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# TORT LAW IN INDIA 1997-1998

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Usha Ramanathan

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## I. INTRODUCTION

THE EMERGENCE of constitutional tort has influenced the development of the principles and priorities of tort law in India. In contrast with the litigation concerning the Bhopal Gas Disaster which exposed the incapacity of the traditional tort law to meet situations yet unmet, constitutional tort has been devised as a public law remedy for violation of rights, generally by agents of the state. Unhindered by the problems of court fees, and with the possibility of expeditious disposal since a large number of constitutional tort cases fall within the canopy of fundamental rights, this remedy appears to have found acceptance with victims and with the courts as also the NHRC. The strict liability doctrine, and the *res ipsa loquitur* principle, which underlies most cases of constitutional tort has worked its way into other domains too, in electrocution cases, for instance.

The cases in the two years under survey stand testimony to the growing relevance of constitutional tort.

Culpable inaction is a gradually evolving area and the cases under survey indicate the direction that the courts have taken, particularly in the context of riots. Compensation in criminal law continues to be a tentative remedy as adopted by courts. Motor vehicle cases constitute one branch of tort law where courts continue to grapple with principles of liability and compensation.

## II. CONSTITUTIONAL TORT

*Rudul Sah's* case<sup>1</sup> constitutes a landmark in the jurisprudence of state liability. Rudul Sah had been illegally detained for over 14 years after his acquittal on the unsubstantiated claim that he was insane. The Supreme Court ordered the State of Bihar to pay him compensation of Rs. 35,000/- while rejecting as "stale and sterile" a hypothetical objection that Rudul Sah could, if so advised, recover damages from the state government in a suit. "The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was controversial," the court said, "in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which could be decreed in his favour." In the court's perception, article 21 would be denuded of its content "if the power of this court were limited to passing orders for release from illegal detention. One of the telling ways in which the violation of the right can reasonably be prevented and the due compliance of the mandate of article 21 secured, is to mulct its violations in payment of monetary compensation." The court recognised a surviving right "to recover appropriate damages from the state and its erring officials" while commenting: "We cannot leave the petitioner penniless until the end of his suit, the many appeals and execution proceedings."

*Rudul Sah* marked a shift in Indian tort law. Traditional tort law is about questions of liability, loss and compensation and is in the area of private law. With *Rudul Sah*, constitutional tort was recognised by the court. The culpability of the state was implicitly premised on the strict liability principle. The identification and penalising of offending/erring officers or agents of the state were, left to the state. Culpability and compensation were introduced as devices in deterrence. Law's delays, expense, procedural demands, multiplicity of proceedings and its uncertainties were partially addressed by introducing compensation as a constitutional remedy where fundamental rights had been violated.

In 1993, when the Supreme Court in *Nilabati Behara*<sup>1a</sup> declared that the award of compensation by the high courts and the Supreme Court was "a remedy available in public law; based on strict liability for the 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",<sup>2</sup> constitutional tort was firmly entrenched. *Sebastian Hongray*, *Bhim Singh* and *Saheli* had, among others, already drawn on the acknowledgment of constitutional tort in *Rudul Sah*. "This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be

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1 *Rudul Sah v. State of Bihar*, (1983) 4 SCC 141

1a (1993) 2 SCC 746. Further, see *Sebastian M. Hongray v. Union of India*, (1984) 1 SCC 339; *Bhim Singh v. State of J&K* (1985) 4 SCC 677; *Saheli v. Commissioner of Police*, (1990) 1 SCC 422.

2 *Ibid.*

tempered by judicial restraint to avoid circumvention of private law remedies where more appropriate”, the court said (*Nilabati Behera* was a case of custodial death) and the court ordered the State of Orissa to pay Rs.1,50,000/- to the petitioner. It was left to the state to ascertain and fix the responsibility of individuals responsible for the death in custody.

The regularity with which custodial violence and custodial deaths are reported in the press, in Annual Reports of the NHRC and in judicial dicta - has been coincident with the increasing induction of human rights parlance and principles into legal discourse. Along with *Rudul Sah* and *Nilabati Behera*, *D.K. Basu v. State of West Bengal*,<sup>3</sup> is the third ruling of the Supreme Court that has expatiated on the tortiousness of custodial callousness and crime.

*D.K. Basu* is a reiteration of the principle of strict liability, the denial of the defence of sovereign immunity, and the assertion of the vicarious liability of the state, which have been developed in precedents from *Rudul Sah* through *Nilabati Behera*. The court also explained that cases of the kind under consideration were public law proceedings which serve a purpose different from private law proceedings in tort. The grant of compensation in proceedings under article 32 or article 226 “for the *established* (emphasis in original) violation of the fundamental rights guaranteed under article 21, is an exercise of the courts under the public law jurisdiction for penalising the wrongdoer and fixing the liability for the public wrong on the state which failed in the discharge of its public duty to protect the fundamental rights of the citizen”.<sup>4</sup> Yet, in summing up, the court clarified that in the assessment of compensation, “the emphasis has to be on the compensatory and not on the punitive element. The objective is to apply balm to the wounds<sup>5</sup> and not to punish the transgressor or the offender...”.<sup>6</sup> The award of compensation in the public law jurisdiction, it was clarified, was without prejudice to any other action in law including a civil suit for damages. That is, this is a remedy that is “in addition to the traditional remedies and not in derogation”<sup>7</sup> of other remedies. And, the compensation awarded by the court and paid by the state may be adjusted against any amount which may be awarded to the claimant as damages in a civil suit.

*D.K. Basu* was in the nature of a PIL, and concerned with the rights of arrested persons. The context was arrest and death in custody.

This triumvirate of cases<sup>8</sup> has set out certain points of difference and contiguity between compensation for tortious conduct in public law and in private law. The culpability of the state has been premised on the strict liability principle. Individual culpability for tortious conduct has been left to the state to determine, and recovery of the compensation from the offending agent or officer of the state has largely been left to the discretion of the state.

The difficulties inherent in traditional tort litigation has been softened by the partial remedy of a certain sum in compensation with the caveat that the amounts may be deducted from any award of compensation that may be made in any other proceedings - thus providing the bridge between compensation in public law and in private law proceedings.

To an extent, developments in this branch of tort law have tended to collapse the difference between tortious negligence and tortious criminal conduct in the public law domain.<sup>9</sup>

## Custodial violence

The number of reported decisions concerning custodial violence and deaths in the years under survey are testimony to the gravity of the problem. There are cases from the High Courts of Bihar, Madhya Pradesh, Punjab & Haryana, Orissa, Himachal Pradesh, Gujarat, Bombay, Delhi, Kerala, Andhra Pradesh and Gauhati.

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3 (1997) 1 SCC 416.

4 *Id.* at 439.

5 [o]r to be “a palliative”, as the court said in *Rudul Sah*.

6 *Id.* at 443.

7 *Ibid.*

8 *Rudul Sah*, *Nilabati Behera* and *D.K. Basu*.

9 See for e.g. *Birmati v. State of Haryana*, (1997) 1 Punj LR 61 (P& H) where a prisoner was attacked and killed by a life convict with a gardening tool. The court found negligence and breach of duty of the jail authorities while awarding compensation of Rs. 1 lakh. See also *M. Nagaraj v. Superintendent of Police*, (1998) 6 Andh LT 226 (DB) and *Smt. Chandabai Yadav v. State of Madhya Pradesh*, 1997 Cri LJ 3844.

In *Lawyers' Forum for Human Rights v. State of West Bengal*<sup>10</sup> the Calcutta High Court while awarding compensation of Rs. 1 lakh to be paid to the widow of a man who died in custody explained the responsibility in terms of duty of care. "When a man is taken into custody, it is the paramount duty of the police officials to protect his body",<sup>11</sup> the court said. "The police authority have a duty of care to the arrested accused."<sup>12</sup>

The award of monetary compensation for custodial violence has been justified as being "the only practicable mode of redress available for the contravention made by the state or its servants in the purported exercise of their powers...."<sup>13</sup>

The issue of medical negligence resulting in the death of prisoners has been brought before the courts. In *Murti Devi v. State of Delhi*,<sup>14</sup> the Supreme Court was confronted with the death of an undertrial prisoner who had been seriously assaulted, allegedly by some convicts in jail, when he was in judicial custody in Tihar Jail. He died of the injuries suffered by him and after being admitted in a Delhi hospital; it was found that prompt and appropriate action in rendering medical aid was not taken. Indicting jail authorities for "gross negligence", the court ordered compensation of Rs.2,50,000/- "[a]s it was the bounden duty of the jail authorities to protect the life of an undertrial prisoner...(and the) authorities had failed to ensure safety and security" to the victim.

In *Rasikbhai Ramsing Rana v. State of Gujarat*<sup>15</sup> three prisoners lodged in Vadodara Central Prison petitioned the court alleging medical neglect. Their allegations were supported by a medical certificate issued by the medical officer of the prison. The neglect was occasioned by the unavailability of police escort for over 3-4 months to take the prisoners to the hospital. Having detailed the deliberations that had taken place and guidelines that had emerged, the court warned: "any neglect in providing immediate medical treatment resulting into further deterioration of his health and/or he even succumbing to death for non-availability of police escort...government may ultimately stand responsible and accountable and in a given case not ruling out even the liability to compensation!! This compensation liability ultimately depending upon the facts and circumstances of the case can as well be personal upon the concerned jail and/or any other concerned officer(s) who is ultimately found to be negligent by the court."<sup>16</sup>

Courts have variously viewed the device of compensation as a public law remedy, as an "interim" measure, as *ex gratia*, and as a welfare measure. In *Dharmishtaben Narendrasinh Rana v. State of Gujarat*,<sup>17</sup> the court ordered Rs. 2 lakhs as compensation "by way of interim measure". In *Jagruti v. S.G. Chaudhari*,<sup>18</sup> the Gujarat High Court awarded Rs. 3 lakhs as compensation as an interim measure, and also "clarified that the compensation awarded would not be taken into account for adjustment in the event of any other proceedings taken by the petitioner for recovery of compensation on the same ground." This, it must be said, is not the norm. The Bombay High Court, on the other hand, negotiated an "ex gratia" payment of Rs. 20,000/- to the legal heirs of a prisoner who had died due to lack of medical facilities.<sup>19</sup> The existence of this remedy was drawn upon by the Gauhati High Court when looking at the "pitiable condition" of the widow and aged mother of an alleged ULFA supporter who died in a mine explosion while leading the army to an ULFA camp. The court directed Rs.75,000/- to be paid to them. The court absolved the army of any laches.<sup>19a</sup>

10 (1997) 1 Cal HCN 485 (DB).

11 *Id.* at 491.

12 The court's position on the use of torture in custody is not as categorical: "It is one thing to use third degree method for the purpose of extracting confession and/or for getting information. But everything has got its own limit. But this third degree method which is not permissible cannot be used in such a manner which causes death to a prisoner", *id.* at 494.

13 *Smt. Chanchala Swain v. State of Orissa*, (1997) 84 Cutt LT 86 at 91. See also *Dev Kala v. State of Himachal Pradesh*, 1998 ACJ 632 at 643 (DB) where *Nilabati Behera* was quoted to like effect. See also *Solgabai Sunil Pawar v. State of Maharashtra* 1998 Cri LJ 1505 at 1508 (DB). The strict liability principle was reasserted, and the defence of sovereign immunity was rejected in this case.

14 (1998) 9 SCC 604. See also *Watchdogs International v. Union of India*, (1998) 8 SCC 338.

15 1998 Cri LJ 1347 (DB).

16 *Id.* at 1354, extracted portion underlined in original. See also *Muktaram Sitaram Shinde v. State of Maharashtra*, 1997 Cri LJ 3458 at 3461. In *Lawyers, Forum for Human Rights supra* note 10 at 493, the court asserted the right of every person in custody to receive timely and effective medical assistance and where it was not provided, and the victim had been arrested alive, it would constitute "gross dereliction of duty."

17 1998 ACJ 97 at 106 (Guj).

18 1998 Cri U 3251 at 3255.

19 *Muktaram Sitaram Shinde, supra* note 16 at 3462-63.

19a *Horendi Gogoi v. Union of India*, 1997 AIHC 1642 (Gau).

Even as the grant of compensation in constitutional tort has been established by judicial dicta, the quantum of compensation that should be awarded is still in the realm of discretion. In *Arun Ch. Bhowmik v. State of Tripura*,<sup>20</sup> it was argued that *Nilabati Behera* was a precedent only for awarding exemplary compensation; anything further has to be pursued in a tort action. In this case a lawyer who was tortured in custody claimed compensation of Rs. 5 lakhs. The Gauhati High Court appears to have accepted this argument when it held: “This being a proceeding under article 226 of the Constitution and not a civil suit or an appeal arising out of a civil suit, we can grant only compensation for violation of fundamental rights.... and not any damages that he may have suffered in tort such as loss of reputation etc.”<sup>21</sup> The state was ordered to pay him Rs. 1 lakh in addition to the cost of treatment which had already been reimbursed.

The court’s quandary when the excise police illegally detained, assaulted and killed the wife of a suspect was witnessed in *Kommineni Sanjeeva Rao v. SI of Police*.<sup>22</sup> “Ordinarily, in such a case, we would have chosen to award exemplary and penal compensation”, the court said.<sup>23</sup> But “(w)e are ....reluctant to recognise entitlement for such compensation in her husband....who, it seems, was wanted in connection with some offence and it appears because he was absconding or not traceable.” So the court awarded a token compensation of Rs. 10,000/-.

In *Smt. Geeta v. Lt. Governor*,<sup>24</sup> *Murti Devi v. State of Delhi*<sup>25</sup> and *Thankappan v. Union of India*<sup>26</sup> where courts awarded Rs. 5.5 lakhs, Rs. 2.5 lakhs and Rs. 3 lakhs respectively, it is possible to discern a presumption that the petitioners are unlikely to pursue a claim to compensation or damages beyond the proceedings before the court. Where the remedy in a suit is treated as a possible avenue for further redressal, the compensation has ranged between Rs.1 lakh<sup>27</sup> to Rs. 5 lakhs.<sup>28</sup>

Custodial violence is of concurrent interest to the courts - as a fundamental rights violation, and to the Human Rights Commissions - as a human rights issue. Both institutions may resort to directing compensation as a mode of redress. In *Lawyers’ Forum for Human Rights*<sup>29</sup> the Calcutta High Court took into reckoning the interim compensation of Rs. 25,000/- which the State Human Rights Commission had directed be paid when it directed the state to pay compensation of Rs. 1 lakh to the next of kin of the deceased.<sup>30</sup>

## Encounter deaths

Civil liberties groups have brought to court the issue of extra-judicial killings in staged encounters. In *People’s Union for Civil Liberties v. Union of India*,<sup>31</sup> it was alleged that the Imphal police had, on 3.4.1991, killed two persons of Lunthilian village of Manipur. The District and Sessions Judge, Churachandpur, in an inquiry conducted at the behest of the Supreme Court, in 1995-96, found that there had been no encounter as averred by the police, and that the two deceased persons had been killed in custody. The Supreme Court held that “the present case appears to be one where two persons along with some others were just seized from a hut, taken a long distance away in a truck and shot there.”<sup>32</sup> The court thereafter ordered that Rs. 1 lakh be paid to the families of each of the deceased.<sup>33</sup>

20 (1997) 1 Gau LT 555 at 557.

21 *Id.* at 560.

22 1997 Cri LJ 3109 (AP).

23 *Id.* at 3112.

24 (1998) 75 DLT 822. This was a case of the brother of an escapee-accused being picked up by the police and tortured to death.

25 *Supra* note 14.

26 (1997) 1 Ker LT 374.

27 *Dev Kala*, *supra* note 13; *Birmati v. State of Haryana*, (1997) 1 Punj LR 61 at 65 and *Patna High Court Council of Legal Aid & Advice Committee v. State of Bihar*, 1998 ACJ 446. In *Smt. Chandabai Yadav v. State of M.P.*, 1997 Cri LJ 3844, the court awarded Rs. 50,000 for the death in custody of a 55 year old man earning Rs. 1860 per month.

28 *Smt. Solgabai Sunil Pawar*, *supra* note 13.

29 *Supra* note 10 at 495.

30 See also *Muktaram Sitaram Shinde*, *supra* note 16 at 3461 where the high court suggested that a nominee of the National Human Rights Commission be appointed as *ex-officio* visitor of prisons in the state, or be non-official visitors, particularly to safeguard the human rights of prisoners. See further, *Annual Report 1997-98* of the NHRC 17, 18-19.

31 (1997) 3 SCC 433.

32 *Id.* at 437.

