Tortious Liability of Government

A PRASANNA*

It is a well established principle of law of torts that the master is vicariously liable for the torts of his servants if the alleged tortious act is done in the course of his employment. Lawyers base this principle on the latin maxims - *Qui facit per alium facet per se*\(^1\) or *Respondeat superior*.\(^2\) Another reason for this rule is the lack of funds in the hands of the servants to bear the burden of civil liability. So if the burden is put on the employer, liability can be easily imposed on him.

How far this rule of vicarious liability be applied against the Government? In the modern social welfare State of increased governmental activity, the State pervades every aspect of human life. Running buses, railways and industries, maintenance of hospitals, slum clearance, sewage disposal and supply of necessaries like food, gas and electricity are now the concern of the Government. Administrators who are the executors of these policies may at times commit wrongs in the discharge of these duties. Can the Government as the employer be sued for such torts committed by these employees?

**LAW IN OTHER COUNTRIES**

**England**

In the United Kingdom, for many years, the Crown was not suable for the torts of its servants because of the accept-

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1. He who acts through another is deemed to act in person.
2. Let the principal answer.
ance of the feudal maxim "the king can do no wrong". But this immunity in tort never extended to its servants. The officials were personally liable for any injury for which they could not produce legal authority. But the aggrieved persons found it impossible to recover damages from Government servants personally because the latter might not be in a position to pay compensation. So serious discussion and protest arose against the immunity of the Crown. Consequently the Crown Proceedings Act 1947 was passed making the Crown freely suable in torts.

Under the Crown Proceedings Act, the extent of the liability of the Crown is the same as that of a private person of full age and capacity and it leaves untouched the personal liability of the Crown servants except in certain cases concerning armed forces. The principle evolved by the law is that where a servant of the Crown commits a tort in the course of his employment, the servant and the Crown are jointly and severally liable. But the extent of vicarious liability imposed by the law is not absolute because of the exemption clauses. Accordingly judicial functions, execution of judicial process, post office, armed forces etc. are exempted from the purview of the law.

U.S.A.

In U.S.A. also the English doctrine of sovereign immunity was applied to protect the Government from suits relating to the torts of its employees. However, this immunity was not

3. The nature of the Crown’s liability under the Crown Proceedings Act is best illustrated in *Home Office v. Dorset Yacht Company Ltd.*, [1970] 2 All E.R. 294. In that case ten borstal trainees working in an Island under the control of three officers, escaped during night and set in motion a yacht which collided with, and damaged, another yacht belonging to the respondents. The court found that the officers failed to discharge a duty of care which they owed to the respondents. The damage done by the trainees to the respondents ought to have been foreseen by the borstal officers as likely to occur if they failed to exercise proper control of supervision. The Home Office was held vicariously liable under the Crown Proceedings Act.
shared by the officers of the Government except the judicial officers. The result was that talented men were disuaded from entering the Government service due to the fear of accountability. Further, the remedy by way of personal liability was futile where the official doing a wrong was not financially sound enough to pay adequate compensation to the aggrieved party. The United States found a solution to these problems by enacting the Federal Tort Claims Act 1946 which set aside a major chunk of sovereign immunity.

The law made the United States liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. However it provides a number of exceptions in which liability can be evaded. Most of these exceptions exempt specific administrative functions or agencies in addition to all claims arising in a foreign country. Moreover, it is provided that there is no liability for intentional torts. Thus jurisdiction of the courts is denied over any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. Thus the aim of State liability which is sought to be achieved by the Act is considerably weakened by evading liability in deserving cases through the exemption clauses provided therein in the law. So there is no need to limit the scope of these exceptions by judicial interpretation or by amending the Act.

France

In France the ideas of French Revolution led to the conviction that sovereign responsibility should replace the out-

4. Dalehite v. U.S., 346 U.S. 15 (1953), forms the best illustration in which a claim made against the United States, for damages resulting from an explosion of ammonium nitrate while being loaded for export, failed. The Court held that the United State was not liable because the act in question involved the exercise of discretion which fell within the exceptions of the Federal Tort Claims Act.
moded concept of sovereign infallibility. There, the administrative courts have jurisdiction to annul illegal administrative acts or award damages against the administration when a citizen is injured by an administrative act. This is done on the basis of two principles which the Conseil d'Etat evolved - 'legalite' and 'responsibilite'. According to the former the administration must act in accordance with the law. As per the latter the administration will be responsible to indemnify the citizens whose rights are infringed through any unlawful act on its part.

