

VICARIOUS LIABILITY- LIABILITY FOR WRONG COMMITTED BY OTHERS

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VICARIOUS LIABILITY LIABILITY FOR WRONG COMMITTED BY OTHER PERSON

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- Generally, a person is liable for his own wrongful acts and one does not incur any liability for the acts done by others.
- In certain cases, however, vicarious liability, that is the liability of one person for the act of another person, may arise.
- In order that the liability of A for the act done by B can arise, it is necessary that there should be certain kind of relationship between A and B, and the wrongful act should be, in certain way, connected with that relationship.

The Common Examples Of Such A Liability Are:

- (1) Liability of the principal for the tort of his agent;
- (2) Liability of partners of each other's tort;
- (3) Liability of the master for the tort of his servant.

The central features of the doctrine of vicarious liability are four folded.

- First, a tort must have committed by A, its not being enough that A's action merely had an adverse impact on the plaintiff.

- At the relevant time, A must be an employee or agent of B.

- Third, A's tort must be committed in the course of A's employment with B.

- And finally, the fact that B also is liable for A's tort does not insulate A from liability.

A person may be liable in respect of wrongful acts or omissions of another in three ways:-

- As having ratified or authorised the particular act
- As standing towards the other person in a relation entailing responsibility for wrongs done by that person.

As having abetted the tortious acts committed by others.

By Ratification

- If one person commits a tort assuming to act on behalf of another but without any precedent authority, and that other subsequently ratifies and assents to that act, he thereby becomes responsible for it.
- The person ratifying the act is bound by the act whether it be to his detriment or advantage.

Three considerations

- The ratification should be with full knowledge of it being tortious, or it must be shown that he meant to take upon the risk of any irregularity which might have been committed.
- An act which is illegal and void is incapable of ratification.
- Only such act binds the principal , as were done at the time on the principal's behalf.

Qui facit per alium facit per se

- Qui facit per alium facit per se is a Latin legal term meaning, "He who acts through another does the act himself."
- It is a fundamental maxim of the law of agency. This is a maxim often stated in discussing the liability of employer for the act of employee."
- According to this maxim, if in the nature of things the master is obliged to perform the duties by employing servants, he is responsible for their act in the same way that he is responsible for his own acts.
- The maxim is a shortened form of the fuller 18th-century formulation: *qui facit per alium, est perinde ac si facit per se ipsum*, i.e. "whoever acts through another acts as if he were doing it himself."
- Indirectly the principle is in action or present in the duty that has been represented by the agent, so the duty performed will be seen as the performance of the agent himself.

- Vicarious Liability deals with cases where one person is liable for the acts of others.
- In the field of Torts it is considered to be an exception to the general rule that a person is liable for his own acts only.
- It is based on the principle of *qui facit per se per alium facit per se*, which means, “He who does an act through another is deemed in law to do it himself”.
- So in a case of vicarious liability both the person at whose behest the act is done as well as the person who does the act are liable.
- Thus, Employers are vicariously liable for the torts of their employees that are committed during the course of employment.

Lord Chelmsford:

“It has long been established by law that a master is liable to third persons for any injury or damage done through the negligence or unskillfulness of a servant acting in his master’s employ. The reason of this is, that every act which is done by servant in the course of his duty is regarded as done by his master’s order, and, consequently it is the same as if it were master’s own act”.

Reasons For Vicarious Liability

Justification for the imposition of vicarious liability:

(1) The master has the 'deepest pockets'. The wealth of a defendant, or the fact that he has access to resources via insurance, has in some cases had an unconscious influence on the development of legal principles.

(2) Vicarious liability encourages accident prevention by giving an employer a financial interest in encouraging his employees to take care for the safety of others.

(3) As the employer makes a profit from the activities of his employees, he should also bear any losses that those activities cause.

- Historic liability for such an imposition was because of slavery system that existed before.
 - As slave were considered to be the property of the master.
- So any tortious act committed by the slave was considered to be done on the direction of the master.
 - Therefore slave along with master was made liable.

Reasons behind attaching vicarious liability to a master include:

- Compensation/ Damages: for the purpose of awarding adequate compensation to the injured part and stop the blame game amongst servant and the master.
 - Avoiding exploitation of servant- Hire and fire rule. First directing servant to do tortious act and then after he does it to fire him to avoid the consequences arising from thereof.