33 The PUCL was paid costs assessed at Rs. 10,000/- to be paid by the State of Manipur.

The PUCL, Committee for Protection of Democratic Rights and the President of the Samajwadi Party moved the Bombay High Court asking for a judicial enquiry into the deaths which had occurred in alleged police encounters in Mumbai, to ask the state government to take action against the erring police officers, and to award compensation to the family of the deceased. The statistics given by the police stated that while in 1996, there had been 43 encounters resulting in deaths of 57 alleged criminals, in 1997 there had been at least 70 deaths and two alleged criminals injured in 47 incidents. The facts disclosed a need to institute an enquiry into instances specified in the writ petition and the sessions judge was directed to hold an inquiry.<sup>34</sup>

In *K.G. Kannabiran v. Chief Secretary, Govt. of Andhra Pradesh*,<sup>35</sup> a case brought to the court by an advocate who was also the President of the PUCL, it was the killing of an “unidentified PWG Naxalite” which was the immediate cause for concern. The court directed investigation of the case by the CBI. In an editorial note appended to the head note, it is reported that, after judgment was delivered in the case, the government designated courts of CJMs in all districts and courts of CMMs as human rights courts.

The police invariably averred that their attempt was to apprehend the alleged criminal; that they were fired upon with sophisticated weapons, and that they returned the fire in self-defence which resulted in the death of the person. Courts were inclined not to rely on this version of events at least in part because of the absence of injury on the person of the policemen and the injuries caused to the deceased were on vital parts of the body. “In no case,” said the Bombay High Court, “the firing was made by the police officer with an intention to disable the concerned criminal.”<sup>36</sup>

It is significant that in each of the instances, insurgency, militancy or underworld criminality were advanced as reasons for what the Supreme Court termed “administrative liquidation”.<sup>37</sup> Again, demoralisation in the police force<sup>38</sup> and a caution against the court laying “too much emphasis on (the) fundamental rights and human rights” or “such criminals may go scot-free” were advanced as reasons for non-interference in encounter killings through independent inquiry. Courts have, however, generally accepted the need to hold inquiries.<sup>39</sup>

In *Smt. Kamini Bala Talukdar v. State of Assam*,<sup>40</sup> it was established in an inquiry that the deceased who was an active member of the ULFA, a banned organisation, had been killed in cold blood and there had been no bona fide attempt to apprehend him; the court awarded Rs. 1 lakh. “[T]here was ample opportunity to apprehend him alive, but... the police authority wanted to eliminate him,” the court said. And added: “The authority, if it thinks fit, may realise the amount from the police personnel responsible for the killing of the deceased.”<sup>41</sup>

The police had taken photographs of those who had been killed in an alleged encounter in Pilibhit in 1991. Talvinder Singh’s photograph was identified by his father and his grandfather and the court directed the state to pay Rs. 5 lakhs as compensation to his father.<sup>42</sup>

## Illegal detention

When the Government of India ratified the ICCPR, 1966 in 1979, it made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention. This reservation is now of little relevance in view of the decision of the court in *Nilabati Behera*.<sup>43</sup>

In three disturbing cases before the Andhra Pradesh High Court, illegal detention, even torture in custody, was used to bring recalcitrant persons to heel. In *Gongula Venkateswara Rao v. SHO, Vissannapeta P.S.*,<sup>44</sup> a 70 year

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34 *People’s Union for Civil Liberties v. State of Maharashtra*, 1998 Cri LJ 2138. See also *Samji Ladha v. State of Gujarat*, 1998 Cri LJ 2746 where the petitioners were office bearers of an association called Action Committee for Prevention of Police Atrocities.

35 (1997) 4 Andh LT 541 (DB).

36 *Supra* note 34 at 2143.

37 *People’s Union for Civil Liberties*, *supra* note 31 at 437

38 *K.G. Kannabiran*, *supra* note 35 at 556; *supra* note 34 at 2144.

39 An exception is *Smt. Vandana Vikas Waghmare v. State of Maharashtra*, 1998 Cri LJ 4295.

40 1997 Cri LJ 874 (Gau).

41 *Id.* at 878 (emphasis added).

42 *Malkiat Singh v. State of U.P.*, (1998) 9 SCC 351.

43 *People’s Union for Civil Liberties*, *supra* note 31 relying on *D.K. Basu* *supra* note 3.

44 1998 Cri LJ 14 (DB).

old man was picked up by the police and taken away for interrogation in connection with a civil dispute between his son and another person. “A man of 70 years, who has nothing to do with the complaint given, was brought to the police station and was confined for two days, unauthorisedly,” the court found, while directing the sub-inspector of police to pay a compensation of Rs.6,000/- to the detenu. In *K. Yesupadam v. S.I. of Police, Penamaluru P.S., Vijayawada*,<sup>45</sup> the same division bench found, based on an enquiry by the district judge, that a woman was detained between 24.3.1997 and 1.4.1997 “only... to get her son arrested or surrendered, as he was absconding.”<sup>46</sup> “In view of the fact that the detenu is a woman and .... that (she) stands to lose her job (as ayah) in the hospital by the first respondent’s act of illegal detention and also for the reason that the detenu was detained for eight long days,” the court ordered the sub-inspector of police to pay her Rs. 10,000/-.

A woman and her cousin were confined in illegal custody to coerce her to divulge the whereabouts of her husband who was wanted in connection with an excise offence. The woman succumbed to injuries inflicted while she was in custody, while her cousin sustained injury. While her death was dealt with as a custody death,<sup>47</sup> her cousin was ordered to be paid Rs.25,000/- for injuries inflicted and illegal detention.<sup>48</sup>

An accused serving life imprisonment was acquitted in appeal before the high court. Non-communication of the order to the jail where he was lodged resulted in his continued detention for over three months between 21.4.1995 and 28.7.1995. A division bench of the Andhra Pradesh High Court in *K. Umamathy v. Superintendent, Central Jail, Cuddapah*<sup>49</sup> holding that “(h)is continued detention for whatever reasons (beyond April 21, 1995) has to be held illegal and violative of the fundamental rights,” quantified compensation at Rs.6,000/-.

The effect that a misdirected, perhaps *mala fide*, investigation could have on persons roped in as suspects in a crime was considered by a single judge of the Andhra Pradesh High Court in *Smt. Surireddy Pullamma v. Secretary to Government, Home Department*.<sup>50</sup> An entire family, men and women, were implicated in the case of an unnatural death of a neighbour on the varying versions of a child witness. The court was in “no manner of doubt that this was done at the behest of the Circle Inspector....to divert the investigation from its proper direction.” The court did consider awarding damages to the petitioners for their six-month stint in prison: they had claimed Rs. 9 lakhs for loss of crops occasioned by their incarceration. But the government’s plea that the courts too had denied bail and had not found fault with the investigation restrained the court from awarding relief. The court nevertheless clarified that its judgment in this writ petition would “not come in the way of the petitioners taking any steps that are available to them, either in the civil or criminal law.”<sup>51</sup>

In *C. Balakrishna v. State of A. P.*,<sup>52</sup> the petitioner, an account holder with Andhra Bank, was confined, maltreated and threatened by employees of the Bank who insisted that he had been mistakenly given Rs. 8,100/- instead of Rs. 1,800/-. The petitioner thereafter doggedly pursued to conviction a criminal complaint for unlawful confinement; the governor invoked his clemency powers to remit the sentences against the officers of the bank. While the court considered, and upheld, the order of the governor, it said: “Now that they are granted remission under article 161 of the Constitution of India, they need not serve the sentence of imprisonment and their personal liberty is secured

45 (1997) 5 Andh LT 98 (DB).

46 *Id.* at 100.

47 See *supra* note 22.

48 *Ibid.*

49 1997 Cri LJ 1794.

50 1998 Cri LJ 3987.

51 *Id.* at 3990. For further cases on illegal detention see *Thirath Ram Saini v. State of Punjab*, (1997) 11 SCC 623 where the State of Punjab was directed to pay to each of the two persons illegally detained between August 9 and October 2, 1993 Rs. 10,000/-; *Thankappan*, *supra* note 26 where death in custody occurred when the period of detention had exceeded the legal limit; the court ordered Rs. 3 lakhs be paid; *Vimladevi Tiwari v. State of Maharashtra*, (1998) 3 Mah LJ 712, where the cause of death in custody was not established, but illegal detention was: Rs. 10,000/- was to be paid as compensation; *Civil Liberties and Human Rights Organisation v. GAC 'M' Sector*, (1997) 1 Gau LT 91 where the court ordered Rs. 15,000/- to be paid for illegal detention over 15 days of two girls in an army camp; *Lalji v. Superintendent, District Jail* 1997 All LJ 423, where invoking the good faith clause, the court said, to be awarded compensation for illegal detention “mala fides, gross negligence or gross misconduct on the part of the (preventive detention) authority concerned” has to be demonstrated; *Ch. Siddaiah v. State of Andhra Pradesh*, (1997) 2 Andh LT 99 where two advocates alleged illegal detention because they appeared for members of a banned organisation; the court did not address the question of compensation while issuing certain other directions; *Smt. M. Kunja Sampathamma v. SHO, Chirala*, 1998 Cri LJ 621 (AP) where the court found the allegations unsubstantiated. In *Editor, Eenadu v. SHO Akkannapalle P.S.*, (1997) 6 Andh LT 278, an inquiry was ordered into an allegation that a number of villagers had been taken into custody and tortured by the police for refusing to pay money demanded by the latter.

52 (1997) 6 Andh LT 581.

because of clemency. In marked contrast, the petitioner was wrongfully confined by respondents 2 and 3 (officers of the bank) as employees of the (Bank) violating the fundamental right of liberty of the petitioner....See the difference where the law violators who are liable to be jailed are going scot-free and the law-abider standing remediless.”<sup>53</sup> And continued, to ask: “But really, is he remediless...” The court then, relying on *D.K. Basu v. State of West Bengal*,<sup>54</sup> and applying the principle of vicarious liability, awarded damages at the rate of Rs. 1 lakh against each of the two officers to be paid by the bank. The amount was determined having regard to his “pursuing his legal remedies for prosecuting the respondent (officers),.... warding off all legal obstacles created and (he) had spent considerable time, energy, labour and money apart from suffering physical discomfort of unlawful detention and mental anguish of humiliation and insult.”<sup>55</sup> It was left to the bank whether or not to seek indemnification.

*Miss Ezlinda Fernandes v. Chetan Sanghi*<sup>56</sup> is yet another case of the misuse of the law concerning non-criminal mentally ill persons (NCLs). The reports of the commissioners sent by the Supreme Court to West Bengal and to Assam is replete with cases of people being put away as NCLs for reasons wholly unconnected with mental illness.<sup>57</sup> In *Ezlinda Fernandes*’ case, differences between neighbours were attempted to be resolved by confining her in the Institute of Psychiatry & Human Behaviour, Goa. On 7.10.1991, the police approached the SDM for an order detaining the petitioner in the institute on the ground that she was a lunatic.<sup>58</sup> After a purported preliminary examination of the petitioner, the SDM declared that she had been detained in the said institute under observation for three days to enable a medical officer to report on whether she was indeed a ‘lunatic’. On 9.10.1991, the medical superintendent of the institute asked for a further period of ten days. On 15.10.1991, the SDM passed an order that he was satisfied that she was *prima facie* a lunatic. There is nothing to indicate that the SDM had independently applied his mind, the court said. “Perhaps the (SDM) passed the ....orders mechanically on application of the police.”<sup>59</sup> Ultimately on 30.10.1991, the medical superintendent applied to the SDM for a NOC for release of the petitioner since she was not suffering from any psychiatric illness. In other words, she was not a ‘lunatic’ under the Indian Lunacy Act, 1912. The NOC was received on 1.11.1991. She was, however, released only on 6.11.1991, because of intervening holidays. The court has been categorical in its statement that:<sup>60</sup>

If a normal person is detained in a lunatic asylum or a mental hospital or a government institute...., it leads to deprivation of personal liberty and humiliation. Unnecessary and unwarranted detention of a normal person in mental hospital also stigmatises the person....If the state official unlawfully detain a person who is not a lunatic in a mental hospital, the state is liable to pay damages to the person aggrieved for wrongful deprivation of personal liberty without authority of law leading to violation of article 21 of the Constitution of India.

Having found that she had been detained in the institute without the authority of law in any event from 1.11.1991, the court was, however, “not persuaded to award heavy damages” since the initial action of the authorities though erroneous in law, was not *mala fide*.<sup>61</sup>

## Disappearances

Since the decision of the Supreme Court in *Sebastian Hongray v. Union of India*,<sup>62</sup> in a writ seeking *habeas corpus*, the burden is on the police or the armed forces to prove their stand in cases of disappearances where it is shown that the person detained was last seen under their surveillance, control and command.<sup>63</sup> When two boys

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53 *Id.* at 597-98.

54 *Supra* note 3.

55 *Supra* note 52 at 598.

56 1997 AIHC 144.

57 See U. Ramanathan, “Women and Institutionalisation” in S. Mukhopadhyay (ed.), *In the Name of Justice: Women and Law in Society*, 55 at 63-64 (1998); *Anamika Chawla v. Metropolitan Magistrate* (1997) 5 SCC 346 is another, more recent instance of the abuse of this jurisdiction. See also *P.C. Kakar v. Commandant, Military Hospital*, 1994 Cri LJ 1469 (AP) discussed in U. Ramanathan, “Law of Torts”, XXX *ASIL* 484 at 498-99 (1994).

58 See s.13 Indian Lunacy Act, 1912. This Act has been replaced by the Mental Health Act, 1987 w.e.f 1.4.1993.

59 *Id.* at 146.

60 *Id.* at 147 (emphasis added).

61 It directed that Rs. 10,000/- be paid to her.

62 *Supra* note 1.

63 *Smt. Chanchala Swain supra* note 12 at 91. See also *Smt. Savitri Behera v. State of Orissa*, (1997) 84 *Cutt LT* 570:1998 Cri LJ 4716.

were picked up by the army in Imphal on 23.9.1980, a *habeas corpus* petition was filed on 9.4.1981 before the high court, and a report of the district judge to the Supreme Court concluded that there was no cogent evidence that the boys had been released, the court ordered that Rs. 1,25,000/- be paid to the mothers of each of the boys.<sup>64</sup>

In *Civil Liberties & Human Rights Organisation v. GOC 'M' Sector*,<sup>65</sup> a 30 year old resident of Wunghon village in Ukhrul district was arrested by the Assam Rifles and his whereabouts were not known for at least eight years thereafter, the high court ordered that Rs. 2 lakhs be paid to the next of kin.<sup>66</sup>

In *Puspa Gurang v. Jt. Asst. Dir.(Welfare), CRPF*,<sup>67</sup> was the disappearance of an army jawan whom the authorities did not attempt to trace which led the court to presume that there had been civil death; his wife and child were held entitled to all financial dues. On account of the negligence involved in the tracing out of the missing man, his wife and child were directed to receive Rs. 3 lakhs in compensation.

A teacher taken away for investigation in connection with his nephew and a girl the nephew was in love with, and whom he had harboured for one month, never returned. The police took the stand that the teacher had given them the slip. The records revealed that the police had taken elaborate measures to track him down. The court, while holding that there was no doubt that he had been in the control of the police acknowledged that, if in fact he had run away, the police would need time to find him. In the circumstances, it ordered that a sum of Rs. 1,50,000/- be deposited with the court, of which Rs. 25,000/- was to be released to his wife. The opposite parties were given a further year to indicate if, and where, the disappeared was living; or, if dead, the date and cause of death. If in that period the opposite parties did not find definite information, the balance amount was to be released to the disappeared man's wife. She was to file an undertaking that if her husband was found alive or if any of the averments about the opposite parties being responsible for his death was found to be incorrect, appropriate action would be taken against her. In case he was found alive, his wife was to refund the amounts paid to her within three months.<sup>68</sup>

### III. CULPABLE INACTION

A growing acknowledgment of the state's responsibility for the victim of riots is emerging in case law. There is evidence that the expanding dimensions of article 21 rights, particularly the aspect of compensation as a palliative or as partial redress, has contributed to it. The increasing application of the strict liability principle, and implicitly of the *res ipsa loquitur* rule, has made detailed determination of facts unnecessary, and compensation in writ jurisdiction possible. The fixing of liability on the state for not preventing the occurrence of a tort has aided in making this a judicially manageable jurisdiction. That many of the situations coming within the conspectus of culpable inaction stem from communal riots suggests that recognition of the victim, and providing for redress, has become a part of the court's function in restoring the legitimacy of the state in the riot-affected areas.

A single judge of the Gujarat High Court in *Noor Mahmud Usmanbhai Mansuri v. State of Gujarat*<sup>69</sup> explained the rights of victims as emanating from reading into the right to life a "right to protection against any sort of violence or mob frenzy or communal frenzy and breach of such right is breach of fundamental right for which state is answerable to all individuals more particularly to the living injured or victims of such violence....The state within the meaning of article 21...cannot be permitted to contend that it was helpless or beyond its control to provide protection to all individuals...In my opinion, there does exist an obligation to provide protection to all persons against any violence or apprehension of violence."<sup>70</sup>

The petitioner in this case was the victim of the riots that erupted immediately after the demolition of the Babri Masjid on 6.12.1992. Government policy soon after the demolition and the riots declared that Rs. 2 lakhs would be given to those who succumbed to injuries in the riot, and Rs. 50,000/- to the seriously injured. The district collector in fact visited the petitioner in the hospital and gave him a cheque for Rs.1,000/- with a promise that the

64 *Postsangbam Ningol Thokchom v. GOC*, (1997) 7 SCC 725.