Regarding administrative torts the Conseil d'Etat evolved two principles - Faute de Service and Faute Personnelle. If the agent of the administration was at fault in carrying out administrative responsibilities then a person injured in consequence could sue the State in the Conseil d'Etat for Faute de Service. If the tortious act was done due to the personal fault of the individual officer then the liability could be imposed on him personally in the civil courts for Faute Personnelle. A combination of service fault and personal fault is recognised as what is called Cumul. In such cases the victim can sue the official both in civil courts and in administrative courts. This does not mean that the victim can obtain damages twice. Instead the damages are contributed by the joint tort feasors. The judgment debtor who pays damages has the right of action against the other for contribution.

In France the administration can be made liable even if there is no fault on its part. This liability without fault is based on the risk theory. According to this theory the administration has a duty to compensate anyone injured as a result of the carrying out of public works involving risk. Thus France has the most advanced system of case law on governmental liability.

6. Id., p. 100.
8. Id., p. 104.
India

In India there is no legislation relating to governmental liability in torts. The only provision is Article 300(1) of the Indian Constitution which imposes the same liability on the Union and the States as that of the liability of the Dominion and the provinces before the enactment of the Constitution. Before the Constitution there was a chain of enactments which ultimately made the liability same as that of the East India Company before the passing of the Government of India Act 1858.

It is in the landmark decision of the Calcutta Supreme Court, Penninsular & Oriental Steam Navigation Co. v. Secretary of State, that the extension of immunity of the Crown to the Company was directly discussed. The facts of the case are as follows. One of the horses of the plaintiff's carriage was

9. Ar. 300(1) of the Indian Constitution reads as follows:
   “The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.”

10. The relevant document immediately before the Constitution is the Government of India Act 1935. Section 176(1) of the Act reads 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, ... 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.”

In order to understand the liability of the Secretary of State in Council one should look to Section 32 of the Government of India Act 1915.

Section 32(2) of the Act stated:
   “Every person shall have the same remedies against the Secretary of State in Council as he might have against the East India Company if the Government of India Act 1858 and this Act had not been passed.”

11. 5 Bom. H.C. R. App. 1. Hereafter referred to as the 'P & O case'
injured by the iron funnel dropped on the road by the workers of the Government dockyard. Hence the plaintiff sued the Secretary of State claiming damages for the injury caused to the horse by the negligence of the Government workmen.

Here the liability of the Secretary of State had to be determined according to the Government of India Act 1858. Section 65 of the Act made this liability co-extensive with that of the East India Company before 1858. The Court found that after the Charter Act of 1833 the company exercised both sovereign functions and commercial functions within the limits of its jurisdiction. But accordingly to the Court the company was not a sovereign though it exercised sovereign functions and therefore not entitled to sovereign immunity. Though certain powers were delegated to the company the servants of the company were not public servants.

The scope of actual liability of the company was not in issue in the above case. Still Chief Justice Barness Peacock stated the proposition that where an act was done or a contract entered into in the exercise of powers, usually called the sovereign powers, which could not be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action would lie against the company. On the other hand if the company were allowed for the purpose of Government to engage in undertakings such as the Bullock Train and the conveyance of goods and passengers for hire, they should do so, subject to the same liabilities as individuals.

Thus in the P & O case the Court made a distinction between sovereign and non-sovereign functions as the basis of liability. If the function is one that can be carried on by a private individual without delegation of sovereign powers it is a non-sovereign function and liability can be imposed on the Government. On the other hand if sovereign power or delegation of such power is essential for the carrying out of the act in question, the function is "sovereign" and no liability can be imposed. This test formed the basis for determining the liability

13. *Id.*, p. 15.
of the Union of India or the States for the tortious acts of its employees in later years because of the retroactive effect of Article 300 of the Indian Constitution and the chain of references in the laws of the past.

This test is so broad that it confers wide discretion on the judge to characterise a function as sovereign or non-sovereign according to his will and pleasure. If he is inclined to do justice to individuals he may interpret the term “non-sovereign function” widely and make the State liable. On the contrary, if he is biased in favour of the State he may give a liberal interpretation to the term “sovereign function” and save the Government from liability.

