J., President, dealt with the meaning of the words "for any commercial purpose" in the following words (majority opinion):

"Since cases of resale have been separately referred to, it becomes obvious that the words "for any commercial purpose" are intended to cover cases other than those of resale of the concerned goods. The words "for any commercial purpose" are wide enough to take in all cases where goods are purchased for being used in any activity directly intended to generate profit. According to the meaning given in standard dictionaries, the expression commercial' means-

"connected with, or engaged in commerce. mercantile; having profit as the main aim,, (See Collins English Dictionary). "Pertaining to commerce: mercantile" (See Chamber's Twentieth Century Dictionary) The meaning of the expression 'commerce' as given in the dictionaries is:

"exchange of merchandise, especially, on a large scale" (See the Concise oxford Dictionary) "interchange of merchandise on a large scale between nations or individuals: extended trade or traffic" (See Chambers Twentieth Century Dictionary) Going by the plain dictionary meaning of the words used in the definition section the intention of Parliament must be understood to be to exclude from the scope of the expression ' consumer' any person who buys goods for the purpose of their being used in any activity engaged on a large scale for the purpose of making Profit. As already indicated since resale of the goods has been separately and specifically mentioned in the earlier portion of the definition clause, the words "for any commerce purpose" must be understood as covering cases other am those of resale of the goods. it is thus obvious that Parliament wanted to exclude from the scope of the definition not merely persons who obtain goods for resale but also those who purchase goods with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit. On this interpretation of the definition clause, persons buying goods either for resale or for use in large scale profit activity will not be 'consumers' entitled to protection under the Act. It seems to us clear that the intention of Parliament as can be gathered from the definition section is to deny the benefits of the Act to persons purchasing goods either for purpose of resale or for the purpose of being used in profit making activity engaged on a large scale. It would thus follow that cases of purchase of goods for consumption or use in the manufacture of goods or commodities on a large scale with a view to make profit will fall outside the scope of the definition. It is obvious that Parliament intended to restrict the benefits of the Act to ordinary consumers purchasing goods either for their own consumption or even for use in some small venture which they may have embarked upon in order to make a living as distinct from large scale manufacturing or processing activity carried on for profit. In order that exclusion clause should apply it is however necessary that there should be a close nexus between the transaction of purchase of goods and the large scale activity carried on for earning profit. "

21.One of the members of the Commission, Sri Y.Krishan, however, took a different view. The learned Member was of the opinion that:

"..... the word used in Sec.2(l)(d)(i) "for commercial purpose" have to be given a precise and restrictive meaning: commercial purpose has to be distinguished from commercial production and commercial activity. The sub- section 2(1)(d)(i) and (ii) of the Consumer Protection Act have to be interpreted harmoniously. The interpretation of the words "Commercial purpose" in Sec. 2(l)(d)(i) must be logical and equitable so as to avoid patent anomalies and inconsistencies in the application of the law. Viewed in this background.the various tests for determining whether the goods have been purchased for a commercial purpose would be:

(i) the goods are not for immediate final consumption but that there is only transfer of goods. i.e., resale.

(ii) there should be a direct nexus between the purchase of goods and the profit or loss from their further disposal. Such a direct nexus is absent when the goods or services are converted for producing other goods or services. After conversion there is no direct nexus between the kind of goods purchased and the kind of goods sold.

(iii) there is nexus of form and kind between the goods purchased and the goods sold. Such a direct nexus of form and kind ceases when the goods undergo transformation or conversion.

In brief the immediate purpose as distinct from the ultimate purpose of purchase, the sale in the same form or after conversion and a direct nexus with profit or loss would be the determinants of the character of a transaction-whether it is of a "commercial purpose" or not. Thus buyers of goods or commodities for "self consumptions" in economic activities in which they arc engaged would be consumers as defined in the Act."