65 *Supra* note 51.

66 The bodies of two others who had been arrested with him were recovered by the civil police the day after arrest. Rs. 2 lakhs was ordered to be paid to each of their next of kin too. *id.* at 98.

67 (1998) 86 Cutt LT 379.

68 *Smt. Chanchala Swain*, *supra* note 12.

69 (1997) 1 Guj LH 49.

70 *Id.* at 57.

rest would be paid subsequently. On the import of this payment, the court said that it constituted a recognition that the right to life included within it the right to protection. ‘The immediate reaction (of declaring cash assistance to affected persons) is not an act of charity,’ the court said. ‘It is an act of recognition of its constitutional obligation.....’<sup>71</sup> And, ‘[t]his court has now accepted right to protection as part and parcel of right to life and the state cannot be permitted to.....(contend) that there does not exist anything like right to protection in the Constitution of India.’<sup>72</sup>

The internal decisions of the government to reduce the cash assistance to between Rs. 1,000/- and Rs. 5,000/- depending on the nature of injuries was rejected by the court relying on the promise held out to the petitioner in its original policy.<sup>73</sup> The court awarded Rs. 50,000/- to the petitioner at the rate of 10 per cent interest from the date of the petition, for the injuries suffered and the resulting disability, consonant with the policy of the state declared soon after the event.

In the violence following the assassination of Mrs. Gandhi on 31.10.1984, the Orissa High Court was of the opinion that by 4.11.1984, the law-enforcing agency had enough time to make foolproof arrangements to avoid any riot violence. ‘The state’, it said, ‘cannot absolve itself of the responsibility by simply making arrangement of a routine police patrolling.’<sup>74</sup> There was nothing to show that adequate steps had been taken to prevent mob violence. Further, the state had treated the deceased victim as a riot victim and having already paid Rs.20,000/- for his death, the court had little hesitation in declaring that there had been ‘lapses on the part of the state to grant adequate protection as guaranteed under article 21’, and to grant compensation.

An argument based on an earlier case of the court in *Sardar Kartar Singh v. Union of India*<sup>75</sup> that the occurrences had been the ‘result of spontaneous outburst which despite precautionary measures could not be prevented by state functionaries and that there was no proof that the loss.....was as a result of the failure on the part of the state government’<sup>76</sup> was negated, indicating the strides made in the law of culpable inaction between 1991 and 1997. Expressing difficulty in following a Delhi High Court decision which ordered the payment of Rs. 3.3 lakhs to a victim of the 1984 riots,<sup>77</sup> the court awarded Rs. 50,000/- to be paid within two months, as ‘equitable compensation’.<sup>78</sup>

The single judge in *Moinkhan Ballukhan Pathan v. State of Gujarat*<sup>79</sup> appears to have differed hardly at all from the earlier cases on the issue of culpable inaction. The petitioner in this case had been compensated for the loss of movables connected with his business/profession. The question before the court was regarding the shop and the land on which it was constructed. The court does not appear to have doubted that the shop and the land did in fact suffer damage. It, however, based its denial of compensation on the legality of the occupation and use of the shop and the land. Finding that the petitioner was an encroacher on the land and that he had constructed the shop without authority of law, the court held: ‘Compensation for loss of immovable property can be claimed provided the property is lawfully occupied or constructed upon by the claimants.’<sup>80</sup>

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71 *Id.* at 58.

72 *Ibid.*

73 But see *Jan Sangharsh Manch v. State of Gujarat*, AIR 1998 Guj 133 where the court refused to interfere with the folding up of the commission of inquiry set up to investigate the riots following the demolition of the Babri Masjid. Among the reasons cited by the government for not extending the term of the commission were that (i) the victims of violence have been compensated;...(v) because of the lapse of time people have lost interest...(vii) there has been communal peace and harmony in the state since the riot of 1992. See also *Mobina Begum v. Union of India*, (1998) 8 SCC 715 where the winding up of the Srikrishna Commission enquiring into the Bombay riots of 1993 was challenged. Relief seeking directions to various governments to pay compensation to an unspecified number of victims, on the basis of alleged dereliction of duty of the government was denied because of absence of acceptable evidence; the petitioner relied upon newspaper reports. See also *Ranganathan v. Union of India*, (1998) 8 SCC 201 where the state government rejected the finding of the commission of inquiry into the violence following a state-called bandh in Karnataka in December, 1991 that there had been ‘systemic failure’, but said nothing about what was being done for the victims of the riots. The court directed expedited hearing of the petition.

74 *Mrs. Charan Kaur v. Chief Secretary, Orissa*, (1998) 85 Cutt LT 581 at 587.

75 O.J.C No. 523 of 1990 dated 16.4.91.

76 Referred to at *supra* note 74 at 582.

77 This is presumably a reference to *Smt. Bhajan Kaur v. Delhi Admn.*, 1996 A1HC 5644 at 5649 where the court awarded Rs. 3.5 lakhs which included interest on a compensation amount of Rs. 2 lakhs: see 1996 *ASIL* at 426. The Orissa High Court found the computation unexplained and therefore not capable of being followed as a precedent.

78 Failure to pay within two months was to entail interest at 12 per cent p.a. from 6.9.1986, which was the date on which the state government had paid the *ex gratia* of Rs. 20,000/-.

79 (1998) 1 Guj LH (UJ) 19.

80 The costs of the petition, quantified at Rs. 1,500/- were further imposed on the petitioner.

This link between legality and compensation for culpable inaction may need to be reexamined particularly in the manner it reflects on the right to protection by the state during riots, mob violence and other breakdown of law and order. Moreover, encroachment is not an uncomplicated concept in law. Importantly, this might result in excluding people living in slums and like settlements who have, in fact, been found to be most vulnerable in times of public violence, and most in need of protection from violence and compensation to rebuild their lives.

*K. V. Joseph v. State of Kerala*<sup>81</sup> was a case where 75 per cent of a dwelling house and a boundary wall and gate were demolished for widening a road. A member of the local *panchayat*, a government servant employed in the telephone exchange and a businessman were alleged to have led a frenzied mob and carried out the demolition. An earlier episode of trespassing and demolishing, armed with shovels, pick axes and iron rods had been reported to the police and protection sought. The residents of the house were all women including one who had delivered a child ten days before the event.

It was contended that it was the inaction on the part of the police to provide adequate protection, which had resulted in the incident under contest. The court accepted this contention when it held that the demolition by a mob would not have taken place if the police had acted on the complaint following the earlier incident of trespassing and destruction. "Thus," said the court, "her right guaranteed under the constitution (a right to decently live in a residential house, without intervention from others) had been totally violated because of the inaction on the part of the police machinery under the state."<sup>82</sup> Holding that the "claim for compensation is based on the principle of strict liability to which the defence of sovereign immunity is not available,"<sup>83</sup> the court ordered the state of Kerala, the district collector, the superintendent of police and the sub-inspector of police to pay Rs. 4.65 lakhs according with the assessment of damage and cost of reconstruction made by a commissioner.

Interestingly, other petitioners who had had their properties demolished even in the first instance, were treated differently. At the time that their properties were demolished, the court said, the police could not have prevented it, since the petitioners had not approached the police prior to the demolition. "They can," therefore, "approach the appropriate authority seeking damages against the persons who caused such damage."<sup>84</sup> The elements of *warning* and *foreseeability* appear to have been introduced into this treatment of culpable inaction.

*Students of A.P.A.U v. Registrar, A.P.A.U.*<sup>85</sup> is a case where the court found that the harm to a student "could have been prevented had the Principal and others, teachers and officers of the college and the university, taken note of the warnings which were more than obvious in several representations by the students and several reports in this behalf already furnished to them."<sup>86</sup> A woman student who suffered deep burn injuries and disfigurement caused by a stalker, a senior student, was compensated by the court for "the loss of her studies, for the mental agony she has already suffered and which she undoubtedly would suffer for the whole of the remaining life."<sup>87</sup> The state government was ordered to make the payment and to undertake full and complete treatment, including surgery and plastic surgery including costs and expenses of transportation, hospitalisation, treatment. The court went further in directing the university to admit her to any further course she may choose to take "without insisting on any entrance examination and/or fulfilment of the merit for the purpose of selection etc.", and to give her a job instead if she prefers that option. This of course is from the reservoir of extraordinary jurisdiction of the court and it is difficult to trace it to any precedent, nor is it likely to constitute one. Not entering into the "niceties" whether it was the state, the university, its agents or servants who had been negligent, the court reserved the right for the state to recover the amount of Rs. 5 lakhs from the accused, and from the university or the college or the principal if they were found negligent and put the onus on the state to recover the compensation from the person found responsible.

Courts seem to have experienced less difficulty in recognising culpable inaction where the authorities were given information about potential harm and the harm occurred thereafter.

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81 (1997) 1 Ker LT 582.

82 *Id.* at 587.

83 *Id.* at 588.

84 *Id.* at 587.

85 1997 AIHC 2671 (AP).

86 *Id.* at 2673-74.

87 *Id.* at 2674.

## IV. COMPENSATION IN CRIMINAL LAW

There are two aspects to compensation in criminal proceedings. Section 357(1) CrPC provides that, if fine is imposed as part of the sentence, the court may direct that a part or the whole fine, if realised, be paid to victims of the offence. Where no fine is imposed, the court may nevertheless, under section 357(3), order the accused person to pay a certain sum in compensation.<sup>88</sup> Courts have more commonly resorted to a sentence of fine in addition to imprisonment from which they may direct that the victim be paid an amount in compensation, though the compensation provision is occasionally invoked.

A division bench of the Madras High Court in *Arjunan v. State by Inspector of Police*<sup>89</sup> explained that, section 357(3), which empowers the criminal court to award compensation takes into consideration the paying capacity of the accused. Adverting to the 42<sup>nd</sup> Report of the Law Commission of India where the dormancy of the provision for compensation in criminal law was bemoaned, the court attributed this neglect to the “lack of proper motivation”, and said:<sup>90</sup> “There is a great need to amend the law so as to make it obligatory on the courts to give reasons as to why the provisions relating to compensation have not been applied. Some states like Bihar, Madhya Pradesh and West Bengal by way of amendments to section 357 CrPC have made it obligatory on the courts to award compensation in all cases of crime against the members of the scheduled castes and scheduled tribes. Why not extend these provisions as of right, may be even as a fundamental right under the Constitution, to each of the victim of every crime irrespective of religion, caste, creed etc.?” the court asked. Compensation, the court clarified, would be in addition, and not ancillary, to other sentence. In the instant case, the wife of the deceased, who had been killed in a sudden quarrel between neighbours, demonstrated forgiveness. On being questioned by the court, she said she was not particular about the amount of compensation. The court, on considering the age of the accused, the paying capacity of the family of the accused and the position of the victim-wife, ordered the accused to pay Rs.3 lakhs as compensation, while altering the sentence to one under section 304 I and reducing the sentence to the period already undergone. In default of the payment of the compensation, the accused was directed to undergo seven years’ RI, including the period of one month of imprisonment that he had already undergone.

The case of *Mer Malde Veja v. State of Gujarat*<sup>91</sup> was different in that the lower court imposed both a fine as part of the sentence, and an amount of Rs. 15,000/- from each of the two accused persons as compensation. A division bench of the Gujarat High Court set aside the direction regarding payment of compensation as not being in keeping with section 357(3).

The connection between compensation in criminal proceedings and civil law is patent in *Bashirkhan v. State of Gujarat*<sup>92</sup> where the court, while altering the conviction from one under section 307 IPC to section 324, took into account the fact that nearly 12 years had passed from the date of the incident, and reduced the sentence to the short period already undergone subject to the condition that the accused deposit a sum of Rs.1,25,000/- in the court. It was agreed that a civil suit for Rs. 1 lakh filed for damages would not be pressed by the heirs of the injured victim, and that the court fee in the civil suit would be enforceable against the appellant-accused, again, “as a condition under this order”.

The court adopted a similar posture in *Suresh Balkrishna Nakhaa v. State of Maharashtra*<sup>93</sup> where it was the case of a rape of a 14 year old girl. There was some question as to whether she was a consenting party, but this was recognised as irrelevant in law since she was less than 16 years of age at the time of the alleged rape. That there was some talk of settling the matter between the parties is recorded by the court. Further, an affidavit filed by the wife of the accused explaining the condition of her husband’s family and her own plight and that she had sold her ornaments so that the victim-girl may be compensated, also asked that the sentence be reduced to the period undergone. The father of the victim-girl also stated that the accused, who had spurned earlier attempts to give legitimacy to a child born of the relationship, had agreed to pay Rs. 4 lakhs to the victim girl. The court therefore found itself “inclined” to allow the appeal in part, setting aside the conviction under section 342 IPC, and reducing the sentence under section 376 to six months’ RI and a fine of Rs.1,000/-. The Rs. 4 lakhs deposited with the counsel for the intervenor-father was directed to be placed in a fixed deposit.

<sup>88</sup> The penalty for non-payment of compensation is not provided in law. Non-payment of fine, on the other hand, may be punished by an (additional) period of imprisonment.

<sup>89</sup> 1997 Cri LJ 2327.

<sup>90</sup> *Id.* at 2334-35.

<sup>91</sup> 1998 Cri LJ 4412.

<sup>92</sup> (1997) 1 Guj LH 827.

<sup>93</sup> 1998 Cri LJ 284 (DB).

In *State of Maharashtra v. Rajendra Jawarmal Gandhi*,<sup>94</sup> where the Supreme Court enhanced the sentence for attempt to rape a minor girl of about eight years, it said: “While imposing the sentence of fine and directing payment of whole or certain portion of it to the person aggrieved, the court has also to go into the question of damage to the victim and even to her family.”<sup>95</sup>

The precedential value of *Bodhisattwa Gautam*’s case<sup>96</sup> was addressed by two high courts, both of which rejected the argument that *Bodhisattwa Gautam* constituted a precedent for payment of interim compensation to victims of rape. In *Mukeshbhai Narubhai Patel v. State of Gujarat*,<sup>97</sup> a single judge explained that the direction for maintenance did not form part of the parameters set out by the *Gautam* court. The Supreme Court had made the order for interim maintenance under its plenary power under article 142 of the Constitution. Moreover, *Gautam* was not a case of rape but of offences relating to marriage, the court said. A single judge of the Andhra Pradesh High Court in *S. Kannan v. D. V. Padmaja*<sup>98</sup> was of a similar view in a case concerning section 493 IPC. The court also said: “The provisions of CrPC or of any other law do not empower the trial courts to grant such interim compensation.”<sup>99</sup> It is upon conviction that an order of fine may be passed, the court added.

The problem of delay in criminal proceedings has had its influence on the use of the sentence of fine. In *State of Maharashtra v. Rajendra Jawarmal Gandhi*,<sup>100</sup> the high court had reduced a sentence of seven years’ RI and Rs. 5,000/- fine to the period already undergone (33 days) and a fine of Rs. 40,000/- of which Rs. 25,000/- was to be paid to the complainant who was the father of an eight year old girl who was raped by the accused. Even as the Supreme Court considered enhancing the sentence, it was contended that over 11 years had elapsed since the commission of the offence, and that if the sentence had to be enhanced, then the amount of fine could be raised. The court rejected this plea while imposing a sentence of five years’ RI and retaining the order of fine.<sup>101</sup>

Delay did, however, result in a reduced sentence of imprisonment in *State of Maharashtra v. Hindurao Daulu Charapale*,<sup>102</sup> where the court restrained its impulse to enhance the sentence imposed on a person convicted of the offence under section 326 IPC by a further term of two years because “it would indeed be very harsh to send him back to the jail after efflux of a decade or more.”<sup>103</sup> Instead the court imposed a fine of Rs. 20,000/- with a default clause of two years, the fine amount to be given to the victim. In *Dwarka Das v. State of Rajasthan*,<sup>104</sup> the elapsing of 16 years from the date of the incident of rash and negligent driving resulted in an enhanced sentence of fine of Rs. 10,000/- under section 304 A and Rs. 1,000/- under section 279 to be paid to the legal heirs of the victim.

In *Munna v. State of U.P.*,<sup>105</sup> the Allahabad High Court desisted from increasing the sentence from the “extra-soft” sentence of Rs. 1,000/- for an offence under section 354 IPC because of a 12 year delay. And in *State of Maharashtra v. Harishchandra Tukaram Awatade*,<sup>106</sup> while reversing an acquittal, the court took into account the 15 years that had gone by, and a 10 month stint as undertrial to impose a “substantial fine”<sup>107</sup> for an offence under section 326, to be paid to the victim or his heirs.<sup>108</sup>

94 (1997) 8 SCC 386.