Respondent Superior: “let the principal be held responsible” or “let the superior make answer”. It is the principle in tort law holding an employer liable for the employee’s/ agent’s wrongful acts committed within the scope of employment of agency.

Qui facit alium facit perse: Every act which is done by a servant in the course of his duty is regarded as done by his masters order and consequently it is the same as if it was the masters own act. If A is doing act for X. It will be considered as X himself is doing the act himself and thus is also made liable for the act of A.

Liability of the Principal for the act of his Agent

- When a principal authorizes his agent to perform any act, he becomes liable for the act of such agent provided the agent has conducted it in the course of performance of duties.

- ### Liability of the Partners

- For the tort committed by a partner of a firm, in the normal course of business of that partnership, other partners are responsible to the same extent as that of the partner who is in fault. The liability thus arising will be joint and several.

Liability of the Master for the act of his Servant

- The liability of the master for the act of his servant is based on the principle of ‘**respondeat superior**’, which means ‘let the principal be liable’.
- In tort, the wrongful act of the servant is thus deemed to be the act of the master. However, such wrongful act should be within the course of his master’s business and any act, which is not in the course of such business, will not make the master liable.

Essentials to constitute vicarious liability:

1. Relation

- There should be some or the other relationship between the wrong doer and the person who gave the order. Relationship can be that of Master-Servant, Principle-Agent, Independent Contractors and alike.

2. Ratification

- Under tort law a person may be liable in respect of wrongful acts or omissions of another in three ways:-
- As having ratified or authorized the particular act with the full knowledge of it being tortious;
- As standing towards the other in a relation entailing responsibility for wrongs done by that person; and
- As having abetted the wrongful act committed by others.
- In ratification the relationship can be between any two or more person, it need not be only master-servant relation.

Course of Employment

- An act is deemed to be done in the course of employment if it is either (a) wrongful act authorized by the master e.g.. delegation of work by the authorized person to someone unauthorized (b) wrongful & unauthorized mode of doing some act authorized by master i.e. unauthorized in the way act is done by the servant.

Criminal Justice Society Vs Union of India AIR 2010 Del 194

- Delhi High Court declared that the Municipal Corporation continues to remain liable for deficient acts even if the same have been handed over to an independent contractor due to mismanagement leading to death or injury of the citizens.
- The High Court in its decision, authored by its Chief Justice Dipak Mishra, was concerned with entitlement of compensation by the wife of a deceased for his accidental death caused due to the fall in a pit on the divider which was required to be covered (but was not so done) by a barricade with warning signs meant for pedestrians by the contractor.

▪ Holding that the Municipal Corporation remained vicariously liable for the acts (and omissions) of the contractor who had been assigned the task, the High Court enunciated the public law doctrine in the following terms-

- On a perusal of the aforesaid pleadings, it is clear as noon day, that a 77 year old man fell into an unbarricaded pit without reflective signs and met his end. The counter affidavit filed by the MCD is crystal clear in that regard. What has been stated in defence is that the MCD is not liable to pay the compensation as it is the obligation of the respondent No.4, the contractor, who was engaged for the work in question to compensate. It is also the stand that action has been taken against the said contractor. The stand of the respondent No.4 is that though the accident had occurred if eventually if any liability is fixed it has to be made good by the subcontractor.

•“The question that emerges for consideration is whether the shifting of the responsibility would deny the wife of the deceased whose cause has been espoused by the society. In this context, we may refer to Section 324 of the Act, which provides that the Commissioner shall, as far as is practicable, during the construction or repair of any public street, or any municipal drain or any premises vested in the Corporation caused the same to be fenced and guarded; take proper precautions against accident by shoring up and protecting and adjoining buildings and cause such bars, chains or posts to be fixed across or in any street in which any such work of construction or repair is under execution as are necessary in order to prevent the passage of vehicles or animals and avert danger.

