



RESTRICTIONS ON THE STATE IMMUNITY FOR TORTIOUS ACTS OF ITS SERVANTS: A STUDY

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Abstract

The importance of the work of the State is increasing day by day as today the nature of the State is 'welfare State' and the economic activities of the government have also increased tremendously. Therefore, it has become necessary to make some rules to protect the rights of citizens. But according to the Latin rule '*Rex non potest peccare*', a lawsuit cannot be filed against the King because he is considered to be beyond all jurisdictions. The Crown's immunity was first abrogated in England by the Crown Proceedings Act, 1947. The courts have since ruled in these cases in such manner that the responsibility of the King has been determined while protecting the rights of the common men. Normally, a person can file a case only against the person who has done wrong but under the concept of vicarious liability a case can also be filed against that person's employer. The theory of sovereign and non-sovereign functions of the State has been forwarded by the judiciary, according to which the government will not be responsible for the sovereign functions. But over time, the courts have reversed this trend. In today's modern world, India, which is a welfare State, is itself bound by whatever laws it enacts, and thus the liability of the State increases. The judiciary also does not allow the State to enjoy immunity and even a government employee cannot escape under the pretext of State immunity for his fault.

Keywords: Torts, State liability, Tortious liability, Restrictions, Sovereign Immunity, Sovereign, Non-sovereign, Compensation, State

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1. Introduction

The subject of government's tortious acts has assumed great importance in modern times. Today State is the source of wealth. In the modern era of a welfare State, government's economic activities are expanding and the government is increasingly assuming the role of the dispenser of a large number of benefits. There is thus need to develop some norms to protect individual interests in such situation. The basic question is to regulate structure and discipline government discretion to confer such benefits.

A restriction on the State liability for tortious acts of its servants arising out of the maxim of '*respondeat superior*' is that a master is not liable for the acts of its servants performed in the discharge of a duty imposed on them by law.ⁱ This principle of the English law has been followed in numerous cases in India.

2. Basis of Sovereign Immunity

The concept of sovereign immunity of the sovereign or the ruler owes its origin to the doctrine of divine right of king which prevailed in Europe during the middle Ages. It is expressed in Latin maxim '*rex non potest peccare*' which meant:

- 1) The natural capacity of the King or the Sovereign is such that he cannot be sued by any worldly power because he is beyond all jurisdictions.
- 2) Being omnipotent, the sovereign is not answerable to his subjects because of the age old presumption that king can do no wrong and whatever he does, will be in the interest of his subjects.
- 3) The presumption that prerogative of the sovereign can do no harm to anyone in the State.
- 4) The sovereign being bound by law, will not permit anyone to do an act which is prohibited by the law.

It is, therefore, evident that it is because of the sovereign immunity of the ruler or the State that the rule of State immunity for the wrongful acts of its servants has evolved in law of torts.

The immunity of the Crown was, however, abrogated by the Crown Proceedings Act, 1947. Section 2 of the Act contained the provision that "Subject to the provisions of this Act, the



Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, would be subject.” The liability of the Crown therefore, extended to the wrongful act of its agents, servants and breaches of duties in relation to ownership, occupation, possession or control of property of the subjects and the compensation or damages were to be paid from the Consolidated Fund. However, the Act still retained the immunity of Crown from liability in certain specific areas untouched. It provided that no proceeding shall lie against the Crown for any act or omission on the part of a person discharging judicial duties or executing judicial process or proceedings in respect of an act or omission in relation to post and telegraph department or Armed Forces etc. Thus the Act introduced revolutionary changes in the law relating to proceedings against Crown in England. Now any subject of the crown aggrieved by an act or omission of the Crown’s servant or official could sue the Crown for damages as of right. Further, anything done by the King in his personal capacity and under Crown’s prerogative and statutory powers was also immune from liability.ⁱⁱ

The liability of Crown for tort before and after the enactment of the Crown Proceedings Act, 1947 has been elaborately analysed in *Home Office v. Doret Yacht Co.*ⁱⁱⁱ In this case, the officers incharge of a Borstal meant for young offenders failed in their duty of supervision thus enabling some offenders to escape causing damage to the property of the owners in the immediate vicinity during their escape. The Crown was held liable for this negligence of its authorities which they had done in course of their employment. But had this case been prior to 1947, the Crown would not have been liable because of the immunity available to him under common law of England.

In *Maharani of Nabha v. Province of Madras*,^{iv} the British Government received the information that the Maharaja of Nabha was scheduled to visit Kodaikonal. The Government wanted to prevent Maharaja’s entry in Madras. Therefore, the Government by an order prohibited the entry of Maharaja within the municipal limits of Madras. The Deputy Superintendent of Police, Madras issued an order directing the Sub-Inspector Police to go to the Kodai Konal railway station and prevent the Maharaja of Nabha from boarding the train from Kodai konal Station for Madras. The Sub-Inspector acting in misunderstanding of the instructions detained her at the Kodaikonal railway station and prevented her from boarding the



train. She sued the Government of Madras and Superintendent of Police for wrongful confinement and claimed damages. The Government's plea was that during Maharani's stay at the Kodaikonal railway station she never expressed her desire to board the train for Madras and therefore, it cannot be said that she was deprived of her freedom of movement which is an essential ingredient for the tort of false imprisonment and as such the Government was not liable. According to them, two policemen were deputed only to keep a watch of the movement of Maharani and her daughter, and the tort would have said to be committed when she would have tried to board the train and the policemen would have prevented her from doing so. The suit was, however, dismissed for want of proper sanction.