However the development of the case-law in this area is interesting. There is a shift in the judicial attitude when India has changed from Police State to Welfare State. Laissez-faire concept favoured non-liability of the State while Welfare State concept State liability. This can be illustrated through case law.

Laissez-faire Judicial Thinking and the Exclusion of Sovereign Functions from Tortious Liability

In the old colonial era when the Government was concerned more with policing function than with welfare activities, most of the functions exercised by the Government of India were considered as sovereign functions. Accordingly defence functions of the State, maintenance of law and order, administration of justice through courts and matters incidental thereto and also imposition and collection of taxes were interpreted as sovereign functions.

Defence functions

Defence functions considered traditionally as a sovereign function extend to commandering goods during war, bombing

14. In a Police State, the functions of the State were limited to the protection of the country from external aggression and maintenance of law and order within the State. State intervention in the affairs of the people was minimum.
15. A.I.R. 1928 Cal. 75.
practices,\textsuperscript{16} maintenance of military road\textsuperscript{17} and even driving of military vehicles\textsuperscript{18} both in war time and peace time.

Some form of Government immunity may be needed for the successful prosecution of war. At the same time it is unjust to impose loss on individual companies who in obeysance of the orders of superior officers, deliver war goods. \textit{Kesoran Podar & Co. v. Secretary of State}\textsuperscript{19} is an example for this injustice. In this case failure of the Secretary of State to take delivery of and pay for certain war goods bought by commandering orders was an act of the sovereign power. It would have been proper for the court to direct the Government to pay the price of the goods from the defence fund of the Union so that the loss could be shared by all subjects protected by the State.

\textbf{Functions of Police}

Functions of the Police Department included in the category of sovereign functions extend from arrest\textsuperscript{20} and detention,\textsuperscript{21}

\begin{enumerate}
\item In \textit{Secretary of State v. Nagarao Limbaji} (A.I.R. 1943 Nag. 287) the plaintiff lost the challenge of his finger due to the explosion of an ignition set lying near the area which was used as a practice bombing ground by the military authorities. The court interpreted bombing practice as a sovereign function to immune the State from liability.
\item In \textit{Secretary of State v. Cockraft} (A.I.R. 1915 Mad. 993) maintenance of military road was interpreted as one of the sovereign functions of the Government to evade liability arising out of injuries sustained as a result of allowing a heap of gravel to remain on the road.
\item In \textit{Union of India v. Harbans Singh} (A.I.R. 1959 Punj. 39) a claim arising from an accident, occurred due to the negligence of the driver of a military lorry engaged in supplying meals to military personnel was not maintainable as the function involved was interpreted as a sovereign function. Same wide interpretation was given in \textit{Thangarajan v. Union of India} (A.I.R. 1975 Mad. 32) to save the Government from liability arising out of rash and negligent driving of a military driver while transporting carbon dioxide gas from the factory to the military ship.
\item A.I.R. 1928 Cal. 75.
\item In \textit{M.A. Kadar Zailani v. Secretary of State} (A.I.R. 1931 Rang. (f. n. contd.))
\end{enumerate}
seizure of property\textsuperscript{22} to activities for the maintenance of law and order.\textsuperscript{23} However, this classification has led to injustice in individual cases. \textit{Kasturilal Ralia Ram Jain v. State of U.P.}\textsuperscript{24} forms the best illustration. The Police seized some gold from the appellant on the suspicion that they were stolen property and kept it in the Government \textit{Malkhana}. It was later misappropriated by the constable in charge of the \textit{malkhana}. The Government was sued. It was proved that the authorities were negligent in keeping the gold in safe custody. But the court held that the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers.\textsuperscript{25} Further the power to arrest a person, to search him and to seize the property found with him are powers which can be characterised as sovereign powers and so the claim against the Government could not be sustained.\textsuperscript{26}

The decision in \textit{Kasturilal}'s case is quite unsatisfactory. The trader failed to get compensation from the Government for

\textsuperscript{294}) the plaintiff's claim for damages for wrongful arrest and imprisonment by certain police officers was dismissed as the function involved was sovereign in nature.

\textsuperscript{21} In \textit{Gurucharan Kaur v. Province of Madras} (A.I.R. 1942 Mad. 539) a complaint against wrongful detention was held not maintainable.