- It also stipulates that the Commissioner shall cause such street, drain or premises to be sufficiently lighted or guarded during night while under construction or repair. There is also a stipulation that no person shall without the permission of the Commissioner or other lawful authority remove any bar, chain, post or shoring, timber, or remove or extinguish any light set up under this section. Thus, the provision casts a responsibility on the Commissioner of the MCD. As is evincible, the Corporation has admitted in its counter affidavit that the respondent No.4 did not fix the barricades or any reflective sign. A mercurial plea has been taken by the respondent No.4 that it was the responsibility of the labour contractor engaged by him and expected measures were taken. ”

- The learned counsel for the MCD submitted that if any liability has to be fixed the same has to be determined against the respondent No.4. There is no scintilla of doubt that the MCD had entered into a contract. Condition No.29 of the schedule of the work clearly stipulates that if there is any violation of barricading, the owner has the power to deduct payment for nonbarricading of the pits and non-display of any warning sign including reflective lights and blacklist the firm and debar it from undertaking any work under MCD for a period of five years. True it is, the MCD has the power to take action under the contract against the respondent No.4 but the fact remains whether it can advance a plea that it has no liability to pay any compensation to the wife of the deceased when the facts are clear.

•In the case at hand the MCD admittedly has entered into a contract. There is a stipulation in the contract enabling the owner to take steps against the contract. Section 29 of the Act casts responsibility on the Commissioner what steps to be taken when there is construction or repair of any public street. Cumulatively understood, the liability of the MCD cannot be denied. The liability in our considered opinion would come within the domain of in public law remedy which covers grant of compensation when right to life under Article 21 of the Constitution of India is jeopardized.

• **In Pushpabai Parshottam Udeshi and others Vs. M/s Ranjit Ginning & Pressing Co. Pvt. Ltd. and another, AIR 1977 SC 1735**, it has been held that when an act is committed by a driver in the course of employment or under the authority of the master, the liability would be that of the master.

- In **State of Maharashtra and others Vs. Kanchanmala Vijaysing Shirke and others, AIR 1995 SC 2499**, where clerk in a Government Department was driving a vehicle under the authority of driver at the time of accident and the vehicle was used in connection with the affairs of State and for official purpose, it was held by the Lordships under the circumstances the State cannot escape its vicarious liability to pay compensation to the heirs of the victim.

▪ In **Sitaram Motilal Kalal Vs. Santanuprasad Jaishanker Bhatt, AIR 1966 SC 1697** it has been held that law is well settled that a master is vicariously liable for the acts of his servant acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable.

Servant and Independent Contractor

- A servant and independent contractor are both employed to do some work of the employer but there is a difference in the legal relationship which the employer has with them.
 - A servant is engaged under a contract of services whereas an independent contractor is engaged under a contract for services. The liability of the employer for the wrongs committed by his servant is more onerous than his liability in respect of wrongs committed by an independent contractor.
 - If a servant does a wrongful act in the course of his employment, the master is liable for it. The servant, of course, is also liable. The wrongful act of the servant is deemed to be the act of the master as well.
 - “The doctrine of liability of the master for act of his servant is based on the maxim respondeat superior, which means ‘let the principal be liable’ and it puts the master in the same position as he if had done the act himself.

- It also derives validity from the maxim **qui facit per alium facit per se**, which means ‘he who does an act through another is deemed in law to do it himself’.”

Since for the wrong done by the servant, the master can also be made liable vicariously, the plaintiff has a choice to bring an action against either or both of them.

- Their liability is joint and several
- The reason for the maxim respondeat superior seems to be the better position of the master to meet the claim because of his larger pocket and also ability to pass on the burden of liability through insurance.
- The liability arises even though the servant acted against the express instruction, and for no benefit of his master.

- A servant is a person employed by another to do work under the direction and control of his master.
- As a general rule, master is liable for the tort of his servant but he is not liable for the tort of an independent contractor. It, therefore, becomes essential to distinguish between the two. A servant is an agent who is subject to the control and supervision of his employer regarding the manner in which the work is to be done.
- An independent contractor is not subject to any such control. He undertakes to do certain work and regarding the manner in which the work is to be done. He is his own master and exercises his own discretion. And independent contractor is one “who undertakes to produce a given result, but so that in the actual execution of the work, he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.”

▪ My car driver is my servant. If he negligently knocks down X, I will be liable for that. But if he hire a taxi for going to railway station and a taxi driver negligently hits X, I will not be liable towards X because the driver is not my servant but only an independent contractor.

▪ The taxi driver alone will be liable for that.

Traditional View: Test of Control

- A master is one who not only prescribes to the workmen the end of his work but directs or at any moments may direct the means also; retains the power of controlling the work.
- The traditional mode of stating the distinction is that in case of servant, the employer in addition to directing what work the servant is to do, can also give directions to control the manner of doing the work; but in case of an independent contractor, the employer can only direct what work is to be done but he cannot control the manner of doing work.