22. Secretary, Consumer Guidance and Research Society of India v. M/s. B.P.L. India Lid. (1992 (1) CPJ 140), follows and affirms the decision in Synco Textiles and another decision in Oswal Fine Arts v. M/ s. H.M. T. Madras (1991 (1) CPJ 330). In this case, one Mrs.Shanta Manuel had pur- chased one paper copier from the respondent and installed the same in her premises. The National Commission dealt with the case in the following words:

"In the case now before us, it is clearly established by the materials on record that the purpose of the purchase of the paper copier by Mrs.Shanta Manuel was only to enable to earn her livelihood by the process of self employment. Such being the factual position Mrs.Shanta Manuel cannot be said to have purchased the machine for a 'commercial purpose' inasmuch as the basic prerequisite of large scale trading or business activity for purpose of making profit is totally absent. We hold that the view concurrently expressed by the District Forum and the State Commission that the complainant is not 'consumer' entitled to invoke the ju- risdiction of the consumer forum is incorrect and the said finding will stand set aside.

23.Though rendered earlier to the 1993 Amendment, these decisions are broadly in accord with the amended definition. CONCLUSIONS:

24.We must, therefore, hold that (i) the explanation added by The Consumer Protection (Amendment) Act 50 of 1993 (replacing Ordinance 24 of 1993) with effect from 18.6.1993 is clarificatory in nature and applies to all pending proceedings.

(ii)Whether the purpose for which a person has bought goods is a "commercial purpose" within the meaning of the definition of expression "consumer" in Section 2(d) of the Act is always a question of fact to be decided in the facts and circumstances of each case.

(iii)A person who buys goods and use them himself, exclusively for the purpose of earning his livelihood, by means of self employment is within the definition of the expression "consumer".

25.So far as the present case is concerned we must hold (in agreement with the National Commission), having regard to the nature and character of the machine and the material on record that it is not goods which the appellant purchased for use by himself exclusively for the purpose of earning his livelihood by means of self employment, as explained hereinabove.

26.The appeal accordingly fails and is dismissed but without costs. If the appellant chooses to file a suit for the relief claimed in these proceedings, he can do so according to law and in such a case he can claim the benefit of Section 14 of the Limitation Act to exclude the period spent in prosecuting the proceedings under the Consumer Protection Act, while computing the period of limitation prescribed for such a suit.

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Lucknow Development Authority v. M.K. Gupta

1994 SCC (1) 243

R.M. SAHAI, J.- The question of law that arises for consideration in these appeals, directed against orders passed by the National Consumer Disputes Redressal Commission (referred hereinafter as National Commission), New Delhi is if the statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority constituted under State Acts to carry on planned development of the cities in the State are amenable to Consumer Protection Act, 1986 (hereinafter referred to as 'the Act') for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flat within the stipulated time, or defective and faulty construction etc. Another aspect of this issue is if the housing activity carried on by the statutory authority or private builder or contractor came within the purview of the Act only after its amendment by the Ordinance No. 24 in 1993 or the Commission could entertain a complaint for such violations even before.

2. How the dispute arose in different appeals is not of any consequence except for two appeals which shall be adverted to later, for determining right and power of the Commission to award exemplary damages and accountability of the statutory authorities. We therefore come straight away to the legal issue involved in these appeals. But before doing so and examining the question of jurisdiction of the District Forum or State or National Commission to entertain a complaint under the Act, it appears appropriate to ascertain the purpose of the Act, the objective it seeks to achieve and the nature of social purpose it seeks to promote as it shall facilitate in comprehending the issue involved and assist in construing various provisions of the Act effectively. To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A

scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such things which otherwise would have been beyond its natural import. Manner of construing an inclusive clause and its widening effect has been explained:

" 'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural, import, but also those things which the definition clause declares that they shall include."

The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to the attempted objective of the enactment.