\textsuperscript{22} In \textit{Shivabhajan v. Secretary of State} (28 I.L.R. Bom. 314 (1904) the illegal seizure of certain bundles of hay by the police was justified as an act done in the discharge of a statutory duty. This rule was followed in \textit{Ross v. Secretary of State}, 39 I.L.R. Mad. 279 (1916) to save the Government from liability arising out of an illegal closure of a labour-recruiting depot belonging to the plaintiff.

\textsuperscript{23} In \textit{State v. Padmalochan} (A.I.R. 1975 Ori. 41) injuries sustained by the plaintiff by the police lathi-charge while dispersing an unlawful mob and in \textit{State of M.P. v. Chironjilal} (A.I.R. 1981 M.P. 65) loss caused to the plaintiff by police lathi-charge were dismissed on the ground of sovereign immunity.

\textsuperscript{24} A.I.R. 1965 S.C. 1039.

\textsuperscript{25} \textit{Id.} at p. 1048.

\textsuperscript{26} \textit{Ibid.}
the huge loss he had suffered because of the wide interpretation given to the term 'sovereign function'. It would have been proper for the court to narrow the scope of sovereign function in this case, so that governmental liability could be imposed to redress the grievance of the appellant. Instead the court unanimously rejected the claim of the appellant and expressed its regrets about the unsatisfactory position in law. The learned Chief Justice Gajendragadkar suggested the need for legislative enactments to regulate and control the claim of government immunity, on the lines of the Crown Proceedings Act 1947.

Kasturilal's decision was seriously criticised by eminent jurists. According to one author "the distinction between sovereign and non-sovereign functions, which the Supreme Court has now perpetuated though its pronouncement in the Kasturilal's case is erratical in the modern context when the State embarks on so many varied activities. It is therefore necessary that the liability of the State should match its present day role and not to be confined to the laissez-faire era which the P & O case signifies".27 Another has suggested that water tight compartmentalization of the functions of the State as "Sovereign" and "non-sovereign" or "Governmental" or "non-governmental" is highly reminiscent of laissez-faire era. It is out of tune with modern jurisprudential thinking and unworkable in practice.28 So in order to find a practical solution to the problems in this branch of law, our courts should benefit from the experience of the continental countries especially France.29

Imposition and collection of taxes

Imposition and collection of exercise and customs duties and other taxes including land revenue and adoption of revenue

29. Id., p. 250.
30. In Secretary of State v. Ramnath Bhatta (A.I.R. 1934 Cal. 128) the plaintiff-respondent claimed damages from the Secretary of (f. n. contd.)
recovery proceedings\textsuperscript{31} are classified as sovereign functions of the State. Sometimes these functions are interpreted widely by the Courts so as to include matters incidental thereto, which may often lead to injustice. In \textit{Nobin Chunder Day v. Secretary of State},\textsuperscript{32} the plaintiff was the highest bidder for the licences for sale of \textit{gania} and \textit{sindhi}. The bids were recorded. The plaintiff paid the requisite money. Subsequently, the excise authority refused to give licences to the plaintiff. But the Court refused to enforce the claim against the Government holding that the act of the authorities in refusing licence to the plaintiff related to the imposition and collection of excise duties which are part of the sovereign functions of the State. This position is quite unsatisfactory. It is not just for the authorities to refuse licence to a person who has complied with all the procedural formalities required by them. It would have been proper for the Court to construe the 'imposition and collection of excise duties' strictly so as to exclude incidental matters from its purview thereby imposing liability on the Government.

State, for a wrongful act of the collector of Chittagong who paid the surplus sale proceeds of a Taluk not to the plaintiff who was the real owner, but to the recorded proprietor. The Secretary of State was held not liable for the act done by the deputy collector in the discharge of his statutory duties.

\textsuperscript{31} In \textit{Chetty & Co. v. Collector of Anantapur} (A.I.R. 1965 A.P. 457) the attachment by Tahsildar of immovable property under the Madras Revenue Recovery Act by following the procedure prescribed for the attachment of movable property was illegal, but the Government was held not liable for the tort committed by the Tahsildar. Similarly in \textit{State of A.P. v. Pinessetti Ankanna} (A.I.R. 1967 A.P. 41) the High Court rejected the claim for damages from the State of Andhra Pradesh, for the destrainment of the plaintiff’s bullock cart by the revenue officers for realising the land revenue due from another. The reason was that the collection of land revenue, though delegated to certain specified authorities by statute the function would not cease to have the essential character of a sovereign function.