Four ingredients of a contract of service:

- (1) Master's power of selection of his servant;
- (2) Payment of wages or other remunerations;
- (3) Master's right to control the method of doing the work, and
- (4) Master's right of suspension or dismissal.

The important characteristic according to this analysis is the master's power of control which may also be found in a contract for services.

This was the traditional test.

“the distinction between a contract for services and a contract of service can be summarized in this way: In one case the master can order or require what is to be done, while in other case he can not only order or require what is to be done, but how it shall be done.”

Modern View :Control Test Not Exclusive

A Control Test

- The test of control as traditionally formulated was based upon the social conditions of an earlier age and “was well suited to govern relationship like those between a farmer and an agricultural labourer, a householder and a domestic servant and even a factory owner and an unskilled hand”.
- The control test bricks down when applied to skill and particularly professional work and, therefore, in recent years it has not been treated as an exclusive test.

- The Supreme Court in **Dharangadhara Chemical Works Ltd. v State of Saurashtra AIR 1957 SC264(267)** laid down that the existence of the right in the master to supervise and control the execution of the work done by the servant is a prima facie test.
- Nature of control may vary from business to business and is by its nature incapable of any precise definition.
- Not necessary that the employer should be proved to have exercised control over the work of the employee.
- Test of control is not of universal application and that there are many contracts in which the master could not control the manner in which work was done.

The Nature of the Employment Test

- One accepted view is that people who have a contract of service (an employment contract) are employees, but people who have a contract for services (a service contract) are independent contractors.

The Integral Part of the Business Test

- Distinction between a contract of service and a contract for services:
 - “it is almost impossible to give a precise definition of the distinction. It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. One feature which seems to run through the instances is that, under a contract of service, a man is employed as a part of the business; and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but it is only accessory to it.”

The Allocation of The Financial Risk/The Economic Reality Test/ Multiple Test

- More appropriate to apply a complex test involving (1) Control;
(2) Ownership of the tools;
(3) Chance of profit;
(4) Risk of loss; and Control in itself is not always conclusive.

- **Fundamental test was;** “Is the person who has engaged himself to perform these services performing them as a person in business on his own account?” If the answer is yes, it is a contract for services; if no, it is a contract of service.
- There is no exhaustive list of considerations relevant to determining this question, and no strict rules about the relative weight the various considerations should carry in a particular case.

The control will no doubt will always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are:

- (1) Whether the man performing the services provides his own equipment;
- (2) Whether the person hires his own helpers;
- (3) What degree of financial risk he takes;
- (4) What degree of responsibility for investment and management he has; and
- (5) Whether and how far he has an opportunity of profiting from sound management in the performance of his task.

- Test is not “the power of control whether exercised or not over the manner of performing service to the undertaking”, but whether the persons concerned were employees “as a matter of economic reality” and the important factors to be seen are “the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operations.”

Signifacant Outcome

“The question is not whether in practice the work was in fact done subject to a direction or control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter’s order and directions.”

Silver Jubile TailoringHouse Vs Chief Inspector of Shops & Establishments(1974) 3 SCC498

- “In recent years the control test as traditionally formulated has not been treated as an exclusive test. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weigh in all cases. It is equally clear that no magic formula can be pronounced, which factors should in any case be treated as determining ones.

- The plain fact is that in a large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite directions. It was also pointed out that the control is obviously an important factor and in many cases it may still be the decisive factor, but it is wrong to say that in every case it is decisive. It was further observed that the degree of control and supervision would be different in different types of business and that “if an ultimate authority over the worker in the performance of his work resided in the employer so that he was subject to the latter’s direction that would be sufficient.”

Liability for Independent Contractor

- If someone employs an independent contractor to do work on his behalf he is not in the ordinary way responsible for any tort committed by the contractor in the course of the execution of the work.

The main exceptions to the principle fall into the following categories:

- (1) Cases where the employer is under some statutory duty which he cannot delegate.
- (2) Cases involving the escape of fire.
- (3) Cases involving the escape of substances, such as explosives, which have been brought on the land and which are likely to do damage if they escape; liability will attach under the rule in *Rylands v Fletcher*.
- (4) Cases involving operations on the highways which may cause danger to persons using the highway.
- (5) Cases involving non-delegable duties of an employer for safety of his employees.
- (6) Cases involving extra-hazardous acts.