The Full Bench of the High Court of Gujarat in its decision in *State of Saurashtra v. Bholanath Jatashanker Thakkar*^v held that the covenant entered into by the rulers and maharajas of independent princely State prior to the formation of Joint Saurashtra State were to be treated as act of State and therefore, States were immune from liability in respect of those covenants.

3. Liability in Tort

Ordinarily, a person has to file a civil suit against the government to claim damages as it raises question of fact for which the court has to take oral evidence. This protracted process for civil litigation in India is an extremely slow and tardy process.

However, lately, a new judicial trend has emerged. Damages have been awarded against the government by the Supreme Court and the High Courts through writ petition under Articles 32 and 226 for infringement of Fundamental Rights, especially of Article 21. A detailed discussion on this topic falls more appropriately within the compass of Administrative Law.^{vi} Here the matter is referred to only in an outline.

The Supreme Court has observed on this point:^{vii}

“However it cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Article 21 is there, it cannot be said that there will be any bar to proceed under Article 226 of the Constitution. Right to life is one of the basic human rights guaranteed under Article 21 of the Constitution.”



In *Shivabhajan v. Secretary of State*,^{viii} certain bundles of hay were attached by the chief constable of Mahim because they were believed to be stolen property. The person from whose possession hay was attached was prosecuted by acquitted. The hay was lost in the meantime. The person concerned sued the Secretary of State for compensation for negligence of the chief constable. The High Court held that the Secretary of State was not liable as the chief constable had acted under powers conferred on him by the Criminal Procedure Code.

In *Ross v. Secretary of State*,^{ix} the Secretary of State was held not liable for the wrongful acts of the District Magistrate done by him in the exercise of statutory authority.

In *Secretary of State v. Srigobinda Chaudhuri*,^x a suit for damages against the Secretary of State for misfeasance, wrongs, negligence or omissions of duties of managers appointed by the court of wards was rejected because these officers of the government acted in exercise of statutory powers.

In *Secretary of State v. Ramnath*,^{xi} the Deputy Collector by mistake paid some money to a person who was not entitled to it. The Secretary of State was held not liable for the mistake of the Deputy Collector as it was committed in exercise of his statutory duties.

In *Mohammed Murad v. State of Uttar Pradesh*,^{xii} the police recovered some stolen property which was deposited in malkhana. The property was stolen from there. The High Court ruled that the State was not liable to pay damages as its servant was performing a statutory obligation.

In *Rudul Shah v. State of Bihar*,^{xiii} the Supreme Court awarded compensation for illegal detention. In a number of cases,^{xiv} compensation has been awarded on account of police atrocities^{xv} or custodial deaths^{xvi}.

Compensation has also been awarded for medical negligence in government hospitals.^{xvii} In the instant case, the Supreme Court has ruled that Article 21 imposes on the State an obligation to safeguard the life of every person. The State-run hospitals and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Violation of this duty amounts to violation of Article 21. Adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Article 32 and Article 226.



4. Judicial attitude in recent case laws

We shall consider the extent of vicarious liability of the government for the tortious acts of its employees acting in the course of their employment as such. The question, therefore, is: what was the extent of liability of East India Company for the tortious acts of its servants committed in the course of their employment as such? This important question arose before the Calcutta Supreme Court in 1861 in leading case of *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India*.^{xviii} In India, the story of the birth of the doctrine of sovereign immunity - a symbol of absolutism and feudalism - begins with the decision of Sir Barnes Peacock C.J. in this case, in which the terms 'sovereign' and 'non-sovereign' were used while deciding the liability of the East India Company for the torts committed by its servants. The functions of the State were divided into sovereign and non-sovereign to determine tortious liability of the State. Till the commencement of the Indian Constitution the following were the principles applied by the Courts to determine the liability of State:

- a) The State was not liable for the wrongful act of servants, when he was engaged in sovereign functions.
- b) The State was not liable for the "act of State."
- c) The State was liable for the wrongful acts of the servants if they were engaged in commercial or non sovereign functions of the State.

The court held that the State was liable for torts committed while discharging non-sovereign functions. This 'great and clear distinction' of Sir Barnes Peacock led to gross and utter confusion as it held potential for multiple interpretations. In the later period the courts confounded the confusion by inventing their own tests like 'commercial and non-commercial', 'benefit to the State', 'ratification by the State' and 'statutory and executive power'.

The emerging judicial trend clearly reflects the widening dimensions of State liability thereby rendering the difference between sovereign and non-sovereign functions redundant in the modern welfare State. The doctrine of sovereign immunity emanating from British legacy has been put down by the higher courts through their epoch-making judgments over the past few years. It speaks for judiciary's concern for establishing 'Rule of Law' in true sense of the term



and its anxiety for extending protection to people's right against tortuous acts of the State and its authorities.