95 *Id.* at 403. See also *Babulal Bora v. State of Assam*, (1997) 1 Gau LT 549 at 551, a case of patricide and assault on mother and sister. “[T]his payment of fine, if at all it is made, would be the burden of the victims...[A]part from poverty.....we find this imposition of fine to be redundant and unduly burdening those left behind.”

96 *Bodhisattwa Gautam v. Subhra Chakraborty*, AIR 1996 SC 922.

97 (1997) 1 Guj LH 876.

98 1997 Cri LJ 3994.

99 *Id.* at 3997.

100 *Supra* note 94.

101 See also *State of Maharashtra v. Savala Sagu Kokare*, 1997 Cri LJ 786; *Francis Xavier Rodrigues v. State*, 1997 Cri LJ 1374 at 1376 (Goa) where the court refused to confine the sentence to fine in the face of delay of over 16 years saying: “Moreover, this will create an impression in the minds of the people that any guilty driver whatever may be the gravity of his negligence, can easily walk over by paying a fabulous amount by way of fine.”

102 1997 Cri LJ 1649.

103 *Id.* at 1652.

104 1997 Cri LJ 4601.

105 1997 Cri LJ 274.

106 1997 Cri LJ 612.

107 Rs. 10,000/-.

108 For other cases on compensation from fine imposed, see *State of Gujarat v. Gopalrao Baurao Mohite*, (1997) 2 Guj LH 82, a case of torture by a police officer; *Cruz Pedro Pacheco v. State*, 1998 Cri LJ 4628 (Ooa) where compensation from fine of Rs. 20,000/- was reduced to Rs. 10,000/- assessed as damage occurring in a case of arson; *State of A.P. v. Kuna Satyanarayana*, (1998) 8 SCC 268 where a partial restoration of a sentence was accompanied by fine which was to be paid as compensation and *G.S. Walia v. State of Punjab*, (1998) 5 SCC 150.

*State of Gujarat v. Hon'ble High Court of Gujarat*<sup>109</sup> was a contest before the Supreme Court about payment of minimum wages to prisoners serving a sentence which includes hard labour.<sup>110</sup> In Justice Wadhwa's partly dissenting judgment, where he asserts that article 23 will not be violated if prisoners doing hard labour when sentenced to rigorous imprisonment are not paid wages, he attempted a victimological foray to lend a refurbished appearance to section 357. "A victim of crime cannot be a 'forgotten man' in the criminal justice system," he said. "It is he who has suffered the most..... Reparation is taken to mean the making of amends by an offender to his victim, or to victims of crime generally, and may take the form of compensation, the performance of some service or the return of stolen property....." With that, he mooted the establishment of a "prison fund" into which a certain amount from the wages of the prisoners be credited and an amount out of that be paid to the victim or for the upkeep of his family as the rule may provide. "Creation of a fund, to my mind, is necessary", he added, "as any amount of compensation deducted from the wages of the prisoner and paid directly to the victim or his family may not be acceptable considering the psyche of the people in our country."<sup>111</sup>

Compensation for the victim through the criminal process being dependent on conviction, it leaves the victim a further victim of the vagaries of criminal trial. A criminal injuries compensation board, suggested by the Supreme Court in earlier years, may hold more potential for victim-redress than a punishment oriented approach towards the convicted person.

## V. NEGLIGENCE

The trend in tort law has been to require statutory authorities to shoulder liability for breach or negligence of their duties. Where injury results, the doctrine of *res ipsa loquitur* has often been invoked either expressly or implied in decisions. The injury or harm have been compensated, and, while it might often be partial compensation for losses sustained, courts have tended not to leave the costs to be borne only by the victim. In a recent decision of the Supreme Court in *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum*,<sup>112</sup> a two judge bench appears to have discarded these evolving approaches.

This was a case from 1975, when a wayfarer was struck down by a roadside tree which was in a state of decay. He succumbed to his injuries. The trial court, holding that the corporation had failed to perform its statutory duty - which includes the duty to plant trees as well as to maintain them in a healthy condition - decreed the suit for Rs. 45,000/-. The high court affirmed this decision. The Supreme Court reversed, on a reasoning that rewrites many of the notions of negligence and duty to care of statutory corporations.

The judgment draws elaborate distinctions between omission to perform a statutory duty as actionable negligence and the positive action of a statutory authority which results in harm or injury. The court suggests that this would be the distinction between misfeasance and non-feasance and says: "where the public authority has decided to exercise a power and has done it negligently a person who has acted in reliance on what the public authority has done, may have no difficulty in proving that the damages which he has suffered have been caused by the negligence. Where the damage has resulted from a negligent failure to act there may be greater difficulty in proving causation and requires examination in greater detail."<sup>113</sup>

The court saw the issues before it thus: whether the plaintiff had established that necessary relationship giving rise to the duty of care. And, whether there was any negligence at the time when the act in question was committed. The court quickly added: "The tort of negligence does not depend simply on the question of foreseeability. Foreseeability is not the sole criterion nor does the fact that the damage is foreseeable create any onus."<sup>114</sup>

Having visited the 'neighbourhood' or 'proximity' principle, and drawn the difference between errors of judgment of a public authority and unreasonable exercise of discretion, the court turned to the duty of care involved in planting and maintaining trees. Terming the imposition of responsibility on statutory authority as "an intolerable

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109 (1998) 7 SCC 392.

110 See also *Muktaram Sitaram Shinde*, *supra* note 16 at 3462 where the question of minimum wages for prisoners was raised, but not answered.

111 *Supra* note 109 at 435.

112 (1997) 9 SCC 552.

113 *Id.* at 584.

114 *Id.* at 585.

burden of duty of care on the authority” the court cautioned that this might “detract the authority from performing its normal duties” and deter the planting of trees.<sup>115</sup>

The question, as the court saw it, was whether the public authority, which is enjoined to plant trees in public places and along the roads, owes a statutory duty towards that class of persons who frequent and pass and re-pass on the public highway or road or the public places. Stating that it is difficult to lay down any set standards, and that it would depend on the facts and circumstances, the court held in conclusion that in the case before it, the causation was too remote and the authority was not liable to be sued for the tort of negligence.

The penultimate paragraph of the judgment reflects the court’s concerns which led it to so re-work the concepts in tort of the duty of care and negligence. The conditions in India have not developed such that a corporation can keep constant vigil on the healthy conditions of the trees in public places, roadsides and highways frequented by passers-by, the court explained. And held further: “There is no duty to maintain regular supervision thereof, though the local authority.....is under a duty to plant and maintain the tree. ..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...to foresee such an occurrence.”<sup>116</sup>

A very different approach was adopted by another bench of the Supreme Court in *Union of India v. United India Insurance Co.*<sup>117</sup> discussed *infra*.

A tangible feature of the cases of negligence in the years under survey is the general application of the *res ipsa loquitur* doctrine where electrocution occurs. The electricity boards have often attempted to advance the defence of act of god, but that has been uniformly rejected by the courts;<sup>118</sup> wind and rain have been viewed as reasons for greater degree of care, and not as valid defences. Where it was demonstrated that the authority had been informed of the neglected condition of the wires transmitting electricity and had done little to restore it to safety, courts have had no difficulty in bringing in a finding of negligence.<sup>119</sup> There have also been categorical statements that “the burden of proof in a case of this nature rests on the defendant to prove that there was no negligence on its part but not on the plaintiff to prove negligence.”<sup>120</sup> The occasional defence of contributory negligence has not been lent any undeserved seriousness.<sup>121</sup>

Delay continues to plague the process.<sup>122</sup> There is an emerging trend to depart from the practice of awarding standard amounts as damages, in electrocution cases, to computing compensation based on the income replacement principle applying the multiplier method<sup>123</sup> though the awarding of amounts reflecting the discretion of the court has not disappeared altogether.<sup>124</sup> The influence that executive prescription may have on compensation is witnessed in *Shashikalabai v. State of Maharashtra*<sup>125</sup> where the court raised the compensation from Rs. 30,000/- to Rs. 60,000/- on the basis of a circular issued by the Maharashtra State Electricity Board.

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115 *Id.* at 599.

116 *Id.* at 601.

117 (1997) 8 SCC 683.

118 For e.g., *Shankarsan Das v. Grid Corporation of Orissa Ltd.*, 1998 ACJ 1420; *Motukuri Bheemavva v. APSEB*, (1998) 1 Andh LT 67; *T.Gajayalakshmi Thayumanavar v. Secy., PWD, Govt. of Tamil Nadu*, AIR 1997 Mad 263; *Rushi Prusti v. OSEB*, 1998 AIHC 3396.

119 E.g., *RSEB v. Jai Singh*, AIR 1997 Raj 141; *Motukuri Bheemavva*, *supra* note 118; *A.S. Zingthan v. State of Manipur*, AIR 1998 Gau 102.

120 *Motukuri Bheemavva*, *supra* note 118.

121 See *T. Gajayalakshmi Thayumanavar*, *supra* note 118 where the electricity board contended that it was the negligence of the deceased in leaving his house on the day of wind and rain that had led to his death; and *Motukuri Bheemavva*, *supra* note 118 at 74 where contributory negligence was alleged as he went near the fence away from the path. The court held that “question of contributory negligence would arise only if the deceased knew about the presence of the live wire at the place and he did not take reasonable care to avoid coming into contact with it.” See also *Dano Bai v. State of Punjab*, 1997 AIHC 2272.

122 See for e.g., *Ambika Padhan v. OSEB*, (1998) 86 Cutt LT 865 at 870 where there was a delay of 12 years.

123 See for e.g., *T Gajayalakshmi Thayumanavar*, *supra* note 118 at 270 (Rs. 3,99,000/- at 12 per cent interest); *S. Dhanaveni v. State of Tamil Nadu*, AIR 1997 Mad 257 at 263 (Rs.1,71,000/-at 12 per cent interest); *Motukuri Bheemavva* *supra* note 118 at 75 (Rs.2,05,000/-); *Haneefa Bano v. State of Jammu & Kashmir*, AIR 1998 J&K 37 at 45 (Rs.1,68,000/- for permanent disablement of a 16 year old girl).

124 For e.g., *Dano Bai*, *supra* note 121 (Rs. 1 lakh); *Rushi Prusti v. OSEB*, (1998) 85 Cutt LT 529 at 539 (Rs. 40,000/- for the death of a seven year old boy); *Shankarsan Das*, *supra* note 118 at 1423 (Rs. 45,000/- for the death of a 47 year old woman) and *A.S. Zingthan*, *supra* note 119 (Rs. 1 lakh).

125 (1998) 5 SCC 332.

It is, however, in declaring that “electricity is clearly a substance since electrons, which constitute electricity, are material particles having specific physico-chemical properties” and is “hazardous”, that a significant interpretation has been essayed by a single judge of the Allahabad High Court.<sup>126</sup> This was the “liberal interpretation’ adopted by the court to bring cases of electrocution within the application of the Public Liability Insurance Act, 1991. The 1991 Act is a beneficial legislation with a social objective, the court said. If Parliament had intended that only notified substances should be regarded as hazardous substances, it would have said so, the court added, before holding that “hazardous substance” in section 2 (d) of the 1991 Act includes all substances which come under the definition of “hazardous substance” under the Environment Protection Act, 1986. “[W]ith this exception that if any such substance is also notified by the Central Government under section 2(d) of the 1991 Act, then it will be a hazardous substance’ only if it exceeds the quantity specified in the said notification.”<sup>127</sup> The expeditious and inexpensive nature of this relief seems to have drawn the court to this interpretation.<sup>128</sup> The perception of the principle of strict liability as serving social welfare needs appears to have urged the court to this consideration.<sup>129</sup>

The decision of the court to stretch the Public Liability Insurance Act, 1991 to cover electrocution cases is likely to find difficulty in establishing itself as a precedent. There are, however, two statements of the court which ought to be scrutinised with some care. “It is true that attempts to apply the principle of *Rylands v. Fletcher*<sup>130</sup> against public bodies have not on the whole succeeded...”, the court said, “mainly because of the idea that a body which acts not for its own purpose but for the benefit of the community should not be liable. However, in my opinion, this idea is based on a misconception. Strict liability has no element of moral censure. It is because such public bodies benefit the community that it is unfair to leave the result of a non-negligent accident to lie fortuitously on a particular individual rather than to spread it among the community generally.”<sup>131</sup>

Later in the judgment, countering the argument that the UPSEB was not insured under the Act and that that should affect the liability of the Board, the court said: “Section 4 (of the PLIA) which requires owners who handle hazardous substances to take out insurance policies, is for the protection of the owners, and it cannot be said that if no insurance policy is taken out the owner will escape liability.”<sup>132</sup>

*A. Krishna Patra v. OSEB*<sup>133</sup> recognised generation and transmission of electricity as a hazardous activity, and held: “it cannot be denied that the more hazardous the activity is, the greater is the responsibility and higher is the standard of care and caution to be exercised in carrying out the activity and, in such a situation... even a slight negligence on the part of the undertaking is sufficient to hold it liable.”<sup>134</sup> In this case, the snapping of the conductor was presented as an inevitable accident. But the court rejected this contention while explaining that “(a)n inevitable accident is an event which happens not only without the concurrence or will of the man, but in spite of all efforts on his part to prevent it. It means, an accident physically unavoidable, i.e., something which cannot be prevented by human skill or foresight.”<sup>135</sup> That the conductor had outlived its utility and become mechanically weak and unsound did not help the cause of the board.

In the area of medical negligence, *Spring Meadows Hospital v. Harjot Ahluwalia*<sup>136</sup> dealt with the liability of a hospital for having reduced a child to a vegetative state as irreparable damage had been caused to the brain. The Supreme Court concurred with the National Consumer Disputes Redressal Commission in awarding compensation of Rs. 12.5 lakhs to the minor patient “taking into account the cost of equipment and the recurring expenses that would be necessary for the said minor child who is merely having a vegetative life”, and Rs. 5 lakhs to the parents “for their acute mental agony and lifelong care and attention which the parents would have to bestow on the minor child.”<sup>137</sup>

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126 *UPSEB v. District Magistrate, Dehradun*, 1998 All LJ 1 at 6.

127 *Id.* at 7.

128 *Id.* at 4.

129 *Id.* at 11.

130 1868 LR 3 HL 330.

131 *Supra* note 126 at 10.

132 *Id.* at 11.

133 1998 ACJ 155.

134 *Id.* at 157.

135 *Id.* at 158.

136 (1998) 4 SCC 39.

137 *Id.* at 48. In *Venkatesh Iyer v. Bombay Hospital Trust*, AIR 1998 Bom 373, however, a patient suffering from a cancer that recurred was unable to establish that his problem arose from excessive radiation administered to him. The court, though so urged, refrained from imposing “exemplary costs” on him.

Negligence in performing family planning operations has reached the courts in *Dr. Tabassum Sultana v. State of U.P.*<sup>138</sup> and *State of M.P. v. Asharam*.<sup>139</sup> In the first case, the victim was a woman of 18/19 years who was forcibly operated in a family planning camp. A division bench of the Allahabad High Court, adverting to “motherhood (which) is precious possession of a woman”, castigated the government personnel involved in the “involuntary criminal tubectomy operation”, and directed that she be paid Rs. 3 lakhs by the state. The state was at liberty to recover the amount from its guilty employees. In *Asharam’s* case, it was the failure of an operation in a family planning camp which provoked the single judge of the Madhya Pradesh High Court to award Rs. 20,000/-, an amount that was claimed by the affected person since he was in no position to pay the court fees for a higher amount. The estimate of damages at Rs.100/- per month till the daughter attained majority was based on the “burden of maintenance and marriage.”

In *Mrs. Shanta v. State of A.P.*,<sup>140</sup> where a swab of cotton was left in the abdomen of the petitioner during a caesarean operation, “penal compensation” of Rs.3,00,000/- was directed to be paid by the state.

The relevance of contributory negligence to cases where the victims are children has been decided in the negative over the years. In *K. Samikkannu v. Union of India*,<sup>141</sup> a brick wall was discovered during mining operation at the mines of the Neyveli Lignite Corporation. It was thought that it might be an ancient cave. The news spread, and crowds converged in the area. There was no fencing or notification cautioning the people of any danger. In a landslide that ensued, a 13 year old and a 17 year old were trapped. The younger boy was brought out unconscious and died later in the day. The court found that the authorities had been negligent and added: “It is settled law that there is no question of applying contributory negligence for the minor’s action”,<sup>142</sup> while awarding Rs.75,000/- and 12 per cent interest from the date of the petition.

The incapacity to anticipate risk underlay the decision of the court in *Shaymal Baran Saha v. State of West Bengal*<sup>143</sup> where a 16 year old boy, standing in a queue to buy tickets for a match, became the victim of a stampede. This was in December, 1969. The court in 1998, held that “any reasonable man” would have required the state authorities “in view of the massive demand for tickets and the number of people in the queue having surpassed their calculations, to review and increase the police arrangements forthwith.” The court found the Cricket Association of West Bengal to have been negligent, and the plaintiff to have suffered injury as a consequence, and held him entitled to damages from the CAB.