STATE LIABILITY

- The concept of the State has undergone a vast transformation from a form of political organization to that of an entity that closely interacts with its citizens in a number of areas.
- The functions of the State are no longer limited to maintenance of law and order, administration of justice and defence of the country, but also extend to commercial and economic activities, provision of various public services etc.
- In its interactions with citizens, the State can affect the lives of people, sometimes causing harm to their lives and property through the wrongdoing of its servants.

- State-run mass sterilization camp in Chattisgarh resulted in the deaths of about 14 women.
- Due to the alleged negligence of the officials of a state-owned gas transmission and marketing company, a fire broke out at its gas pipeline in Andhra Pradesh that claimed 22 lives.
- Accidents caused due to unmanned railway crossings, open bore wells etc. may also be attributable to negligence of State actors to a certain extent.

- Based on the principles of equality and justice, state should be held responsible for the damage caused to citizens due to the wrongdoings of its employees or agents in the carrying out of its services and operations.
- Often, the remedy for such wrongs can be found through the imposition of civil liability in tort law, which would recompense the citizen for the intrusion into his/ her private rights.
- Such a remedy would be corrective justice, in that it requires the state whose activities have interfered with the rights of a citizen to set it right, and distributive justice, in that the state bears the risk of harming the individual through its activities, even though it may not be at fault.

- The significance of such remedy in vindicating the private rights of individuals as against the state being clear, the principles fixing liability on the state in tort must be precise and easily identifiable.
- However, the law on state liability in tort in India does not meet these criteria, and consequently fails to provide adequate guidance to the citizen and in some cases, results in injustice to citizen by leaving him/her without redress.

- The current legal position in India has its foundation in a provision which was formulated during the years of colonial rule and has since become of doubtful relevance.
- Further, judicial decisions interpreting the provision have created confusion because of the conflicting stances taken therein.
- In spite of a Law Commission Report making a case for reform very soon after the Constitution came into effect, the Parliament has not enacted a law on this subject yet.

Constitutional Law

- The legal regime governing state liability for tortious acts of its employees is based on A.300 of the Constitution of India.
- A. 300(1) allows for actions to be brought by and against the Government of India or the Government of a State in the name of the Union of India or the State respectively. This provision expressly permits the imposition of civil liability on the Government of India and the Government of every state.
- Additionally, A. 300(1) delineates the scope of such liability by imposing liability on the Government of India and the Government of every state to the same extent as the liability of the Dominion of India and the corresponding provinces or the corresponding Indian states.
- A. 300(1) also makes the scope of liability thus defined subject to any legislation made by the Parliament of India or the legislature of any state.

Article 300 in The Constitution Of India 1949

- 300. Suits and proceedings
- (1) The Government of India may sue or be sued by the name of the Union and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted
- (2) If at the commencement of this Constitution, any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and
- (b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings

- The result of this constitutional position is that the scope of liability of the Government of India and the Government of every state is defined by reference to the scope of liability of the Dominion of India and the corresponding Indian princely states or provinces respectively, as it stood prior to the enactment of the Constitution.
- in order to determine the scope of such liability, reference must be made to the Government of India Act, 1935 to assess the scope of liability of the Dominion of India and the corresponding provinces.

- S 176(1) of the Government of India Act, 1935, which is the relevant provision, ultimately refers to S 65 of the Government of India Act, 1858.
- S 65 of the Government of India Act, 1858, while dealing with the scope of liability of the Secretary of State for India, merely stipulates that the scope of liability of the Secretary of State for India would be the same as that of the East India Company.

- S 176(1), Government of India Act, 1935 refers to the legal position contained in s 32, Government of India Act, 1935 thus:

- “The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this Chapter, may, subject to any provisions which may be made by an Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.”

- S 32, Government of India Act, 1915 refers to the position contained in s 65, Government of India, 1858.
- S 65, Government of India Act 1858: “The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of to Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable, to in respect of debts and liabilities lawfully contracted and incurred by the said Company.”

- The first key judgment, which considered state liability for tortious acts of public servants, was **P & O Steam Navigation Co. v Secretary of State of India (1861) 5 Bombay HCR App I,p1.**

- This case involved a claim for damages for injury caused to the appellant's horse due to the negligence of workers in a government dockyard. The issue was whether the Secretary of State would be liable for the negligence of the workers.