3. Although the legislation is a milestone in the history of socioeconomic legislation and is directed towards achieving public benefit we shall first examine if on a plain reading of the provisions unaided by any external aid of interpretation it applies to building or construction activity carried on by the statutory authority or private builder or contractor and extends even to such bodies whose ancillary function is to allot a plot or construct a flat. In other words could the authorities constituted under the Act entertain a complaint by a consumer for any defect or deficiency in relation to construction activity against a private builder or statutory authority. That shall depend on ascertaining the jurisdiction of the Commission. How extensive it is? A National or a State Commission under Sections 21 and 16 and a Consumer Forum under Section 11 of the Act is entitled to entertain a complaint depending on valuation of goods or services and compensation claimed. The nature of 'complaint' which can be filed, according to clause (c) of Section 2 of the Act is for unfair trade practice or restrictive trade practice adopted by any trader or for the defects suffered for the goods bought or agreed to be bought and for deficiency in the service hired or availed of or agreed to be hired or availed of, by a 'complainant' who under clause (b) of the definition clause means a consumer or any voluntary consumer association registered under the Companies Act, 1956 or under any law for the time being in force or the Central Government or any State Government or where there are one or more consumers having the same interest, then a complaint by such consumers.The right thus to approach the Commission or the Forum vests in consumer for unfair trade practice or defect in supply of goods or deficiency in service. The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In Oxford Dictionary a consumer is defined as, "a purchaser of goods or services". In Black's Law Dictionary it is explained to mean, "one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other

trade practices for which state and federal consumer protection laws are enacted." The Act opts for no less wider definition. It reads as under:

consumer' means any person who,-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

[Explanation.- For the purposes of sub-clause (i), 'commercial purpose' does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]" It is in two parts. The first deals with goods and the other with services. Both arts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause. For stance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included in it. The legislature has taken precaution not only to define 'complaint', complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (r) and even to define 'defect' and 'deficiency' by clauses (f) and (g) for which a consumer can approach the Commission. The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss. 'Goods' have been defined by clause (i) and have been assigned the same meaning as in Sale of Goods Act, 1930 which reads as under:

" goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;"

It was therefore urged that the applicability of the Act having been confined to moveable goods only a complaint filed for any defect in relation to immoveable goods such as a house or building or allotment of site could not have been entertained by the Commission. The submission does not appear to be well founded. The respondents were aggrieved either by

delay in delivery of possession of house or use of substandard material etc. and therefore they claimed deficiency in service rendered by the appellants. Whether they were justified in their complaint and if such act or omission could be held to be denial of service in the Act shall be examined presently but the jurisdiction of the Commission could not be ousted (sic merely) because even though it was service it related to immoveable property.

4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service". The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause

(o) of the definition section defines it as under:

" service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means 'one or some or all'. In Black's Law Dictionary it is explained thus, "word ,any' has a diversity of meaning and may be employed to indicate 'all' or ,every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject- matter of the statute". The use of the word 1 any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future installments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modem sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in

private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility.

5. This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function, therefore, they could not be subjected to the provisions of the Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect the functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking. It is still more so in public services. When private undertakings are taken over by the Government or corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and the spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even political pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act.The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire argument found on being statutory bodies does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the Act and let their acts and omissions be scrutinised as public accountability is necessary for healthy growth of society.

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within the meaning of clause (o) of Section 2 of the Act as it stood prior to inclusion of the expression 'housing construction' in the definition of "service" by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction

of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and other statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immoveable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (ii) of clause (r) of Section 2 as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit of which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it, while performing statutory duty renders service to the society in general and individual in particular. The entire approach of the learned counsel for the development authority in emphasising that power exercised under a statute could not be stretched to mean service proceeded on misconception. It is incorrect understanding of the statutory functions under a social legislation. A development authority while developing the land or framing a scheme for housing discharges statutory duty the purpose and objective of which is service to the citizens. As pointed out earlier the entire purpose of widening the definitions is to include in it not only day to day buying of goods by a common man but even such activities which are otherwise not commercial but professional or service-oriented in nature. The provisions in the Acts, namely, Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land, and framing of scheme etc. Therefore if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit then it amounts to rendering of service and will be covered in the expression 'service made available to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993.