*Headmistress, Govt. Girls High School v. Mahalakshmi*<sup>144</sup> applied the principle of vicarious liability when it awarded damages of Rs. 50,000/- to a young girl who lost her right eye while bringing water from a boring pipe situated about 1 1/2 furlongs away from the government school where she was a student. It was argued that the ‘aya’ who was appointed for the purpose of fetching water had been specifically prohibited from employing the children to such ends, that such direction to the children being unauthorised, the state was not liable. The court negated it on the reasoning that the school is bound to provide water to the school children and it is for the aya to fetch the water. If she authorises some other person to perform the task and, “during the course of that employment, the person so authorised suffers from any injury, her employer is also responsible....The state cannot disown its liability for the negligent acts of its servants.”<sup>145</sup>

The negligent conduct of a school management was in issue in *Deep Chand Sood v. State of H.P.*,<sup>146</sup> where 14 students drowned while on a picnic due to fault attributable to the management of the school. After setting out the incident, and the evidence of negligence, the court considered the question of what compensation should be awarded to the parents of the deceased children. It was urged that “the students belonged to good families and had very high chances of taking up good assignments after completing their studies. The school is highly reputed and its charges are quite high.”<sup>147</sup> In determining the quantum of compensation, the court adverted to the lack of uniformity in awarding compensation under the Motor Vehicles Act with respect to the deaths of children, adding

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138 1997 All LJ 834.

139 1997 ACJ 1224.

140 AIR 1998 AP 51.

141 (1997) 2 Mad LJ 344.

142 *Id.* at 347.

143 AIR 1998 Cal 203.

144 AIR 1998 Mad 86.

145 *Id.* at 91.

146 1997 ACJ 831.

147 *Id.* at 856.

that even if precedents had been set, they may not satisfy the requirements of a fresh case. That there had been no mitigation of damage in the rescue attempt and when medical help was not reached to them immediately after they were brought out of the water also weighed with the court. The court ordered compensation of Rs. 5 lakhs to be paid to the parents of each child who died. For the negligent treatment, which resulted in two children who were saved suffering tremendously anyway, the court awarded Rs. 30,000/- to each of their parents.

The assessment of compensation where the victim was a child was again witnessed in *Punjab Civil and Consumer Welfare Front v. UT of Chandigarh*<sup>148</sup>. The father of a three year old who died by drowning in an uncovered manhole was directed to be paid Rs. 1 lakh in “totality of the facts and circumstances of this case”. The difficulty in devising standards for assessing compensation for the death of children is also witnessed in cases under the Motor Vehicles Act.<sup>149</sup>

Where a bridge collapsed, resulting in the death of one person, liability was fixed on those who had been responsible for the construction of the eight-year-old bridge, as well as on the panchayat which was statutorily charged with the maintenance of the bridge. Holding that the lapses of the former in not taking proper care in the construction was the proximate cause for the collapse of the bridge, the court also found that the bridge was in a state of utter disrepair because no repair or maintenance of the bridge had been done since it had been handed over to the panchayat. Even as the court invoked the doctrine of *res ipsa loquitur*, it also turned down the plea of act of god, and said: “In a state like Kerala fury of monsoon is a common phenomenon and the defence of act of god based on such a phenomenon, if permitted to be raised casually, will lead to catastrophic consequences.”<sup>150</sup> With this, the court implicitly applied notions of foreseeability of risk and duty of care expected in situations of higher risk.

In *Klaus Mittelbachert v. East India Hotels Ltd.*,<sup>151</sup> the court explained that duty of care was also related to the quantum of compensation. The higher the duty of care, the higher the quantum of compensation, the court said, adding that both flow from a rise in charges for rendering services. This was a case where a co-pilot of a foreign airline used the swimming pool in a five-star hotel. In diving into the pool he sustained head injuries. He died 13 years later, as a consequence of the accident. The defective design of the pool was found to have made it a veritable trap. Finding it to be “hazardous premises”, the court awarded Rs. 50 lakhs as damages at 6 per cent per annum interest from 27.9.1985, the date of his death, a date that was a long time after the filing of the petition.

This is among the highest amounts that has been awarded in a claim for damages for personal injury. In arriving at the compensation, the court’s premise was that “in the commercialised world, degree of care would also be determined by the price which is being charged....The quality and safety of the services offered increases with the quantum of the price paid for being a guest at the hotel. Higher the charges, higher the degree to take care.”<sup>152</sup> The court was of the opinion that a general notice - at your own risk - is hardly a deterrent. The court inducted principles of strict liability and exemplary damages into its reasoning and held: “Any latent defect in its structure or service, which is hazardous to guests, would attract strict liability<sup>153</sup> to compensate for consequences flowing from its breach of duty to take care.” And continued: “The five-star price tag hanging on its service pack attracts and casts an obligation to pay exemplary damages if an occasion may arise for the purpose.”<sup>154</sup>

Explaining its decision to apply the doctrine of *res ipsa loquitur*, the court said: “where the thing which caused the accident is shown to be under the management of the defendant or his employees and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.”<sup>155</sup>

The need to demonstrate negligence was, in this case, displaced by the *res ipsa loquitur* doctrine, even as the duty of care was explained by the court.

The “gross negligence” of the state “in not taking proper measures before supplying drinking water from handpumps” to the people of Mandla district in Madhya Pradesh was the subject matter of a PIL in *Hamid Khan v. State of*

148 (1998) 3 Punj LR 92.

149 See *infra*.

150 *Pullur Periya Panchayat v. Karthiyayini*, (1997) 1 Ker LT 144 at 149.

151 AIR 1997 Del 201.

152 *Id.* at 209-210.

153 Earlier, the court refers to liability of the hotel for the adverse consequences flowing from the use of the pool - “as hazardous premises”- to be absolute”, (at 214).

154 *Id.* at 214.

155 *Id.* at 215.

*Madhya Pradesh*.<sup>156</sup> It was found that the excessive fluoride content in the water had affected thousands of people who were suffering from a range of effects, from dental fluorosis and cavities to skeletal fluorosis and other forms of deformity. Since the guidelines had not been provided for testing water for its fluoride content, the court was loath to initiate action for negligence against individual officers. But it pinned the liability on the state to provide the “best remedy” that could be provided to be made available at the expense of the state and awarded nominal sums in compensation apart from the medical treatment. Financial difficulty, it was specifically cautioned, ought not to be raised as an impediment to provide them treatment.

*Jasuben v. G.E.B.*<sup>157</sup> addressed some differences in effect in recovering compensation under the Workmen’s Compensation Act, 1923 (WCA) and in a civil suit for negligence. It is interesting that, where the cause of action is the same, the court was to hold that: “The civil court functioning under the general law and the Commissioner working under the Workmen’s Compensation Act have to operate in totally different and distinct fields and have to give their decisions on totally different considerations.” “The liability under the WCA,” the court held, “is of an absolute nature while that within the jurisdiction of the civil court is based on tort, and fault-based.” In a civil court, the court said, a workman can claim compensation beyond the amount which has been specified under the WCA, while a claim under the WCA would be confined to the amounts specified in schedule IV of the WCA. It is significant that the employer had deposited Rs. 31,000/- with the WC Commissioner in fulfilment of his statutory obligation; the high court, assessing the compensation due to him on the ground of negligence determined the amount at Rs. 2,69,000/-.

Where a speed breaker not permitted to be erected by any law, with no signboard to indicate its existence, no markings painted on it and no light to illuminate it caused a person going over it on a moped to meet with an accident leading to his death, the court held the corporation liable.<sup>158</sup> That four persons were travelling on the moped, and that the rider had not exercised sufficient caution, led the court to hold that there was contributory negligence. Interpreting the term “arising out of the use of the motor vehicle” in the MVA, the court held that it connotes that not only the tortfeasors, i.e. the driver, owner and insurance company of the vehicle involved in the accident are liable to pay compensation, “but also others, who are in law under an obligation to provide adequate facility, safety devices or signs under the statute for the use of the motor vehicle.... The government, the authority in charge of the highways and local authorities such as municipal corporations, municipalities, panchayats and urban development authorities, which in their respective territorial jurisdiction, are duty bound to provide safe and motorable roads...”<sup>159</sup> The state government was directed to incorporate provisions for regulating the speed including signboards and markings on speed breakers and/or artificially made rough road.

When an explosion took place in a bus, and the police escort was not present, and the driver and conductor had not taken care despite the atmosphere during the period being polluted, the Supreme Court held that the accident arose out of the use of the motor vehicle and quantified compensation at Rs. 1,20,000/- with interest at the rate of 12 per cent.<sup>160</sup>

## VI. ACCIDENT LAW

### Quantum

The discretion vested in courts to arrive at a “just” compensation has been channelised to an extent by the introduction of the second schedule into the Motor Vehicles Act, 1988 in 1994. This schedule has been considered by some courts to be setting benchmarks in compensation. “When no norms were provided for determining the compensation prior to November 14, 1994, we see no legal inhibition in following the norms as provided in the Second Schedule,” a division bench of the Allahabad High Court said in *New India Assurance Co. v. Jagdish Prasad Pandey*,<sup>161</sup> “as resorting to the second schedule will not do violence to the statutory language.” In the interests of “uniformity, predictability and transparency”, the court held that the second schedule, though not strictly applicable since the

<sup>156</sup> (1997) 1 Jab LJ 308.

<sup>157</sup> (1998) 2 Guj LH 773.

<sup>158</sup> *Kumudben v. Jamnagar Municipal Corporation*, (1997) 1 Guj LH 491.

<sup>159</sup> *Id.* at 503.

<sup>160</sup> *Samir Chanda v. Managing Director, Assam STC*, (1998) 6 SCC 605.

<sup>161</sup> 1997 All LJ 2415 at 2424.

accident occurred in 1994, may be followed.<sup>162</sup> In *P. Renukadevi v. Shantappa*,<sup>163</sup> the court in fact asserted that the Supreme Court having laid down that the multiplier method be applied, the second schedule be followed by all MACTs in the matter of the multiplier.

There are rules that are seen as having evolved in the process of application of the wide discretion that is with the courts. In *Shafiq v. Pramod Kumar Bhatia*,<sup>164</sup> these rules were set out: “[T]he amount of compensation awarded must be reasonable, must be assessed with moderation; having regard to the awards made in comparable cases; the sums awarded should to a considerable extent be conventional keeping in line with the changes in the value of money.” These rules the court saw as necessary to bring about a measure of predictability. A division bench of the Gauhati High Court, while acknowledging the wide power that the Motor Vehicles Act has given to the tribunal, said: “Such compensation shall not however be punitive to the person liable nor the same would be source of profit to the person affected”, and reiterated earlier judgments that compensation is, doubtless, dependent to an extent on guesswork.<sup>165</sup>

The income replacement principle continues to dominate compensation law, leading at times to a valuing of loss — of life and in the context of disability suffered or harm caused — which may be disconcerting in its effect. In *Rajinder Kumar v. Haryana State*,<sup>166</sup> a woman sustained a fracture in her nasal bone, she was hospitalised for ten days and had to endure stitches of her injuries apart from a plaster being applied. The tribunal awarded Rs. 500/- for pain and suffering and Rs. 250/- for her treatment, although she had produced medical receipts for Rs. 1107/-. The high court revised the compensation to Rs. 2210/- including Rs. 1000/- as general damages, Rs. 1107/- as cost of medicines and Rs. 600/- for pain and suffering. Two similar instances were similarly treated by the high court in this reported decision.

In *Komalam K. Nair v. Tiruvalluvar Transport Corporation*,<sup>167</sup> the value of life was more starkly etched when the MACT awarded Rs. 17,500/- for the death of the driver of a car, and Rs. 4,65,000/- for the death of his passenger, a financial director in a company. This was halved on a finding of contributory negligence. The high court negated the finding of contributory negligence, and revised the compensation amounts to Rs. 51,000/- and Rs. 11,25,000/-. This case is also characterised by the difficulty in rendering proof of wages and commissions earned by the driver<sup>168</sup> as against the ease with which the court accepted the entitlements of the financial director.

In *Ram Singh v. Amrit Lal Devangan*,<sup>169</sup> it was compensation to be determined on the death of a 16 year old girl which was in issue. Her parents claimed she was their only child and that she was a labourer earning Rs. 19/- per day. That she was a woman who would be married and would cease to be of financial help to her parents was advanced as an argument. The court turned it down unconvinced that she would leave her parents unprovided for in their hour of need. The court applied a multiplier of 14 given “the age of the deceased (she was 16), the age of the claimants and their social status”, and raised the compensation of Rs. 25,000/- awarded by the tribunal to Rs. 58,800/-.

Compensation to an injured victim, it has been reiterated, should be greater than when death occurs since an injured, disabled person suffers during the remaining span of his life.<sup>170</sup> In *DTC v. Arun Sondhi*,<sup>171</sup> where a 21 year old boy was crippled in an accident, his “family background, status, educational qualification and he himself was studying in one of the prestigious colleges in Delhi” converged with “tak(ing) into consideration his future prospects, amenities of life, dependency on others and loss of earning”, and the expenses he had incurred on treatment in Sweden; a modified compensation of Rs. 8,68,781/- was awarded by the high court.<sup>172</sup> Where a young dancer shaping up to be

<sup>162</sup> *Ibid.* Compensation in this case of permanent partial disablement was reduced from Rs. 9,64,000/- awarded by the tribunal to Rs. 3,92,700/-. The Workmen’s Compensation Act was called into aid in determining the extent of disability.

<sup>163</sup> 1998 AIHC 360 at 364 (Kar).

<sup>164</sup> 1998 ACJ 563 at 565-66.

<sup>165</sup> *Bikash Sen Gupta v. Member, MACT, Kamrup*, (1997) 2 Gau LT 352 at 354.

<sup>166</sup> (1997) 1 Punj LR 410.

<sup>167</sup> AIR 1997 Mad 271.

<sup>168</sup> For e.g., allowance of free electricity and accommodation were disbelieved as “an attempt...with the help of the employers to boost up the claim.”(at 274) Even receipts of commission were not found credible since “[t]hese receipts can be prepared easily.”

<sup>169</sup> 1997 AIHC 2350 (MP).

<sup>170</sup> *Ullanki Kanaka Durgamma v. Dantuluri Suryanarayana Raju*, (1997) 1 Andh LT 739 at 744.

<sup>171</sup> (1997) 65 DLT 989.

<sup>172</sup> But see *Madhav Sakharan Shilotri v. State of Maharashtra*, 1997 ACJ 857, where a division bench of the Bombay High Court awarded Rs. 54,000/- each to the parents of two 19 year old boys who “had excellent academic careers and were students of engineering and technology college...”.

a professional lost her leg in an accident, the bus company sought to demonstrate there had been mitigation of damages. It was contended that she continued to perform with the aid of an artificial leg, and that there was no loss of earning capacity that had been sustained. The high court rejected this contention saying: “Even if she earns by doing more dance performances with the use of artificial leg, it would not mitigate the compensation to be fixed on the ground of loss of income or loss of earning power. If she does her dance performance it may be due to her will power and due to enormous training undergone with the use of artificial leg.”<sup>173</sup>

The accident in *Janai’s* case occurred in 1981. The decision of the high court was in 1996. The changes in the intervening years were sought to be converted into mitigating circumstances by the transport company and was resisted by the court.

In *State of Haryana v. K.L. Pasricha*,<sup>174</sup> it was the accident victim who explained his right to enhanced compensation relying on the years that had passed since 1977 when the accident occurred. At the time of the accident, he was 41 years old. “Now,” wrote the single judge in her judgment, “he is 60 or 61 years old.” Taking his experience over the years into the reckoning, the court increased the component for medical expenses from Rs. 30,000/- to Rs. 1 lakh; pain and suffering from Rs. 20,000/- to Rs. 50,000/- and loss of amenities and future enjoyment of his life from Rs. 30,000/- to Rs. 60,000/-.

When the single judge of the Orissa High Court was categorical in his denunciation of payment of “sentimental” damages, holding that “[t]here is no compensation for sentimental agony, no damage for heart’s anguish and no financial assistance for mental tribulations”, he re-asserted the virtue of computation of compensation based on “pragmatic parameters”.<sup>175</sup> A division bench of the Madras High Court has, meanwhile, computed “loss of marital life” at Rs. 1 lakh,<sup>176</sup> a single judge of the Karnataka High Court has included the reduced value in the marriage market of a bachelor of 24 years in computing compensation<sup>177</sup> and a single judge of the Andhra Pradesh High Court valued the “deprivation of the opportunity to have pregnancy of a married lady” at Rs. 15,000/-.<sup>178</sup> The possibility of remarriage, it was also held, cannot be a ground for reducing the amount of compensation.<sup>179</sup>

The court has had to emphasise that when the multiplier method is applied, - and the Supreme Court has held that that is the logical and sound method - “no deduction is permissible on account of lumpsum payment as it takes care of all heads.”<sup>180</sup>

In the decisions of the Supreme Court in the years under survey, the attempt has been to provide a substantive sense of justice to the claimant; there has, therefore, been no reference to, or reliance on, any principles. Raising the compensation awarded to a higher lumpsum amount has been the preferred remedy.<sup>181</sup>

## Child

In determining compensation for the death of a child, courts inevitably struggle to find rational parameters that can explain their computation. The norm of the “conventional sum”, prospective dependency, pain and suffering and shock have, for instance, variously been applied by the high courts as also by the Supreme Court. In a valiant

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173 *Tiruvalluvar Transport Corporation v. J. Janai*, 1997 AIHC 3233 at 3239 (Mad): compensation was computed at Rs. 5,65,000/- including compensation for loss of income/earning power - Rs. 4,20,000/-; pain and suffering - Rs. 50,000/-; for permanent disability - Rs. 75,000/-; medical expenses - Rs. 16,000/- and expense for extra nourishment - Rs. 4,000/-.