\textsuperscript{32} I.L.R. 1 Cal. 11.
Judicial functions

Traditionally, administration of justice was treated as a sovereign function. In the British India, the East India Company was never held responsible for the acts of its judicial officers. The Courts remained entirely separate from the Company, and the company had no liability for the acts of the courts. This practice of non-liability continues. Still persons aggrieved by wrong orders of the courts are without any remedy. P.A. Maha Nirbani v. Secretary of State is an illustration. The presiding officer of the criminal court directed to return to the original owner, and not to the plaintiff, some ornaments which was delivered by the plaintiff to a police officer. In a suit by the plaintiff, the Court expressed the view that the Government was not liable for loss resulting from a wrong order of the Court.

For upholding the dignity of the Court the orders of the Court should be respected. But the Court in issuing orders should always be vigilant to maintain the correctness thereof.

Maintenance of public path

Maintenance of public path was characterised as a sovereign function in some cases. In McInerny v. Secretary of State the Calcutta High Court held that the Government was not carrying any commercial operations in maintaining a public path

33. In Mata Prasad v. Secretary of State (A.I.R. 1931 Oudh. 29) the Government was held not liable in respect of matters arising out of the administration of justice through its Courts.

In Secretary of State for India v. Sukhadeo, (1899) 21 All. 341, suit was brought by Sukhadeo against the Secretary of State to recover certain property which had been seized by a magistrate in satisfaction of a fine imposed on his son. The Secretary of State was held not liable for the seizure of property by the Court. Similarly acts of the official receiver in the discharge of his duties under the orders of the Court were held to impose no liability on the Secretary of State in Ram Sankar v. Secretary of State (A.I.R. 1932 All. 575).
and was not liable for damages for the injury sustained by the plaintiff through coming into contact with a post set up by the Government on a public road. In *K. Krishnamurthy v. State of A.P.* the plaintiff lost his right palm in an accident due to the rash and negligent driving of the road roller belonging to the Government. Justice Kumarayya of the Andhra Pradesh High Court observed that the road roller was used for the maintenance of highways which was a public purpose; the Government was not undertaking any commercial activity in the discharge of that duty and so no liability would be attached.

Strictly speaking, maintenance of public paths or highways is part of the welfare functions undertaken by the Government in the interest of the public at large. The inclusion of this function in the category of sovereign functions reveals the reluctance of the Indian Judiciary to deviate from the laissez-faire judicial thinking.

**Act of State**

Act of State is a defence in the hands of the Government to get immunity from suits. In International law, "an act of State is an act of the executive as a matter of policy performed in the course of its relations with another State including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown." According to this definition, there must be involved the relations with another State or the subject of another State for the concept of act of State to become operative. But the Courts in India have characterised a wide variety of governmental activities as act of State so as to uphold the Government's claim of absolute immunity from liabilities arising out of torts. Acquisition of territories by

34. A.I.R. 1922 All. 276.
35. (1911) 38 I.L.R. Cal. 797.
the sovereign Government, integration or cession of Indian States with the Dominion of India, resumption of property by the Government, acts of governors acting on behalf of the Government of India were interpreted as act of State to confer sovereign immunity in respect of such acts. This judicial tendency seems to be prompted by the eagerness to protect the Dominion of India from diverse claims which would have otherwise become enforceable against it in numerous grants and agreements entered into between former native states and their


39. Gujarat v. Vohra Fiddali (A.I.R. 1964 S.C. 1043). In this case forest rights were granted by the ruler of sant to some persons. Later sant merged into the Dominion of India. The new Government repudiated the grants made by the former ruler. In a suit against the Government the Supreme Court held that integration of Indian States with the Dominion of India was an act of State and so the grantees of forest rights by the former ruler could not enforce those rights against the new sovereign.

40. In Buland Sugar Co. v. Union of India (A.I.R. 1962 All. 425) the appellant was granted through agreement concession in respect of excise duty by the former rule of Rampur State which was ceded to the Dominion of India in 1949. After the cession the Union of India ignored the previous agreement. Action against the Government failed as the new sovereign had not recognised the previous rights.