- Peacock C.J. held that the Secretary of State would be liable for negligence.

- Peacock C.J. reasoned that state liability for tortious acts of public servants would arise in those cases where the tortious act would have made an ordinary employer liable.

- Peacock C.J. recognised a crucial distinction between sovereign and non-sovereign functions
 - - thus, if a tort was committed by a public servant in the exercise of sovereign functions, no state liability would arise. This distinction was made on the basis that the East India Company⁶ could be held liable for torts committed by its employees during the course of its commercial and trading activities and not for the acts it performed as a delegate of the Crown

- This distinction between sovereign and non-sovereign functions was followed in
 - *Nobin Chunder Dey v Secretary of State for India* ILR 1 CAL.11.
 - In this case, a claim for damages was brought in connection with the issuance of a government licence. The claim was ultimately rejected by the court as it related to the exercise of a sovereign function.
 - Subsequently, this distinction was relied on to repel state liability for tortious acts of public servants where injury was caused in connection with the maintenance of military roads,
 - wrongful conviction,
 - wrongful confinement,
 - maintenance of public hospitals, etc.

Narrow Interpretation of Sovereign Function

Secretary of State v Hari Bhanji. (1882) ILR 5 Mad. 273.

▪ In this case, Turner C.J. rejected the plain distinction between sovereign and sovereign functions, and held that immunity from liability for tortious acts of public servants would only be available in respect of acts done in the exercise of sovereign power and without the sanction of a statute ('acts of State'). For acts done pursuant to a statute, or in exercise of powers conferred on a public servant by a statute, no immunity would be available, even though such acts might be done in exercise of sovereign powers.

•The decision of the Supreme Court in **State of Rajasthan v Vidhyawati AIR 1962 SC 933** was one of the earliest decisions on the issue of state liability for the tortious acts of public servants after the Constitution came into force. In this case, a government servant negligently drove a government vehicle and injured a pedestrian, who later succumbed to his injuries.

▪ The Supreme Court followed the decision of Peacock C.J. in *P & O Steam Navigation Co.* to hold that the Government of Rajasthan would be liable for the tortious acts of its servants like any other private employer. The Supreme Court also observed that "there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for tortious acts of its servant."

- The decision in Vidhyawati was analyzed by the Supreme Court in a subsequent decision in **Kasturilal Ralia Ram Jain v State of Uttar Pradesh. AIR 1965 SC 1039**

- In this case, a quantity of gold seized from the plaintiff by the police and kept in police custody was misappropriated by a police constable. The plaintiff raised a claim against the Government of Uttar Pradesh and argued that the loss was caused due to the negligence of police officers. The Supreme Court rejected the claim raised by the plaintiff and affirmed a more expansive view of sovereign immunity.

- The Supreme Court did not follow the decision in Vidhyawati as it distinguished this decision on the basis of the facts involved. It noted that the tortious act in Vidhyawati (driving a government vehicle from the workshop to the Collector's residence) could not be considered as an exercise of sovereign functions, unlike the tortious act in Kasturilal (seizure of property by police). Therefore, the decision in Vidhyawati necessarily had to be different from the decision in kasturilal.

■ Ultimately, the Supreme Court held that state liability for tortious acts of public servants would not arise if the tortious act in question was committed by the public servant while employed “in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State.” This broad formulation of the definition of sovereign functions resulted in a substantial expansion in the scope of sovereign immunity.

- Subsequently, the definition of sovereign functions enunciated in *Kasturilal* was applied in a number of circumstances by reference to whether the act in question could be pursued by private individuals or not. If the act in question could be pursued by private individuals, then such act would not be a sovereign function and state liability would arise.

▪ In **Shyam Sunder v State of Rajasthan**, AIR 1964 SC890 the Government of Rajasthan was held vicariously liable for the death of a person sent on famine relief work. It was held that famine relief work could not be considered as a sovereign function as it could be carried out by private individuals also.

▪ Similarly, in **Chairman, Railway Board v Chandrima Das**, AIR 2000 SC 988 the establishment of guest houses at railway stations was not considered as a sovereign function.