174 (1998) 73 DLT 246.

175 *Braja Mohan Jena v. Haripada Bayan*, 1997 ACJ 316 at 317.

176 *National Insurance Co. v. A. Kala Mohan*, 1997 AIHC 2382: total compensation awarded was Rs. 6,49,000/-.

177 *M. Vijaya Kumar v. KSRTC*, 1997 AIHC 1948. “[N]ot in the sense of dowry”, it was clarified by counsel.

178 *Smt. Mala Parkal v. Shaik Haider*, (1997) 3 Andh LT 646.

179 *Kamla Devi v. Jaswant Singh*, 1997 ACJ 1426 (Raj).

180 *State of M.P. v. Smt. Kishori Paragnihya*, AIR 1998 MP 109.

181 See *Shanti Bai v. Charan Singh*, (1998) 5 SCC 359, lumpsum of Rs. 1,50,000/- at 12 per cent interest; *Nagesha v. M.S. Krishna*, (1997) 8 SCC 349, Rs. 6 lakhs inclusive of interest; *K. Murugesha v. M. Palappa*, (1998) 8 SCC 418, Rs. 1 lakh at 6 per cent interest; *Rajendra v. Bishamber Nath*, (1998) 8 SCC 359, Rs. 1 lakh; *Shashendra Lahiri v. UNICEF*, (1997) 11 SCC 446, Rs. 4 lakhs enhancement over the Rs. 58,000/- plus expenses awarded by the high court for permanent disability in an accident which occurred in 1977; *Bimlesh v. HPRTC*, (1998) 8 SCC 686, Rs. 1 lakh in addition to Rs. 42,000/- awarded by the lower courts and *Jamnabai v. Deepak Automobiles*, (1998) 8 SCC 551, Rs. 50,000/- enhanced from Rs. 33,000/-.

attempt at devising principles where the fatal victim of an accident is a child, a single judge of the Andhra Pradesh High Court has set out these guidelines as declared law:

1. The items of compensation in cases of death of children should not be different from the items of compensation for the death of adults;
2. While awarding the conventional sum for the death of children, all the factors should be taken into consideration including the age of the deceased, the age of the parents or the dependants, the possibility of the deceased growing up and contributing to the family in future in an orderly life etc.;
3. The monetary loss to the claimants should also be awarded subject to proof as special damages in each case;
4. No precedent should be taken as conclusive in the matter as each case has to be considered on its own merits subject to the general principles;
5. No amount of compensation as conventional sum should be taken as fixed;
6. The minimum amount of compensation awardable for the case of death of children as in the case of death of adults shall be as follows:
  - (i) Rs. 15,000/- for the death of children in respect of accidents which occurred on or after the date when section 92-A of the 1939 Act was brought on the statute book i.e. 1.10.1982
  - (ii) Rs. 25,000/- for the death of children in respect of accidents which occurred on or after the date when section 140 of the 1988 Act was brought on the statute book i.e. 1.7.1989
  - (iii) Rs. 50,000/- for the death of children in respect of accidents which occurred on or after the date on which section 140 of the 1988 Act was amended by Act No. 54 of 1994 i.e. 14.11.1994.
7. The compensation in each case may be more than the minimum amounts stated above in each case depending upon the facts and circumstances of each case which should be proved;
8. Any other item of compensation as suggested in the article "Compensation for the death of children in motor accidents" by Smt. S.Lalitha, Reader, Department of Law, Sri Krishnadevaraya University, Anantapur (1991) ACJ p.XVIII) may also be taken into consideration depending on the facts and circumstances of each case;
9. It shall not be taken that either the Supreme Court or this court or any other court has laid down the law in clear terms that the compensation for the death of children of a particular age is a known sum or a definite sum as indicated in some of the precedents and it has to be worked out in each case depending upon the facts and circumstances of each case.<sup>182</sup>

In computing compensation for the death of a 13 year old boy, the court also considered that the child belonged to a scheduled caste and, therefore, he had better chances of getting a job, and went on to hold that considering the family background of the child and his potential, it would be fair if the minimum wages learned by a person at the time of the accident were to be taken for computing dependency, and a suitable multiplier applied.<sup>183</sup>

Taking a shy at setting out a formula which may be adopted with modifications depending on the facts of each case, the court suggested: "The Tribunals should assess the time when the deceased child would have started earning; taking his earning on the basis of minimum wages, those [that] are earned by people in [the] year in which the accident takes place, and then adopt a suitable multiplier taking into account the age of the dependant(s) in the year in which the child would normally start earning. While assessing the minimum wages, the Tribunals shall keep in mind the family background and the likely potential of the deceased child."<sup>184</sup>

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182 *Amati Hymavathi v. Nissankararao Srikrishnamurthy*, AIR 1998 AP 345 at 358-59.

183 *Om Parkash v. National Insurance Co.*, 1997 A1HC 2377 (J&K).

184 *Id.* at 2380. See also *Shankar Lal v. Yaseen Ali*, 1997 ACJ 903 (Raj) at 905.

The approach of the law and economics school was adopted by the single judge in *Amati Hymavathi's* case<sup>185</sup> when, after explaining the investment on the child, he said: "Although children may not be equated to property, the investment on them....shall really partake the character of an estate in money value."

In *KSRTC v. Dharmanna*,<sup>186</sup> child labour has been given recognition overriding any statutory prohibition that may exist. The court, having to determine compensation for the death of a 11 year old girl who was a wage earner engaged as a coolie said: "I don't think this court can shut its eyes to stark realities of life in this country for economic and social reasons, when it is a matter of assessment of compensation justly and properly to be awarded in claims cases...."<sup>187</sup>

## Dependency

Even as income replacement continues to be the dominant factor in computing compensation, the test of dependency is applied quite frequently by the courts, Dependency is invariably a factor that limits the extent of compensation, except occasionally when the death of non-income earning women is being considered. In *Manubhai Punamchand Upadhya v. Indian Railways*,<sup>188</sup> for instance, it was said that where a 20 year old only son died in a railway accident "instead of considering the age of the deceased, the age of the parents must be taken into account, and the fact that the deceased was unmarried." The approximate age of the parents being 50 years, a multiplier of 10 was adopted and Rs. 48,000/-awarded.

When a child of 10 was killed in a road accident, it was held that where the person who is dead had not started earning, dependency of the parents would be calculated from the time the person would have been 20 years, and the dependency of the parents be computed till they would reach 70 years. The amount that the person would have spent on his parents would have to be estimated, and the family background, that the person may have married, for instance, be taken into account.<sup>189</sup>

When a 70-year-old man died in an accident, counsel argued that at his age he could not be expected to support his family and, therefore, there could be no dependency on his earnings. The court, clearly uncomfortable with the implications of this argument, suggested somewhat generally that, though an aged person, "he was involved in a positive business, and it cannot be said that he had no income and that income was not being utilised for the family". Also, the court held, it could not be said that his love and affection was of no value to the family, causing for instance, a great loss to the childhood of his granddaughter. With that the court reduced the award to Rs. 1 lakh, because of his "age and availability of assistance in future."<sup>190</sup> While determining compensation for the death of the grandmother who had also lost her life, the court however held that "she was not an earning member. She had no other way to support the family than to bring up a minor granddaughter and for her death only loss of love and affection can be awarded."<sup>190a</sup> Compensation was limited to Rs. 10,000/-.

In *MPEB v. Ram Mohan Shrivastava*,<sup>191</sup> the court had to reject argument from counsel that neither the husband nor the daughter of the victim could be held to be dependent on her since her husband was a contractor and not dependent on her earnings, and it was the prime duty of the father to maintain the daughter. The court held that they were indeed entitled as legal representatives, even if not as dependants, of the deceased woman.<sup>192</sup>

The relevance of dependency continues to pose problems when the victim is a woman. In *Vinay Dattatraya Deuskar v. Pepsu RTC*,<sup>193</sup> the counsel relied on *Purnima Vindal v. Chater Mal*<sup>194</sup> to contend that the death of a

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185 *Supra* note 182 at 357.

186 (1998) 3 Kar LJ 409 at 411.

187 See also *Triveni Prasad v. Indrapal Kachhi*, 1997 ACJ 269 (MP).

188 1997 ACJ 1270 at 1278 (Guj).

189 *Shankar Lal v. Yaseen Ali*, 1997 ACJ 903 (Raj).

190 *RSRTC v. Manjari Biswas*, 1997 AIHC 1633 at 1634.

190a *Id.* at 1635.

191 1997 AIHC 311.

192 See *id.* at 313, where the court, in an *obiter* commented that in an Indian family, sisters' and brothers' children and sometimes foster children live together and they are dependent on a bread winner of a family. If the breadwinner is killed, the court said, the MVA has substantially altered the FAA and there would be no justification in denying them compensation. See also *Rajesab Bandagisab Gennur v. Siddalingayya R. Hiremath*, 1997 AIHC 3080 (Kar) at 3081.

193 (1997) 2 Punj LR 824 at 831.

194 1995 ACJ 884.

housewife is a loss to all the members of the family. “Even maid servant cannot be a suitable and adequate substitute for the services rendered by a housewife”, the court records the argument. Further, it was common knowledge, it was contended “that a maid servant is not available even at the rate of Rs. 600 or Rs. 700 per month” and “maid servant at the most visits the house twice a day but the housewife serves and looks after the house all the 24 hours.” The tribunal’s assessment of the worth of the woman at Rs. 500 per month, with 50 per cent being deducted for personal expenses, was therefore assailed. The court, however, distinguished *Purnima Vindal’s* case since the victim in that case had also been a partner in the family business. “But in this case the deceased was a housewife only,” the court said. Her children were grown up and not dependent on her. Compensation at Rs. 48,000/- was upheld.

In *Sonu v. Balbir Singh*,<sup>195</sup> the court estimated the dependency of the two children of the victim woman at Rs. 86,400/-. They have been deprived of love and care of their mother, the court said. Further, if their mother had not died in the accident along with their father, she would have taken over the running of the dairy which their father had left behind. The care of the buffaloes would now need another hand which would be available at the minimum wage of Rs. 600/-per month. The children being too young still, and likely to need support for another 12 years, a multiplier of 12 was adopted in arriving at the compensation.

When “social status” of the woman is brought into the assessment, and the victim was working as a coolie before her death, the court awarded Rs. 35,000/-which, it may be remarked, is below the amount payable under no fault liability where death occurs.<sup>196</sup>

In *Manager, PNP Transports, Tirupur v. Mother Superior General*,<sup>197</sup> compensation was sought to be rendered irrelevant because the victim had become a nun, and that constituted civil death. This, it was contended, meant that no one could claim to be her legal representative. Nor had any dependency been established. Since it was the admitted position that she had never sent any money to her parents, the court side-stepped the issue by recording a finding that she had not yet become a full fledged nun and that claim would therefore hold. The court did not venture into the relationship between succession law and compensation for vehicular accidents either.

The tribunal having ruled out dependency by holding that the father of a married woman was not getting financial assistance from her, a division bench of the Kerala High Court was asked to consider that the claimants were governed by the *marumakathayam* law.<sup>198</sup> A newly married woman having died in an accident, her mother could claim for loss to the estate, it was contended. The court, however, addressed the question whether any loss had been suffered by the estate. There was no evidence that she had any intention of working and of earning, the court said. She appears to have wanted only to live with her husband on marriage, it added. Even if they are *marmakathayees*, there was no evidence of probable loss, it was held. “In such a situation all that can be awarded is only a nominal amount as compensation...”, it said. Assuming a contribution of Rs. 200/- towards her parents’ expenses, the court adopted a multiplier of 10 since her parents were 57 and 50 years old, to arrive at Rs. 20,000/- after deduction of Rs. 4,000/- since it was a lumpsum payment. This was in addition to Rs. 25,500/- that had already been paid, still keeping the sum below the amount payable as no fault compensation and less than the minimum prescribed in the second schedule.

## Medical expenses

Compensation calculated on the structured formula set out in the second schedule to the MVA 1988 (as amended in 1994) appears to place a limit on the medical expenses that may be recovered. A maximum amount of Rs. 15,000/-prescribed in the schedule is based on actual expenses incurred, it is to be supported by bills and vouchers, and is to be a one time payment. This limiting of recovery of medical expenses arising out of an accident is more than likely to leave the victim to bear costs generated by the accident. In *P. Renukadevi v. Shanthappa*,<sup>199</sup> a division bench of the Karnataka High Court was confronted with the question whether it is permissible for the claims tribunal to award a sum beyond Rs. 15,000/- as “medical expenses” as is set out in the second schedule.

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195 (1997) 1 Punj LR 523.

196 *Rajesab Bandagisab Gennur*, *supra* note 192.

197 1997 ACJ 394 (Mad).

198 *Anandavally Amma v. KSRTC* 1997 ACJ 1044 (Kar).

199 1998 AIHC 360 (Kar).

The court accepted the interpretation offered by the central government standing counsel when it drew a distinction between cases filed under section 140 or section 163A, and those filed under section 166.<sup>200</sup> The court endorsed a submission that the second schedule is referable only to section 163 A and to section 140 where the liability to pay compensation in certain cases on the principle of 'no fault' was provided for, and held: "wherever there are claim petitions filed under section 166 of the Act, the awardable compensation under the head of medical expenses is not limited to Rs. 15,000/- as set out under section 4(ii) of the second schedule to the Act and that the claim thereto is matter of evidence and proof before the Claims Tribunal and the sum may therefore be beyond the said limit of Rs.15,000/-." <sup>201</sup>

The difficulties encountered in placing reliance upon documents relating to expenses incurred in treatment was addressed in *Kuldeep Singh v. Mubarak Hussain*.<sup>202</sup> Adopting a "rational approach", the court reasoned: "It is a matter of experience that when a person is involved in such accident [which had partially crippled the victim], the victim or his near relatives do not find calmness of the mind to preserve all the receipts and vouchers. In many places such vouchers are also not given...The Tribunal has to take a reasonable view...by keeping itself informed of the normal human behaviour and experience. Such things are not to be calculated solely on the basis of vouchers." <sup>203</sup>

This was the approach of a single judge of the Punjab and Haryana High Court too, where, though the receipts produced were not proved as required by the Evidence Act, it was held that "in such claim petitions it is not necessary that the receipts should be proved in accordance with law." <sup>204</sup>

The Madras High Court in *Thiruvalluvar Transport Corporation v. J. Janai*<sup>205</sup> saw it somewhat differently when it awarded Rs. 6,000/- on the basis of documents produced by a dancer who had to have her foot amputated. While the court did not discredit her counsel's contention that there was ample evidence to show that she had been treated at the Vijaya Hospital in Madras, the court declined to recognise the costs she must have incurred "in the absence of acceptable evidence in the form of documents." <sup>206</sup>

## No fault

The high courts continue to decide differently on whether the amounts to be paid on the principle of no fault<sup>207</sup> are to be determined as on the date of the accident, or as on the date when it is awarded. While a division bench of the Himachal Pradesh High Court has held that the amended provision of section 140 (2) of the MVA was retrospectively applicable,<sup>208</sup> a single judge of the Gujarat High Court held otherwise. "The amending Act, which came into force from November, 1994 has, however, not provided that such amendment shall have retrospective effect or shall apply irrespective of the date of the accident. The relevant date being the date of the accident, the entitlement of a person to receive interim compensation shall have to be decided by reference to the date of the accident," the court said in *United India Insurance Co. Ltd. v. Girish Devprasad Trivedi*.<sup>209</sup>

A division bench of the Andhra Pradesh High Court<sup>209a</sup> has found support for its denial of retrospectivity in a decision of the Supreme Court in *R.L. Gupta v. Jupiter General Insurance Co. Ltd.*<sup>210</sup> In that case, the Supreme Court was considering a contention for enhancement of compensation of Rs. 8,000/- each awarded by the tribunal for the death of two persons in a motor accident. The low compensation not having been in issue before the high

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200 S. 140 provides for no fault liability. S. 163 A provides for payment of compensation on a structured formula basis and is linked with the second schedule.

201 *Id.*, *supra* note 199 at 364.

202 1997 AIHC 4261 (MP).

203 *Id.* at 4262.