41. In State of Saurashtra v. Menon Haji Ismail (A.I.R. 1959 S.C. 1383) the administration of the princely State of Junagadh was taken over by the Government of India. The administrator resumed same property which had been gifted by the former Nawab of Junagadh. A suit against the Government of India claiming the price of the property so resumed, failed as resumption of property by the administration was interpreted as an act of State.

42. In Cipriano v. Union of India (A.I.R. 1969 Goa 76) the Government of India acquired the territories of Goa, Daman and Diu from the Portuguese in 1961. Later the Governor of these territories acting on behalf of the Government of India passed an order closing the Air Transport Service of Portuguese India (T.A.I.P.). This was challenged. But the High Court dismissed the petition characterising the acts of the Military Governor as an act of State.
subjects. The pitiable condition of the judicial process in the past has been described in no better words than the following.

"The defeated and impoverished princes of Hindustan who had no sovereign powers after their defeat were raised to the status of sovereign on a par with the status of His Britanic Majesty so that all agreements entered into with them by the East India Company could be violated without they ever getting a chance to agitate their case before a court of law". 43

This line of cases reveal the diplomacy of the Indian judiciary at the infancy of the Indian Republic rather than the traditional craving for individual justice to the citizens. Further the courts allowed the defence of act of State doctrine even against the subjects of the same State. Accordingly acts done in the exercise of sovereign powers of the State in times of war, insurrection, rebellion or other emergency of a like character affecting the person or the property of the subjects were saved if the necessity or reasonableness of the action was proved by the State claiming immunity. 44 In this line of cases there is no foreign State or foreigner involved. Still the courts read the concept of act of State to these cases because the judgments were written at a time when the judicial thinking was coloured by the laissez-faire philosophy. With the loosening of the grip of this ideology on the judiciary, courts have begun to think that these cases are instances where the concept of act of State is plainly inapplicable. 45


45. In State of Kerala v. Ravi Varma Raja (A.I.R. 1964 Ker. 123) the High Court of Kerala held that the formation of the State of Kerala from the former Travancore-Cochin State was not an act of State. See also Hardial Singh v. State of PEPSU, A.I.R. 1960 Punj. 644.
The influence of the social welfare concept is seen also in other areas of case law involving governmental liability. In most of the cases decided after 1950, governmental liability was imposed, giving a restrictive interpretation to the term 'sovereign function'. Accordingly commercial functions, welfare functions, civilian functions of the military etc. are included in the non-sovereign category.

**Commercial functions**

Commercial functions are interpreted by the courts to include removal of timber from the forest, running of railways, driving of vehicles, treasury business and activities in

46. In *Secretary of State v. Sheoramjee Hanumantrao*. (A.I.R. 1952 Nag. 213) the respondent purchased a certain forest coupe at an auction sale. But the Forest Range Officer hampered and interfered with the removal of timber, thereby causing loss to him. He sued the Secretary of State for damages. The liability of the Secretary of State was affirmed holding that the acts of the Forest Range Officer arose out of the exercise of commercial or merchantile functions and were not in the exercise of sovereign powers.

47. In *Pratap Chandra Biswas v. Union of India* (A.I.R. 1956 Ass. 85) the respondent undertook to facilitate transport of labourers by rail through a prohibited area. On failure to do so the plaintiff suffered loss, who in turn sued the State. The suit was allowed since in the opinion of the court the Government was carrying on business when providing transport of all description for which no sovereign immunity could be claimed. See also *Maharaja Bose v. Governor General* (A.I.R. 1952 Cal. 242).


49. In *State of U.P. v. Hindustan Lever* (A.I.R. 1972 All. 486) the Allahabad High Court held that the State was liable for the loss caused to the respondent by the embezzlement of money deposited in the treasury as treasury was running ordinary banking business which any private individual could do.
of the Public Works Department.  

In State of Rajasthan v. Vidhyawati a jeep, owned and maintained by the State of Rajasthan for the official use of the Collector, was driven rashly and negligently while being taken back after repairs from the workshop to the Collector's residence and a pedestrian was fatally injured. The Supreme Court held that the State was vicariously liable as no sovereign function was involved. The Court did not expressly overrule the ratio in P & O case but pointed out the need to abolish the practice of conferring unnecessary immunity on the Government organs. Sinha C. J. speaking for the Court observed:

"The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong and therefore, of authorising or instigating one and that he could not be sued in his own courts.... Now that we have, by our Constitution, established a Republican form of Government, and one of its objectives is to establish a socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification in principle or in public interest, that the State should not be held liable vicariously for the tortious acts of its servants."