▪distinguishing between sovereign and non-sovereign functions has remained rather difficult. The difficulties faced in distinguishing sovereign and non-sovereign functions have been further compounded by a number of decisions that have attempted to bypass the distinction altogether. These decisions have sought to impose liability for tortious acts of public servants on the basis of other justifications.

• In **State of Bombay v Memon Mahomed Haji Hasam**, AIR 1967 SC1885 certain vehicles and goods seized by customs authorities were disposed of owing to the negligence of the police. The Supreme Court, after comparing the position of the Government of Gujarat to that of a bailee, held that the Government of Gujarat was liable for tortious acts of public servants such as the police. It further held that the decisions in Vidhyawati and Kasturilal were not relevant to the issue of state liability in such circumstances.

• Similarly, in **Basava Dyamogouda Patil v State of Mysore**, AIR 1977 SC 1749 on facts largely similar to the facts in Kasturilal, the State of Mysore was held liable for property which was lost while in the custody of the police.

The Supreme Court, in certain landmark decisions, recognized state liability for acts of public servants that infringed fundamental rights, including tortious acts of public servants. The appropriate remedy in such circumstances was to file a petition under A.32 or A.226 of the Constitution.

In **Nilabati Behera (Smt.) v State of Orissa, (1993)2 SCC 373** the Supreme Court imposed liability on the State of Orissa and awarded damages pursuant to a petition for relief against the infringement of fundamental rights. The Supreme Court observed that such a remedy was a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.

In **N. Nagendra Rao & Co. v State of Andhra Pradesh, AIR 1994 SC 2663** the Supreme Court considered whether the State of Andhra Pradesh could be held liable for the loss caused to the appellant due to the negligence of its officers in returning goods seized from him under the Essential Commodities Act 1955. The Supreme Court held that the State was vicariously liable for the negligence of its officers in complying with the provisions of the statute. However, in addition to this specific finding, the Supreme Court expressed a decidedly unfavourable view of the doctrine of sovereign immunity and remarked that "the doctrine of sovereign immunity has no relevance in the present day context when the concept of sovereignty itself has undergone drastic change."

- The Supreme Court also noted that the distinction between sovereign and non-sovereign functions was not a meaningful distinction and that the doctrine of sovereign immunity appeared to exist merely for reasons of practicality.
- Notwithstanding this clearly adverse stance, the Supreme Court in Nagendra Rao did not reject the doctrine of sovereign immunity - most likely because it could not have overruled or disregarded the decision of a larger bench in Kasturilal. The Supreme Court merely restricted the application of the doctrine of sovereign immunity to those cases in which the act in question related to a “function for which it [the state] cannot be sued in court of law.” These functions included - “administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government.”

▪ The decision in Nagendra Rao was followed in **Common Cause, A Registered Society v. Union of India AIR 1996 SC 3528**. In this case, the Government of India was held liable for loss in connection with the allotment of a petrol outlet as such function could not be considered a sovereign function.

- First Report of the Law Commission of India (1956)

The Law Commission of India (“LCI”) in its First Report acknowledged the uncertainty that existed with regard to liability of the state for tortious acts of its servants. The decision of the Madras High Court in Hari Bhanji was approved by the Commission as laying down the correct position on the extent of state liability. Acknowledging the increased participation of the State in commercial activities and its public welfare initiatives, the Commission recommended that the extent of liability of the State should be the same as that of a private employer, subject to certain limitations. The proposals of the LCI are taken up in the next section. Following the recommendations of the LCI, a draft Bill was introduced in the Lok Sabha in 1967, but this was aborted with the dissolution of the Lok Sabha in 1971.

- Consultation Paper, National Commission to Review the Working of the Constitution (2001)
 - NCRWC came out with a Consultation Paper in 2001.

In India, the immunity enjoyed by the erstwhile East India Company in relation to the acts done by it as the delegate of the Crown in India mutated into a similar sovereign immunity for the Government of India in relation to its sovereign functions. The crux of this legal regime, plainly enough, was the distinction between sovereign and non-sovereign functions - i.e. the 'sovereign powers' test.

- (A) Rationale for the 'sovereign powers' test

- While the 'sovereign powers' test came about on account of historical reasons, it still finds some justification in the present context on account of practical benefits. The 'sovereign powers' test, it may be argued, serves as a flexible tool to protect the state from unfair litigation that would otherwise interfere with the performance its functions.