It has been rightly held that in a welfare State like India, it must be ensured that the State's executive power should not flow from the 'law' but it should also be limited by the law it makes, thus accountability should be the essence of modern law. State immunity as a weapon of State shirking liability for the damage caused to its subjects must be used sparingly and that too in very rare cases. Replacement of losses in the form of compensation should be the dominant theme of modern legal acts and this can be best achieved by adopting the policy of social insurance for distribution^{xix} of losses.

It is indeed heartening to note that the development of 'constitutional tort-law' through expanding dimensions of Article 21 of the Constitution relating to protection of life and personal liberty of persons and evolution of Public Interest Litigation writs have substantially contributed to the development of compensatory jurisprudence in the Indian legal system. The judiciary no longer permits the State and its executive authorities to justify their wrongful acts in the name of State immunity. It would be no exaggeration to say the doctrine of State's sovereign power has lost its credence in the new millennium and the real sovereignty now vests in the people of India. Particularly, in cases of unnatural death occurring in police or jail custody there is need to hold public enquiry and the relatives of the deceased prisoner/under-trial should be offered an opportunity to participate in such public enquiry in order to ensure that all facts are brought to light and the suspicion of deliberate killing or wrong doing is allowed.^{xx}

In India also, Section 176 of Code of Criminal Procedure, 1973 provides that in case of death or disappearance of a person or rape of a woman while in custody of Police, there shall be a mandatory judicial enquiry in which relatives of the victim will be allowed to be present and in case of death, examination of the dead body shall be conducted within a period of twenty four hours of death. This provision is indeed an effective legal measure to prevent custodial deaths.^{xxi}

5. English law

In England, the law on this subject has greatly been changed by the Crown Proceedings Act, 1947. Before 1947, if a government servant committed a tort, it was not possible to bring an action against the Crown. But the action always could be brought against the actual wrongdoer.



It is not very clear on what grounds the exemption of the Crown was based. Many hold that the true basis of the doctrine is the constitutional maxim “the King can do no wrong”. But as Holdsworth suggests^{xxii}, the rule that no action lies against the Crown is procedural rather than substantive. On principle, there could be no justification for exempting the government from the liability for torts of its servants. The Crown Proceedings Act, 1947, however, has placed the government as regards the right to sue and to be sued in the same position as a private individual. Now the Crown in the departments can be sued for torts of the government employees done in the course of their employment.^{xxiii}

6. Conclusion

Being a ‘welfare State’ in modern times, the importance of the State has increased a lot. The economic activities of the government have increased so much that it has become imperative to enact such laws to protect the rights of the common man. Compensation for damages incurred by government employees should be recovered. According to ‘*respondeat superior*’ principle, the law was first applied to the East India Company to determine its responsibilities. But the English rule ‘King can do no wrong’ has never found a place in India and the court trends that have been going on have resulted in the government having to accept its responsibility. If any tort has been committed by a government employee then we have a lot of examples which also show this. The concept of English ‘sovereign immunity’ is followed to some extent in India but there are also some conditions or we can say that there are some tests to imply this rule. If the government passes this test then it escapes the responsibility but if it fails then the government becomes liable just like an ordinary citizen.



ⁱ *Tobin v. The Queen*, 143 ER 1148; *Nireaha v. Baker*, 1901 AC 561.

ⁱⁱ N.V. Paranjape, *Law of Torts* 101 (Central Law Agency, Allahabad, 3rd edn., 2015).

ⁱⁱⁱ (1970) 2 All ER 394 (HL).

^{iv} (1944) 1 MLJ 399 (PC).

^v AIR 1952 Saurashtra 49.

^{vi} M.P. Jain, *Indian Constitutional Law* 58 (LexisNexis, Nagpur, 7th edn., 2016).

^{vii} *Rudul Shah v. Union of India*, AIR 1983 SC 1086; *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

^{viii} ILR 28 Bom 314.

^{ix} AIR 1915 Mad 434.

^x AIR 1932 Cal 834.

^{xi} AIR 1934 Cal 128.

^{xii} AIR 1956 All 75.

^{xiii} AIR 1983 SC 1086.

^{xiv} *People's Union for Democratic Rights v. State of Bihar*, AIR 1987 SC 355.

^{xv} *D.K. Basu v. Ashok K. Johri*, AIR 1997 SC 610.

^{xvi} *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 1203.

^{xvii} *Dr. Jacob George v. State of Kerala*, (1994) 3 SCC 430.

^{xviii} (1861) 5 Bom HCR (App.) 1.

^{xix} Public Liability Insurance Act, 1991 represents this trend.

^{xx} *R. v. Secretary of State for Justice*, (2009) 2 All ER 521 (HL). In this case, a prisoner attempted to commit suicide sustain serious injuries.

^{xxi} *Supra* note 2 at 115.

^{xxii} W.S. Holdsworth, *A History of English Law Vol. 9* 625 (Andesite Press, Warsaw, 2017).

^{xxiii} V.N. Shukla, *Constitution of India* 903 (Eastern Book Company, Lucknow, 12th edn., 2016).