7. In Civil Appeal No. 2954 filed by a builder it was urged that inclusion of 'housing construction' in clause (o) and 'avail' in clause (d) in 1993 would indicate that the Act as it stood prior to the amendment did not apply to hiring of services in respect of housing construction. Learned counsel submitted that in absence of any expression making the amendment retrospective it should be held to be prospective as it is settled that any

law including amendments which materially affect the vested rights or duties or obligations in respect of past transactions should remain untouched. It was also argued that when definition of 'service' in Monopolies and Restrictive Trade Practices Act was amended in 1991 it was made retrospective. Therefore, in absence of use of similar expression in this Act it should be deemed to be prospective. True, the ordinance does not make the definition retrospective in operation. But it was not necessary. In fact it appears to have been added by way of abundant caution as housing construction being service was included even earlier. Apart from that what was the vested right of the contractor under the agreement to construct the defective house or to render deficient service? A legislation which is enacted to protect public interest from undesirable activities cannot be construed in such narrow manner as to frustrate its objective. Nor is there any merit in the submission that in absence of the word 'avail of' in the definition of consumer' such activity could not be included in service. A perusal of the definition of 'service' as it stood prior to 1993 would indicate that the word 'facility' was already there. Therefore the legislature while amending the law in 1993 added the word in clause (d) to dispel any doubt that consumer in the Act would mean a person who not only hires but avails of any facility for consideration. It in fact indicates that these words were added more to clarify than to add something new.

8. Having examined the wide reach of the Act and jurisdiction of the Commission to entertain a complaint not only against business or trading activity but even against service rendered by statutory and public authorities the stage is now set for determining if the Commission in exercise of its jurisdiction under the Act could award compensation and if such compensation could be for harassment and agony to a consumer. Both these aspects specially the latter are of vital significance in the present day context. Still more important issue is the liability of payment. That is, should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it. The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable to compensate for loss or in' jury suffered by a citizen due to arbitrary actions of its employees. In State of Gujarat v. MemonMahomed Haji Hasam the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's 'legal obligation to preserve the property intact because the Government was, 'bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants'. It was extended further even to bona fide action of the authorities if it was contrary to law in LalaBishambarNath v. Agra Nagar Mahapalika, Agra. It was held that where the authorities could not have taken any action against the dealer and their order was invalid, 'it is immaterial that the respondents had acted bona fide and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The First Law Commission constituted after coming into force of the Constitution on liability of the State in tort, observed that the old

distinction between sovereign and non- sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed:

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and nongovernmental function, but the nature and form of the activity in question."

Even KasturiLalRalia Ram Jain v. State of U.P. did not provide any immunity for tortuous acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a sovereign function of the State the ratio of Kasturi Lal could not stand in way of the Commission awarding compensation. We respectfully agree with Mathew, J. in Shyam Sunder v. State of Rajasthan that it is not necessary, 'to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State' (SCC p. 695, para 20). In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently. As far back as 1878 the law was succinctly explained in Geddis v. Proprietors of Bann Reservoir thus:

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, occasion damage to anyone; but an action does lie for doing what the Legislature has authorised, if it be done negligently."

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

9. Facts in Civil Appeal No. 6237 of 1990 may now be adverted to as it is the only appeal in which the National Commission while exercising its appellate power under the Act not only affirmed the finding of State Commission directing the appellant to pay the value of deficiency in service but even directed to pay compensation for harassment and agony to the respondent. The Lucknow Development Authority with a view to ease the acute housing problem in the city of Lucknow undertook development of land and formed plots of different categories/sizes and constructed dwelling units for people belonging to different income groups. After the construction was complete the authority invited applications from persons desirous of purchasing plots or dwelling houses. The respondent applied on the prescribed form for registration for allotment of a flat in the category of Middle Income Group (MIG) in Gomti Nagar Scheme in Lucknow on cash down basis. Since the number of applicants was more, the authority decided to draw lots in which flat No. 11/75 in VinayKhand-II was allotted to the respondent on April 26, 1988. He deposited a sum of Rs 6132 on July 2, 1988 and a sum of Rs 1,09,975 on July 29, 1988. Since the entire payment was made in July 1988 the flat was registered on August 18, 1988. Thereafter the appellant by a letter dated August 23, 1988 directed its Executive Engineer-VII to hand over the possession of the flat to the respondent. This information was given to him on November 30, 1988, yet the flat was not delivered as the construction work was not complete. The respondent approached the authority but no steps were taken nor possession was handed over. Consequently he filed a complaint before the District Forum that even after payment of entire amount in respect of cash down scheme the appellant was not handing over possession nor they were completing the formalities and the work was still incomplete. The State Commission by its order dated February 15, 1990 directed the appellant to pay 12% annual simple interest upon the deposit made by the respondent for the period January 1, 1989 to February 15, 1990. The appellant was further directed to hand over possession of the flat without delay after completing construction work up to June 1990. The Commission further directed that if it was not possible for the appellant to complete the construction then it should hand over possession of the flat to the respondent by April 5, 1990 after determining the deficiencies and the estimated cost of such deficient construction shall be refunded to the respondent latest by April 20, 1990. The appellant instead of complying with the order approached the National Commission and raised the question of jurisdiction. It was overruled. And the appeal was dismissed. But the cross- appeal of the respondent was allowed and it was directed that since the architect of the appellant had estimated in October 1989 the cost of completing construction at Rs 44,615 the appellant shall pay the same to the respondent. The Commission further held that the action of the appellant amounted to harassment, mental torture and agony of the respondent, therefore, it directed the appellant to pay a sum of Rs 10,000 as compensation.