- Problems with the 'sovereign powers' test
- The flexibility of the 'sovereign powers' test is both a benefit and a serious disadvantage. While such flexibility ensures that the courts are able to intervene in suitable cases to protect the state from unfair litigation, it also creates a lot of uncertainty about the scope of state liability for tortious acts of public servants. This uncertainty is problematic in itself, but additionally, it manifests itself in the form of unjust decisions that effectively deprive citizens of compensation for harm suffered at the hands of public servants.

The decision in *Kasturilal* is one such unjust decision. This uncertainty also results in the wastage of judicial energy in trying to prescribe a meaningful distinction between sovereign and non-sovereign functions and to apply or modify such distinction to ensure fair outcomes. Distinguishing between sovereign and non-sovereign functions has proved to be a difficult task for the courts in India. Consequently, the enactment of suitable legislation to define state liability for tortious acts of public servants appears to be the best solution for the resolution of this issue.

Passage of legislation on vicarious liability of the state in tort :

- The Supreme Court has often reiterated the need for a comprehensive legislation addressing tortious liability of the state and its instrumentalities. The proposal to enact legislation on state liability for tortious acts of public servants has also been mooted by the LCI and the NCRWC. The NCRWC has provided its suggestions in the form of comments on the proposals mooted by the LCI.

(A) Liability of the state

- The main proposal of the LCI was that the extent of the vicarious liability of the state should be akin to that of a private employer, subject to certain exceptions.

Consequently, any defences available to a private employer must also be available to the state.

- (a) Liability of the state in general

- - The state should be liable for torts committed by its employees and agents while acting within the scope of their employment. We would like to specify that there should be no exception from liability of the state for intentional torts committed by its employees or agents as long as they are acting within the scope of employment. There is no rational basis to distinguish between the commission of an intentional tort and an unintentional tort by a public servant.

- The state should be liable for the acts of independent contractors only in those limited circumstances that a private employer can be held liable under common law- such circumstances include non-delegable duties placed on the employer by virtue of common law or statute, ratification of the independent contractor's tort by the employer etc. This is significant as the state now provides a wide range of public services and operations such as building of highways, dams etc through delegation to independent contractors. Where the employment of such independent contractors results in a breach of duty owed by the state itself, the state should be held vicariously liable in tort.

- The state should be liable for those breaches of duties which are owed to employees/agents as an employer.
 - The state should be held liable for breaches of duties under general law attached to the ownership, occupation, possession or control of immovable property.

(b) Liability of the state for breach of statutory duties
- Generally, the position in **law is that a master is not responsible for acts of its** servants done in discharge of a statutory duty. The rationale for the same is that when a person is acting in discharge of statutory duties, his actions are not subject to the control of the employer. This position should be followed in the case where the state is the employer. However, the state should be liable in certain cases for the actions of its servant.

-In this regard, proposals made in the LCI report below.

-The state should be liable for the breach of statutory duty imposed on the state or its

- employees which causes damage to the claimant, subject to the provisions of such statute

- pertaining to liability for such breach.

▪The state should be liable for the acts or omissions of its employees in discharge of statutory duties if they act negligently or maliciously. In this regard, it is not sufficient that the act be done in good faith. This principle should be followed even in cases where discretion is conferred on the state or employee in the performance of the statutory function. Protective clauses in statutes giving immunity to the state for acts of its servants done in good faith should be appropriately restricted. We would like to point out that this would serve to avoid situations like *Kasturilal* where although the seizure of property was in exercise of statutory power, due to the negligence of the employee of the state, property was stolen.

CROWN PROCEEDINGS ACT 1947

- In U.K., Crown Proceedings Act, 1947, abolished the concept that the 'king can do no wrong' and subjects the Crown to all liabilities in tort just like a private individual.
- Crown Proceedings Act was not extended to India.
- However, having been passed by the British Parliament on 31st July 1947, it modified the common law as it stood prior to 15th August 1947, the date of the commencement of the Indian Independence Act.
- Since the Crown Proceedings Act became operative from January 1, 1948 i.e. prior to the commencement of the Constitution, the common law as modified by the Crown Proceedings Act, 1947 would have been the 'law in force

Joint tortfeasors

- two or more persons responsible for a tort. Courts have power to allocate responsibility among the joint tortfeasors, but each is wholly and severally liable to the victim.

Thank you