204 *Rajinder Kumar v. Haryana State*, (1997) 1 Punj LR 410 at 413. The sum of Rs. 3910/- for the purchase of medicines where brain surgery had been performed, however, does seem unrealistically low.

205 *Supra* note 173.

206 *Id.* at 3239. See also *State of Punjab v. Mohinder Singh Chawla*, (1997) 2 SCC 83 on reimbursement of medical expenses in service law.

207 S.140, MVA 1988.

208 *Manjit Singh v. Rattan Singh*, AIR 1997 HP 21 at 25, relying on *Oriental Insurance Co. Ltd. v. Khem Chand*, FAO(MVA)No. 205 of 1995 decided on July 16, 1996.

209 1997 ACJ 314 at 316 (Guj.)

209a *New India Assurance Co. v. Salapuriappa* 1997 ACJ 914 (AP).

210 1990 ACJ 280 (SC).

court, it was urged that the claim should not be entertained in the Supreme Court. “[I]n the peculiar facts of the case”, the Supreme Court overlooked this “technicality of the law” and assessed the compensation at Rs. 20,000/- each, adding: “This is keeping in view the quantum of no fault liability now provided by the statute prospectively.”<sup>211</sup> The high court argued that if the Supreme Court had been of the view that the provision had retrospective effect, it would have awarded Rs. 25,000/- and not Rs. 20,000/- as it had done. “Therefore,” the court continued, “the decision of the Supreme Court that the quantum of no fault liability provided by the new Act was prospective cannot be held to be obiter. Even otherwise, we are bound by the dicta of the Supreme Court even though they are obiter.”<sup>212</sup> Setting out a series of decisions of high courts on prospectivity and retrospectivity of the no fault provision, the court adverted to the decision in *Gujarat SRTC v. Ramanbhai Prabhatbhai*<sup>213</sup> to hold that the changes introduced to the no fault provisions are substantive in nature. The uncertainty that retrospectivity would bring in was also seen to discourage the court from accepting such an interpretation.

There has, however, not yet been an authoritative pronouncement from the Supreme Court on this question, and contradictory decisions of the various high courts continue to be handed down.

On occasion, the court has applied the standard represented in the amount to be paid on the basis of no-fault to overturn paltry awards. In *Ravindra Shyambihari Patel Shethwala v. Dineshbhai Majabhai Rathod*,<sup>214</sup> the court set aside a settlement of Rs. 5,000/- for the death of a two year old boy. Placing reliance on section 140 which provides that a minimum sum of Rs. 50,000/- be paid as no fault liability, the court found *prima facie* that the legality of the settlement was questionable and remanded the matter to the tribunal for reconsideration.

In introducing no fault liability into accident law, courts recognise that Parliament intended that the immediacy of relief, uncluttered by the “niceties of the defence”<sup>215</sup> would aid the claimant. Whether the insurance company should be allowed to contest its liability to pay, at the time that compensation based on no fault is determined, has been addressed by the courts. In *Savitribai Tukaram’s case*,<sup>216</sup> a single judge held that enquiry while directing no fault compensation to be paid by the insurance company was narrow and limited; but it does not exclude the consideration of whether *prima facie* on the face of the policy liability for no fault could not be fixed on the insurance company.

Courts have negated the relevance of negligence<sup>217</sup> or of contributory negligence<sup>218</sup> while directing payment of compensation based on no fault. *Ex gratia* payments made to dependants of a victim under the policy of the government or a corporation have also been held not to be relevant while determining the quantum of compensation to be paid on the basis of no fault.<sup>219</sup>

## Insurance companies

That insurance is nationalised has had its influence on the role that Parliament and the courts have assigned to it. Insurance has emerged as a device of social security in statutes.<sup>220</sup> Courts too have been impatient with insurance companies acting as adversarial litigants.

In *National Insurance Co. Ltd. v. Santro Devi*,<sup>221</sup> for instance, having set out the approach of the Supreme Court and the high courts to insurance as social security,<sup>222</sup> a full bench of the Punjab and Haryana High Court observed that the object of statutory and compulsory insurance under the MVA 1988 “is not only bereft of profit motive by the insurance companies but is also a step towards owning responsibility by the society with respect to road

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211 Quoted at *supra* note 209 at 915.

212 *Ibid.*

213 1987 ACJ 561 (SC).

214 (1998) 1 Guj LH (U.J) 16.

215 *New India Assurance Co. Ltd. v. Smt. Savitribai Tukaram Londhe*, 1997 AIHC 2525 at 2527 (Bom).

216 *Ibid.* This was under the 1939 Act.

217 *Pankajbhai Chandulal Patel v. Bharat Transport Co.*, 1997 ACJ 993 (Guj).

218 *Municipal Council v. Tara Singh*, 1997 AIHC 1929 (P&H).

219 *Beni Ram Sahu v. Beer Singh*, 1997 ACJ 593 (MP).

220 E.g., in the Workmen’s Compensation Act, 1923, the PLIA 1991, s.163 MVA, 1988 which require the General Insurance Corporation to administer a scheme for payment of compensation in case of hit and run motor accidents.

221 1997 ACJ 111 (P&H).

222 *Id.* at 127-29.

victims.”<sup>223</sup> Explaining that the insurance policy under the MVA is “a blanket security to the road users”, the court viewed it as providing “absolute liability of the insurance company wherein one is not liable for the conduct but for the event.”<sup>224</sup> Concerned with a case of fake driving licence, which was then renewed by the competent authority, the court placed the onus squarely on the state, and on the insurer, while protecting the interests of third parties who become victims in an accident.<sup>225</sup>

The decision of the Supreme Court in *Ved Prakash Garg v. Premi Devi*,<sup>226</sup> was concerned with determining the elements of compensation for which an insurance company may be liable. The case was concerning a claim which could have been lodged under either the MVA 1988 or Workmen’s Compensation Act, 1923 (WCA). The claimants opted for the forum under the WCA. The WC Commissioner, while awarding compensation of Rs. 88,968/- also imposed penalty of Rs. 41,984/- as also interest at 6 per cent p.a. The insurance company contended that compensation under the insurance policy would cover only the principal amount, and not the penalty and interest thereon. It was held that insurance companies are liable “not only for the principal amounts of compensation payable by insured employers but also interest thereon.”<sup>227</sup> But on the question of the penalty imposed on an insured employer, the court was categorical that “as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer.”<sup>228</sup> The entire burden of the penalty with proportionate interest would have to be borne by the defaulting employer.

## VII. INTEREST

Courts have generally awarded interest at 12 per cent<sup>229</sup> though occasionally they have directed that 15 per cent be paid as interest from the date of the application.<sup>230</sup> Courts have also used penal interest where payment of compensation is delayed. For instance, in *MPEB v. Ram Mohan Shrivastava*,<sup>231</sup> the court directed the payment of interest at 12 per cent p.a.; however, if the amount was not deposited within two months, the rate of interest would be increased to 15 per cent.<sup>232</sup>

A single judge of the Karnataka High Court in *United India Insurance Co. Ltd. v. Gangawwa*,<sup>233</sup> while acknowledging that in many cases the employer may have a justification for the delay in payment of compensation observed: “Even in such cases the Commissioner<sup>234</sup> can award interest on the amount which is found due, not because the conduct of the employer requires to be penalised, but because the claimant had been deprived of the amount due to him and to compensate him for that.”<sup>235</sup> The court clarified that the award of interest is only compensatory in nature and not a penalty. Also, since the person liable to pay the compensation would have had the benefit of retaining the amount from the time it became due, the person liable will have to pay interest on compensation.<sup>236</sup> This was also a case where the victim had an option to seek compensation under the MVA or under the WCA. “It would be anomalous to hold that while the insurer would be liable to pay the interest awarded by the Tribunal, but the insurer would not be liable to pay the interest payable under the WCA” the court concluded while holding that the insurer cannot even contract out of the statutory liability to pay interest.<sup>237</sup>

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223 *Id.* at 130.

224 *Ibid.*

225 See also *Shivraj Vasant Bhagwat v. Smt. Shevanta Dattaram Indulkar*, AIR 1997 Bom 242, where the court drew a distinction between irregularity and illegality while holding an insurance company liable to pay compensation.

226 (1997) 8 SCC 1.

227 *Id.* at 15.

228 *Id.* at 17.

229 E.g., *Dr. K.R. Tandon v. Om Prakash*, (1998) 8 SCC 421 and *RSRTC v. Smt. Manjari Biswas* 1997 AIHC 1633 (Raj).

230 *United India Insurance Co. v. Girish Devaprasad Trivedi*, 1997 ACJ 314 (Guj).

231 1997 AIHC 311.

232 See also, for e.g., *Shafiq v. Pramod Kumar Bhatia*, 1998 ACJ 563 (MP); *Manju Bhatia v. NDMC*, (1997) 6 SCC 370 (this is a case of the tort of negligence and breach of duty).

233 (1997) 1 Kar LJ 142.

234 This was a case under the WCA, 1923.

235 *Supra* note 233 at 148.

236 *Id.* at 149.

237 *Id.* at 151. See also *C. Linge Gowda v. Union of India*, (1998) 6 Kar U 552 at 557.

The Madhya Pradesh High Court has, however, adopted a contrary approach. In two cases<sup>238</sup> the court reduced the period for which interest was to be paid to eight years and six months, although the accident, and the claim, were of much greater vintage. The court reasoned that the delay in the litigation could not be attributed to the appellant, and the appellant could not therefore be “burdened with interest for a period of 16 years, on the principle that no one should suffer for the act of the court.”<sup>239</sup> The court did not deal with the burden that this would cast on the victim.

The absence of a specific provision in the Railway Claims Tribunal Act, 1987 gave rise to a contest whether interest could be awarded by the tribunal.<sup>240</sup> It was held that though there is an omission in the Act with regard to grant of interest, section 34 of the CPC would enable the court to award interest. Prior to the enactment of the 1987 Act, the court said, the civil court could award interest to an aggrieved person who was found to be entitled to compensation from the railways. The legislature, while bringing a special enactment to give speedy justice to the victims by way of appropriate compensation, was hardly likely to have deliberately omitted interest on the compensation amount awarded by the tribunals, the court said. Further, the court was of the view that denying post-litigation interest would amount to depriving the claimants of compensation for delay in obtaining relief for no fault of theirs.”[I]n the absence of any specific bar and in the interest of justice”, the court held that the CPC provision in section 34 regarding interest would be applicable.

It is evident that some confusion has entered into the understanding of the import and purpose of interest. Delay in litigation affects the pecuniary loss bearer most directly. Interest is a component that is expected to ensure that the compensation has relevance to the victim in real terms. Decisions which pass the burden of the wait in litigation on to the victim appear to require reconsideration.

## VIII. DELAY

Tribunalisation does not seem to have obviated the problem of delay. Cases concerning accidents which occurred in 1977<sup>241</sup> and 1980<sup>242</sup> and *Union of India v. Badruddin*<sup>243</sup> (where the judgment of the tribunal was dated 29.11.80) were, for instance, decided by high courts between 1996 and 1998.<sup>244</sup> In *RSRTC v. Smt. Manjari Biswas*<sup>245</sup> a case under the 1939 Act, a single judge had to contend with the delay having led to the claimants, at one time, offering to settle for a meagre amount and, later, failing to keep in contact with the case. The amount of Rs. 7,15,000/- as computed was directed to be paid to the wife and daughter of the victim. The direction that the amount be paid in a lower proportion if the wife has remarried is another consequence that courts, and delay, may visit upon the surviving spouse.

Delay in the Motor Accidents Claims Tribunal, Delhi prompted a public interest petition being filed in the Delhi High Court in 1997. On orders of the court, reports were sent to it giving details of the pendency of cases before different tribunals, and the disposal of cases. The matter was referred to the high court on the administrative side to examine the question of constitution of more tribunals. The pendency of cases, number of cases decided every month, and availability of judicial officers and the available infrastructure were cited as some relevant factors for consideration. Referring to the long dates given by tribunals, the court said: “Undoubtedly the public is suffering immensely because of long delays particularly in these matters.”<sup>246</sup> Recognising the object of compensation based on no fault as being immediate relief, and acknowledging the delay that actually occurs, the court directed that the presiding officers of the tribunals send quarterly returns in respect of the applications under section 140 MVA including the reasons for delay.<sup>247</sup>

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238 *State of M.P. v. Smt. Kishori Paragniha*, AIR 1998 MP 109 and *MPEB*, *supra* note 231.

239 *MPEB*, *id.* at 315. See also *Kishori Paragniha*, *id.* at 111.

240 *Union of India v. A. Janardhanan*, 1998 ACJ 791 (Mad).

241 *State of Haryana v. K.L. Pasricha*, *supra* note 174.

242 *Kamla Devi v. Jaswant Singh*, *supra* note 179.

243 1998 AIHC 214 (All).

244 See also *Raja Ram v. ESI Corpn.*, (1998) 75 DLT 266.

245 1997 AIHC 1633 (Raj).

246 *All India Lawyers Union (Delhi Unit) v. Govt. of N.C.T of Delhi*, 1997 (70) DLT 794 at 796.

247 A report was solicited from the Commissioner of Police on why S. 158(6) of the MV Act, requiring that reports of accidents be forwarded to the tribunal, had not been acted upon.

## IX. FORUM

The setting up of tribunals and of *lok adalats* has been with the express intention of reducing the pressure on the court system, which may also result in the quicker resolution of cases. Courts are, therefore, reluctant to reopen proceedings that have been settled before lok adalats.

When, for instance, a tribunal found the terms of a compromise not to be just and reasonable, and set aside the compromise while determining the compensation, the high court demurred.<sup>248</sup> Asserting that the tribunal had no role to play when the parties had agreed to the terms and conditions of the compromise drawn up before the *lok adalat* with a retired district judge acting as a conciliator, the court held: “the very refusal of the Tribunal to record the compromise is contrary to law”.<sup>249</sup> Admitting that “Lok Adalats are held with a laudable object of achieving the object of reducing the heavy pendency in courts”,<sup>250</sup> the court added that “it is also well-known fact that in compromise there should be give and take on both sides....[s]uch a compromise should be encouraged as it would be advantageous to the public at large.”<sup>251</sup> The court “therefore” held the compensation awarded by the tribunal to be “highly exorbitant”.<sup>252</sup>

Even where the *lok adalat* is not involved in settling the case, courts have adopted the *lok adalat* argument where, for instance, the claimants agree to a reduced amount if delay in payment can be averted.<sup>253</sup> Or “in the spirit of Lok Adalat” the high court may engineer a compromise.<sup>254</sup>

In a significant ruling of the Supreme Court in *Union of India v. United India Insurance Co. Ltd.*,<sup>255</sup> one of the questions before the court concerned the jurisdiction of the Tribunal established under the Motor Vehicles Act in the event of an accident involving a motor vehicle being hit by a train at an unmanned level crossing. Resolving an issue that had arisen in a number of high courts, the court upheld the decision of the tribunal and the high court that an award could be passed against the railways if its negligence in relation to the same accident was *also* proved.<sup>256</sup> Adopting the stance of the Gujarat High Court in *Gujarat SRTC v. Union of India*,<sup>257</sup> the Supreme Court held that in case of a motor vehicle accident on being hit by a train, the tribunal had jurisdiction to entertain a claim against the railways, in addition to claims against the insurer, owner or driver. But where it is *ultimately found* that it was the exclusive negligence of the railways which caused the accident, the claim would go out of the purview of the Motor Vehicles Act. Again, if the accident occurred only on account of the negligence of persons *other* than the driver/owner of the motor vehicle, the claim would not be maintainable before the tribunal.<sup>258</sup>

Having set out this legal logarithm, where the decision on the case would determine jurisdiction, the court directed that if any claims against persons other than the owner/driver/insurer were pending in civil courts as on the date of the judgment, “but which as per the law hereinabove stated, ought to have been lodged before the Tribunal, then the civil courts concerned shall return the plaints and the claimants could present the same as a petition before the Tribunal”, and they shall be dealt with under the MVA.<sup>259</sup>

*Parikhita Behera v. Divl. Rly. Manager*<sup>260</sup> also concerned an accident at an unmanned level crossing. The railways denied liability since the victim was a cyclist and not a passenger under section 124 of the Railways Act, 1989. The high court entertained a writ petition, found negligence and an absence of care and awarded compensation of Rs. 1 lakh.

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248 *G.M., KSRTC v. Pandu*, 1998 ACJ 1389 (Kar).

249 *Id.* at 1392.

250 *Id.* at 1393.

251 *Id.* at 1396.

252 *Ibid.*

253 *Regional Manager v. Bipin Behari Sahu*, (1998) 86 Cutt LT 59 at 63-64.

254 *New India Assurance Co. Ltd. v. Karunakar Bhoi*, (1998) 86 Cutt LT 404 at 406. This allusion to the *lok adalat* has reached the realm of criminal law in *Trilokchand v. State of M.P.*, 1997 Cri LJ 4699.

255 (1997) 8 SCC 683.