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No. ... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No

misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by alloting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the Law of Torts). Misfeasance in public office is explained by Wade in his book on Administrative Law thus:

"Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury." (p. 777) The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in Cassell& Co. Ltd. v. Broome13 on the principle that, an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In Rookes v. Barnard14 it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance.

Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book Administrative Law has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for

this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government or semi-govemment offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them.Various decisions rendered from time to time have been referred to by Wade on Misfeasance by Public Authorities. We shall refer to some of them to demonstrate how necessary it is for our society. In Ashby v. White the House of Lords invoked the principle of ubi jus ibiremedium in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations. In Roncarelli v. Duplessis the Supreme Court of Canada awarded damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence solely because the licensee provided bail on many occasions for fellow members of the sect of Jehovah's Witnesses, which was then unpopular with the authorities. It was observed that, 'what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.' In Smith v. East Elloe Rural District Council the House of Lords held that an action for damages might proceed against the clerk of a local authority personally on the ground that he had procured the compulsory purchase of the plaintiff's property wrongfully and in bad faith. In Farrington v. Thomson the Supreme Court of Victoria awarded damages for exercising a power the authorities knew they did not possess. A licensing inspector and a police officer ordered the plaintiff to close his hotel and cease supplying liquor. He obeyed and filed a suit for the resultant loss. The Court observed:

"Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer."

In Wood v. Blair a dairy farmer's manageress contracted typhoid fever and the local authority served notices forbidding him to sell milk, except under certain conditions. These notices were void, and the farmer was awarded damages on the ground that the notices were invalid and that the plaintiff was entitled to damages for misfeasance. This was done even though the finding was that the officers had acted from the best motives.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socioeconomic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modem society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to

other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

12. For these reasons all the appeals are dismissed. In Appeal No. 6237 of 1990 it is further directed that the Lucknow Development Authority shall fix the responsibility of the officers who were responsible for causing harassment and agony to the respondent within a period of six months from the date a copy of this order is produced or served on it. The amount of compensation of Rs 10,000 awarded by the Commission for mental harassment shall be recovered from such officers proportionately from their salary. Compliance of this order shall be reported to this Court within one month after expiry of the period granted for determining the responsibility. The Registrar General is directed to send a copy of this order to the Secretary, Lucknow Development Authority immediately.

T H E E N D

Rubric for Theory Exam Papers:

'All the theory papers, except for CLE subjects*, for LL.B. semester exams carry 100 marks each, for which the University of Delhi conducts an end semester descriptive exam of 3 hours duration. A typical theory question paper contains 8 questions printed both in English and Hindi languages. The student is required to answer 5 out of 8 questions. Each question carries equal marks, that is 20 marks each. Hence the maximum marks for each paper is 100. A student has to secure a minimum of 45 marks out of 100 to pass a paper.

Answers may be written either in English or in Hindi but the same medium should be used throughout the paper.'

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