Vidhyawati has thus opened a new trend. In this case the Court has qualified the significance of the distinction between sovereign and non-sovereign functions laid down in P & O case especially in view of the concept of a Welfare State. The multifarious activities undertaken by Government in a Welfare State involve not only use of sovereign powers but also its...

50. In State of M.P. v. Ram Pratap (A.I.R. 1961 Punj. 336) the State was held liable for injuries caused to the plaintiff by the negligent driving of a truck belonging to the Public Works Department as most of the activities carried out by the P.W.D. could be carried on by the private contractors. See also Rup Ram v. The Punjab State, A.I.R. 1972 Bom. 93.


52. Id., p. 940.
power as employer. So it is too much to claim that the State should be immuned from the consequences of tortious acts of its employees committed in the course of employment. In a democratic country, in order to meet individualised justice, the Government also should be made liable for the torts of its employees just as an ordinary employer. To achieve it, sovereign immunity should be kept at a minimum level. Sinha C.J. had made a good move in this direction in *Vidhyawati* by restricting the sovereign immunity through the liberal interpretation of non-sovereign functions. Jurists also agree with the view that this branch of law has received a fresh stimulus in the *Vidhyawati*.53

*Welfare functions*

Welfare Functions imposing governmental liability include construction of reservoir54 famine relief work,55 and maintenance of hospitals.56 It is suggested that the State can be sued by citizens for the negligence of Government employees in the course of providing welfare services like medical relief, control and prevention of epidemics and infectious diseases, the repair

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54. In *State of Mysore v. Ramachandra* (A.I.R. 1972 Bom. 93) the plaintiff sued the Government for the loss caused to him due to the negligence of the Government servants. Proper precautions were not taken by the Government servants to prevent the overflow of a reservoir constructed by the Government for supplying drinking water. The Government was directed to pay damages as the function involved was a welfare act and not an act done in the sovereign capacity.

55. In *Shyam Sunder v. State of Rajasthan* (A.I.R. 1974 S.C. 890) the plaintiff claimed damages against the Government for the death caused to her husband while travelling in a truck belonging to the P.W.D. engaged in famine relief work. The claim was upheld by the Supreme Court. Famine relief work was held a non-sovereign function.

56. In *Mohamed Shafi Suleman Kazi v. Dr. Vilas Dhondu Kavishwar*, (A.I.R. 1982 Bom. 27) running of hospitals was characterised as a welfare function coming within the category of non-sovereign function. The State was held liable for the death caused to the plaintiff's wife due to negligence of the doctor.
and removal of encroachments on public streets and public places, extinguishing and fighting fire and repairing of Government buildings.

Traditionally, acts of military employees in the discharge of their duties were held to be sovereign functions. No liability was imposed on the Government for such activities. But contrary to the earlier approach now the judicial tendency is to include civilian functions of the military in the category of non-sovereign functions. So claims of compensation for injuries sustained while transporting coal\textsuperscript{57} machineries\textsuperscript{58} and vegetables\textsuperscript{59} or while carrying hockey and basketball teams\textsuperscript{60} or officers from the place of exercise to the college of combat\textsuperscript{61} are held to be maintainable as the functions are interpreted as 'non-sovereign'.

This extension of State liability to the civilian functions of the military forces was the consequence of the change in judicial attitude induced by the emergence of the Welfare State. In \textit{Union of India v. Harbans Singh}\textsuperscript{62} the Punjab High Court was not able to delineate civilian function of the military forces as a basis of liability. In \textit{Thankarajan v. Union of India},\textsuperscript{63} the Madras High Court was rather mistaken in styling as sovereign function the transportation of carbon dioxide gas which actually was a civilian function of the military forces.

ing the Union of India from liability on the plea of sovereign immunity, the court observed that it is a mixed question of law and fact whether the accident had been caused in the exercise of the sovereign functions of the State and is not thus a matter that can be decided in the absence of pleadings and proof.