256 *Id.* at 710, (emphasis in original). In so holding, the Supreme Court overruled the decisions of the Gauhati, Orissa and Madras High Courts and an *obiter* of the A.P. High Court cited in the case, and affirmed the view taken by the Allahabad, Punjab and Haryana, Gujarat, Kerala and Rajasthan High Courts.

257 AIR 1988 Guj 13.

258 This appears to let the question of jurisdiction be deferred to the conclusion of a case rather than to be determined at the threshold. The fate of petitions ultimately not found to fall within the MVA has not been expressly addressed.

259 *Supra* note 255 at 712.

260 (1997) 83 Cutt. LT 781.

The issue in *Puransingh v. Murlilal*<sup>261</sup> was whether the principles governing the calculation of compensation developed through judicial decisions under the MVA was applicable to a case under the Fatal Accidents Act (FAA). The court held in the affirmative explaining that “in both what is to be decided is the pecuniary loss suffered by the beneficiaries” which is awarded *as compensation*.

## X. DUTY OF CARE

In an important judgment, the Supreme Court set out the duty in common law, of the railways in the context of accidents taking place at unmanned level crossings. In *Union of India v. United India Insurance Co.*,<sup>262</sup> the court found that the driver and conductor of the motor vehicle involved in the accident had been negligent. It, however, held that the passenger could not be found guilty of contributory negligence and that the doctrine of “identification” or “imputation” would not be pertinent to the passengers. *Qua* the passengers of the bus, the driver and owner of the bus and, if proved, the railways would be joint tortfeasors. In other words, the principle of contributory negligence is confined to the actual negligence of the plaintiff or of his agents. “There cannot be a fiction of a passenger sharing a right of control of the operation of the vehicle nor is there a fiction that the driver is an agent of the passenger”, the court said.

It is in its explication of the common law duty of the railways at level crossings that this decision is significant. Having found that the railways have no statutory duties under section 13 (c) and (d) of the Railways Act, 1890 to erect gates, chains, bars etc. or to employ persons to man the level crossings unless the central government requisitions the Railways to do so, the court went on to hold that the railways do however have a duty of care in common law. Even if there is no statutory requirement that binds the railways “because the railways are involved in what is recognised as dangerous and perilous operations, they are at common law, to take reasonable and necessary care, on the “neighbourhood principle” it was held.<sup>263</sup>

Taking cognisance of the increased volume of rail and road traffic at the point where the accident occurred, and applying common law principles, the railways were “deemed to be negligent in not converting the unmanned level crossing into a manned one with a gate.”<sup>264</sup>

The court drew an interesting distinction between the omission on the part of the public authority to perform an alleged statutory duty, as in the case of *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum*,<sup>265</sup> and the omission to exercise a power on not deciding whether to exercise statutory power. Referring to a range of decisions including *Stovin v. Wise*,<sup>266</sup> it was found that in view of the general expectation of the community that appropriate safeguards would be taken by the railways at level crossings, the omission on the part of the central government would amount to a breach of the statutory duty giving rise to a cause of action for damages based on negligence. The statute can be taken to intend that compensation for injury will arise out of non-exercise of the statutory powers since the inherently dangerous activities were of a kind in respect of which individuals cannot afford to protect themselves. The conclusion therefore was that this was a case where “a statutory ‘may’ gives rise to a common law ‘ought’”.<sup>267</sup>

## XI. UNTOWARD INCIDENT

The Kerala High Court, in *Union of India v. Aleykutty Devasia*,<sup>268</sup> was of the opinion that the liability under section 124 A of the Railways Act, 1989 which defines ‘untoward incident’ is very wide. The definition therein is clear that a violent attack or the commission of robbery or dacoity would amount to an untoward incident. When

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261 1997 ACJ 1335 (Bom).

262 *Supra* note 255.

263 *Id.* at 699.

264 *Id.* at 702.

265 *Supra* note 112.

266 (1996) 3 WLR 388.

267 *Supra* note 255 at 708. See also *Parikhita Behera v. Divl.Rly.Mgr.* (1997) 83 Cutt LT 781.

268 AIR 1997 Ker 321.

a woman died in a violent attack while travelling in a train, the act was held to amount to an untoward incident, and the claimants entitled to compensation under the Act.

In *P.A. Narayanan v. Union of India*,<sup>269</sup> the Supreme Court was dealing with a case of 1981 in which a woman was criminally assaulted and robbed of her gold chain, three bangles and a wristwatch while the train was in motion between two stations in Bombay. She succumbed to the injuries in the compartment. While not deciding the issue whether the 1989 Act would have retrospective operation, the court awarded compensation on the ground of breach of common law duty of reasonable care which, the court said, lies upon all carriers including the railways. The standard of care is “high and strict”. The victim had pulled the alarm chain, but there was evidence of dereliction of duty. Liability in this case was based on fault, and the court, to give a quietus to the litigation, awarded Rs. 2 lakhs as compensation in addition to Rs. 50,000/- which had been given by the state in 1981 *ex gratia*.

## XII. MASS TORT

The Bhopal Gas Disaster continues to claim its victims, and the victims continue to wage legal battles to extract compensation from the state. Questions of continuing tort and the problem of causation are witnessed in the order of the Supreme Court in *S.Said-ud-din v. Court of Welfare Commissioner Bhopal Gas Victims Tribunal*.<sup>270</sup> A claim was preferred for the death in 1986 of a child of four months. Her mother was one of the victims of the disaster, and it was averred that on account of the gas she inhaled, the child had been adversely affected when in the womb. The doctor who had examined and treated her supported her case. The deputy commissioner awarded compensation of Rs. 1.5 lakhs against a claim for Rs. 15 lakhs. The welfare commissioner *suo motu* decided to revise the decision and, having heard counsel, concluded that since the woman had conceived after the tragedy, there could be no direct effect of gas leakage on the pregnancy. He also brushed aside the evidence of the doctor that the gas could adversely affect a child born in a span of five years after the tragedy. He concluded that the appellant had failed to prove that if the parents are adversely affected by the gas leak, and if the conception is a few months thereafter, there would be any adverse effect on the child.

The Supreme Court, however, credited the doctor’s evidence and held that so long as the doctor’s evidence stands, and has not been dislodged by reliable evidence, the deputy commissioner was justified in relying on it, and the welfare commissioner committed an error in exercising *suo motu* revisional power.

In *Madhukar Rao v. Claims Commissioner*,<sup>271</sup> a victim of the disaster whose case was taken up in *suo motu* revision in regard to choice of multiplier, found the categorisation of his claim being reopened. The death claim was converted into personal injury and compensation decided on that basis. The Supreme Court remitted the matter to the first additional welfare commissioner to decide the limited purpose of the revision.

## XIII. ENVIRONMENT

The health hazards caused by emitting husk and dust in the area surrounding a rice mill was at the centre of the controversy in *K. Muniswamy Gowda v. State of Karnataka*.<sup>272</sup> Even before the grant of licence, on 18.12.1993, the petitioners had lodged their objections on the basis of the disturbance and the pollution that the mill would entail. The steps taken thereafter proved insufficient to arrest the air pollution caused by the industry. The court found that thereafter the state government/state pollution board had granted exemption from the operation of the Air Act, which was *ultra vires* the statute and hence inoperative. The “mental and physical torture suffered by the petitioners” was traced to the arbitrary and unconstitutional actions of the respondents. Considering the arbitrary manner in which the state government or its servants, the state pollution board and the industry had acted to the detriment of the petitioners and citing *Common Cause v. Union of India*<sup>273</sup> in support, the court awarded Rs. 21,000/- to be paid equally by three of the respondents including the State of Karnataka and the industry to the affected petitioner.

<sup>269</sup> (1998) 3 SCC 67.

<sup>270</sup> (1997) 11 SCC 460.

<sup>271</sup> (1998) 8 SCC 544.

<sup>272</sup> (1998) 3 Kar LJ 594.

<sup>273</sup> (1996) 6 SCC 593.

## XIV. NATIONAL HUMAN RIGHTS COMMISSION (NHRC)

The range of issues represented in the section on constitutional tort<sup>274</sup> find their place in the Annual Reports of the NHRC for the years 1996-97 and 1997-98 (*AR 1996-97* and *AR 1997-98*). During the year 1995-96, 136 deaths were reported in police custody and 308 in jail custody. This shows a steep climb to 188 deaths in police custody and 700 deaths in judicial custody in 1996-97 and a further rise to 193 deaths in police custody and 819 deaths in judicial custody in 1997-98. The NHRC attributes the continued escalation of custody deaths to increased reporting to the NHRC.<sup>275</sup> The annual reports do not moot the possibility of increased incidence of custody deaths.

The *AR 1997-98*<sup>276</sup> speaks of district-wise analysis being undertaken by the NHRC to examine if a pattern of violence exists, and to assess if any state or district deserves special attention.

The spurt in reported deaths in custody in Maharashtra is perhaps the most striking - 21 deaths in police custody (PC) and 180 in judicial custody (JC) in 1996-97, an increase from the 34 deaths in custody (9 - PC; 25 - JC) reported in 1995-96. In 1997-98 while the numbers have fallen somewhat, it is still a large figure at 19 deaths in PC and 115 in JC.

One explanation for the rise in deaths in judicial custody is found in the *AR 1997-98*. "An analysis of the causes of deaths (occurring in prisons) revealed that 76% of such deaths in prisons were attributed to tuberculosis", the report says.<sup>277</sup> In the illustrative cases set out in *AR 1997-98*, the NHRC records the custodial death of Somnath Verma, a 32 year old undertrial prisoner as having been because of "negligence in according timely medical treatment (which) resulted in the death of the undertrial prisoner who was suffering from tuberculosis."<sup>278</sup>

While recommending the identification and prosecution of those responsible for custody deaths, the NHRC continues to recommend sums as compensation to the kin of the victim. Compensation ranging from Rs. 50,000/- to Rs. 1.50 lakhs were recommended for payment in 55 cases in 1996-97.<sup>279</sup> In 1997-98, the amounts vary from Rs. 25,000/- in Laxman Somnath Verma's case<sup>280</sup> which was a case of medical negligence; to Rs. 50,000/- for the death of Babu Kalu Shilke;<sup>281</sup> to Rs. 1 lakh for the death of an undertrial prisoner who died while doing hard labour in Roorkee sub-jail;<sup>282</sup> to Rs. 2 lakhs for the death of Usman Ansari after he was taken away by four constables "to prepare food for a party that was organised to celebrate the promotion of a head constable as sub-inspector";<sup>283</sup> and Rs.5 lakhs for the custodial death of Atal Bihari Mishra.<sup>284</sup>

The *AR 1996-97* statistically records reported cases of disappearances,<sup>285</sup> illegal detentions,<sup>286</sup> false implication,<sup>287</sup> complaints regarding jail conditions,<sup>288</sup> terrorist/naxalite violations<sup>289</sup> and what is termed "other police excesses".<sup>290</sup>

The *AR 1997-98* shows a lot of variation from the category of cases admitted for disposal by the NHRC in 1996-97 in reported instances of disappearances,<sup>291</sup> illegal detention,<sup>292</sup> false implication,<sup>293</sup> terrorist/naxalite

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274 *Supra* section II.

275 *AR 1996-97* at 15 and *AR 1997-98* at 11.

276 *Id.* at 11.

277 *Id.* at 17.

278 *Id.* at 57. See, in this context *Muktaram Sitaram Shinde*, *supra* note 16. See also *AR 1996-97*, at 77: instances of deaths occurring in juvenile homes, however, constitute a different class of concern: *AR 1997-98* at 19.

279 *AR 1996-97* at 60.

280 *AR 1997-98* at 57.

281 *Id.* at 59.

282 *Id.* at 58.

283 *Id.* at 53.

284 *Id.* at 60.

285 Bihar - 27; J&K - 10; UP - 74; Delhi - 12.

286 AP - 13; Bihar - 8; Maharashtra - 6; Rajasthan - 6; Tamil Nadu - 40; UP - 174; Delhi - 10.

287 Bihar - 41; Rajasthan - 12; UP - 128; Delhi - 24.

288 Bihar - 42; MP - 19; Maharashtra - 14; Orissa - 9; Rajasthan - 25; UP - 92; West Bengal - 17; Delhi - 12.

289 A.P. - 3; Assam - 3; Bihar - 1; J&K - 40; Manipur - 5; Nagaland - 3; Punjab - 2.

290 A.P. - 26; Assam - 11; Bihar - 175; Gujarat - 10; Haryana - 34; HP - 8; J & K - 11; Karnataka - 20; Kerala - 45; MP - 61; Maharashtra - 31; Nagaland - 2; Orissa - 36; Punjab - 39; Rajasthan - 67; Tamil Nadu - 51; Tripura - 2; UP 876; West. B. - 18; Delhi - 116; Arunachal Pradesh, Manipur, Meghalaya and Chandigarh - 1 from each state.

291 A total of 12 cases.

292 330 in all, of which 244 complaints emanate from UP.

293 237 in all, of which 137 are from UP; 18 from Haryana; 17 from the Union Territories (UTs). The *AR 1997-98* breaks away from the earlier reports in clubbing the UTs as one, without disaggregation.

violation.<sup>294</sup> The problem of jail conditions - a probable cause of death in jail custody - is highlighted by the number of complaints admitted for disposal by the NHRC in 1997-98.<sup>295</sup> “Other police excesses” range high in UP (705 cases), with the UTs (102), MP (85), Bihar (97), Haryana (44), Maharashtra (40), Punjab (43), Tamil Nadu (44) and West Bengal (16) totting up a total of 1413 cases admitted for disposal in 1997-98.

The remedy of compensation, often termed as being “interim” is awarded by the NHRC in cases of illegal detention,<sup>296</sup> false implication in a criminal case<sup>297</sup> and in a case of rape of minors aged between 14-16 years by a teacher in a government secondary school in Rajasthan.<sup>298</sup>

Complaints of “fake” encounters were considered by the NHRC. The complaints were from state of A.P. and, in two separate instances, from Bihar. While the NHRC appears convinced that the explanation of the police was difficult to accept, there was only a passing mention of compensation in one of the three recorded cases.<sup>299</sup>

Culpable inaction finds place in the *AR 1997-98*<sup>300</sup> in a case relating to the killing of 29 bus passengers in Peren sub-division of Nagaland. A report of the Ministry of Home Affairs, Government of India, did not dispute that the deaths occurred as a result of violent activities of insurgents. The NHRC therefore “considered it reasonable to infer that the state government had failed to protect the lives of ... innocent citizens.”<sup>301</sup> The state government had sanctioned an *ex gratia* of Rs. 10,000/- to the dependants of the deceased, Rs. 5,000/- to those seriously wounded and Rs. 2500 to those who sustained minor injuries. The NHRC recommended enhancing the *ex gratia* from Rs. 10,000/- to Rs. 50,000/- to the families of the 29 persons killed in the incident. The state government is reported to have paid accordingly.

## XV. CONCLUSION

The growing body of tort law involving cases of constitutional tort, and the statistics reported in the Annual Reports of the NHRC, explain the interrelationship between fundamental rights, human rights and tort law, especially the law of compensation. While courts have prioritised compensation to victims over fixing culpability, the NHRC in its *AR 1997-98*, appears to be moving towards affixing responsibility, particularly in custodial offences.

The *Bodhisattwa Gautam* decision has been considered in at least two high court cases, and it has been clarified that this was not a case relating to rape but of offences relating to marriage. When the Supreme Court, in *Gautam*'s case, enunciated on the law of rape, and awarded maintenance without clarifying the law on the basis of which the order was made, there was inevitable confusion on the import of the order. That this was an order made under the plenary power of the Supreme Court is a much-needed clarification.

The problem of delay dogs the judicial process. Tribunalisation, conceived as a remedy to obviate delay, and relieve courts of overloading does not appear to be proof against delay. The theme of immediate relief, and of medical assistance, may need to be addressed to reduce the secondary effects of accidents.

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<sup>294</sup> There are no cases in this category.

<sup>295</sup> AP and West B. - 1; Bihar - 41; Goa and Gujarat - 2; Haryana - 10; Karnataka - 5; Kerala - 8; MP - 11; Maharashtra - 90; Punjab - 5; Rajasthan - 11, Tamil Nadu - 6; UP - 61 and the UTs - 41.

<sup>296</sup> E.g., Rs. 10,000/- as interim relief recommended to be paid for illegal detention between 9.11.1993 and 2.12.1993. Also see where Rs. 5,000/- each to three persons illegally detained between 22.6.1995 and 24.6.1995; *AR 1997-98* at 64 and 66. In a case of illegal detention and torture, the NHRC recommended that Rs. 15,000/-, Rs. 20,000/- and Rs. 5,000/- be paid to three detainees; *AR 1997-98*, at 68.

<sup>297</sup> Rs. 25,000/- *AR 1997-98*, at 71-72.

<sup>298</sup> Rs. 1 lakh to the victim named in the complaint to the police; *AR 1997-98* at 72.

<sup>299</sup> *AR 1996-97* at 61-65.

<sup>300</sup> *Id.* at 67.

<sup>301</sup> *Ibid.*

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