**Illegal detention**

The law till recently was that no compensation or damages was payable by the State for wrongful detention. This position has changed recently. In *Rudul Sah v. State of Bihar* 65 the petitioner was detained in prison for fourteen years even after his acquittal. The Supreme Court awarded a compensation of Rs. 35,000- against the State for the illegal act done by the officials. Chief Justice Chandrachud observed:

"The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of the individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

66

Justice Bhagawati and Justice Mukherjee decided in the same year the case of *Bhima Charan Oraon*, 67 awarding compensation of Rs. 15,000- for retaining a sane person unnecessarily in the mental asylum for six years. In the view of the Court, compensation is the only remedy for the illegal deprivation of personal liberty. For the same reason recently the Supreme Court has awarded Rs. 50,000 as compensation to Mr. Bhim Singh, a member of the Jammu and Kashmir Legislative

66. *Id.* at p. 1089.
Assembly for illegal detention and high-handedness by the police. 68

Judicial attitude shows today the tendency to widen the scope of Governmental liability through a liberal interpretation of non-sovereign functions. In the laissez-faire era almost all the functions exercised by the Government were described as sovereign functions. The area of non-sovereign functions was too narrow. In the Welfare State the multifarious activities newly undertaken by the Government are added by judicial interpretation to the category of non-sovereign functions. Besides this, the changed judicial attitude has restricted the scope of sovereign functions by including matters incidental to sovereign functions also in the non-sovereign category.

CONCLUSION

In India Government is not liable in tort for acts done in the exercise of sovereign functions. It is liable for the torts committed by its servants in the discharge of non-sovereign functions. Functions carried out by Government, which can be carried out by private individuals without any delegation of sovereign powers of the Government are non-sovereign functions. Before independence when India was a Police State, the judicial attitude was to give a very wide interpretation to the term 'sovereign function' by including matters incidental to sovereign function. Accordingly, defence and police functions, and matters incidental thereto, were included in the category of sovereign functions.

After independence we have adopted a Constitution committed to Welfarism. Judicial attitude has changed in time with the ideals of the Welfare State. Courts began to curtail sovereign immunity through a restrictive interpretation. Civilian functions of the military, acts of Public Works Department and maintenance of hospitals were thus excluded from the category of sovereign functions. By such interpretation courts attempted to impose tortious liability on Government in suitable cases.

The test of sovereign functions and non-sovereign functions cannot be treated as an appropriate one to decide the liability of Government since it lacks objectivity. If a judge is biased in favour of Government, he can hold the activity in question as a sovereign function and exclude liability. If he wants to help the aggrieved he can characterise the function as non-sovereign. This is not a satisfactory position. A balanced approach is needed.

Uncertainty in law will lead to abuse of judicial process. Justice Holms has said that uncertain justice is better than certain injustice. But can it be said that uncertain law will always do justice? Excessive dependence on precedents will not solve the problems. If courts in India are still allowed to base their decision on the old rule laid down by the British Judge in 1861 in P & O case and other outmoded principles following the case, this important branch of law will be lost in 'that codeless myriad of precedents' or in 'that wilderness of single instances'. This situation should not be allowed to continue. Legislation in this branch of law is a crying necessity. The Law Commission of India had suggested that the old distinction between sovereign and non-sovereign functions, or Governmental and non-Governmental functions, should no longer be invoked to determine the liability of the State. The Commission made many recommendations on the basis of which legislation should proceed. Accordingly Bills were introduced in Parliament more than once. But till now no law has been passed.

A perusal of the Law Commission Report on Tortious Liability of Government and the Bills that followed it shows a long list of exceptions for which the Government should not be made liable. These exceptions include act of State, act done by the President or Governor of the State in the discharge of legislative duties, acts done by the Government for training or maintaining the armed forces, police functions, judicial acts, execution of judicial process, foreign torts and acts done under

70. Ibid.
certain statutes. If the law is enacted with this long list of exceptions it will substantially weaken the Governmental liability sought to be achieved. It may be true that for the effective governance, Governmental immunity should not be ruled out completely. But this should be to the minimum degree. Essential sovereign functions should be protected. But matters incidental to them should not be protected. For instance while defence functions of Government should enjoy immunity civilian functions of the military should not. The defence of act of State should not be allowed to be raised as it is appropriate to the domain of international relations and not to relations between the State and its' citizen.

If the French theories of fault, risk and contribution are adopted in India the ends of justice will be more effectively met. Legislation should be modelled on the lines of the French Law of Governmental liability. Personal liability of the officials and the compulsion to contribute their share to the damages will make the Government officers more responsible.