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JURISPRUDENCE, INTEPRETATION AND GENERAL LAWS

MODULE 1

PAPER 1

Lesson No. and Name	Particulars of Change	Remarks
Lesson 6: Law Relating to Torts	**Introduction** "Law is the great civilizing machinery. It liberates the desire to build and subdues the desire to destroy. And if war can tear us apart, Law can unite us – out of fear, or love or reason, or all three. Law is the greatest human invention. All the rest, give man mastery over his world. Law gives him mastery over himself". Lyndon B. Johnson, TIME September 24, 1965 page 48. Justice has been regarded as one of the greatest concerns of mankind on this planet. Edmund Burke said, that justice is itself the "great standing policy of civil society". Scholars of political Science and legal theory tell us, that the administration of justice is one of the primary objects for which society was formed. Our Constitution, in its very preamble, speaks of justice as one of the great values which its makers have cherished. In the case of *Jay Laxmi Salt Words (P) Ltd vs State Of Gujarat, 1994 SCC (4) 1, JT 1994 (3) 492 judgement dated 4 May, 1994* the Supreme Court of India observed that ...." Truly speaking entire law of torts is founded and structured on morality that no one has a right to injure or harm others intentionally or even innocently. Therefore, it would be primitive to class strictly or close finality the ever-expanding and growing horizon of tortious liability. Even for social development, orderly growth of the society and cultural refineness, the liberal approach to tortious liability by courts is more conducive"	Three para has been inserted to provide more understanding
Lesson 6: Law Relating to Torts	**Role of the State -Tort Law** In any modern society, interactions between the State and the citizens are large in their number, frequent in their periodicity and important from the point of view of their effect on the lives and fortunes of citizens. Such interactions often raise legal problems, whose solution requires an application of various provisions and doctrines. A large number of the problems so arising fall	Added case laws to give more understanding about Vicarious Liability of the State

	within the area of the law of torts. This is because, where relief through a civil court is desired, the tort law figures much more frequently, than any other branch of law. By definition, a tort is a civil wrong, (not being a breach of contract or a breach of trust or other wrong) for which the remedy is unliquidated damages. It thus encompasses all wrongs for which a legal remedy is considered appropriate. It is the vast reservoir from which jurisprudence can still draw its nourishing streams. Given this importance of tort law, and given the vast role that the State performs in modern times, one would reasonably expect that the legal principles relating to an important area of tort law, namely, liability of the State in tort, would be easily ascertainable. The law in India with respect to the liability of the State for the tortious acts of its servants has become entangled with the nature and character of the role of the East India Company prior to 1858. It is therefore necessary to trace the course of development of the law on this subject, as contained in article 300 of the Constitution. Article 300(1) of the Constitution provides first, that 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; secondly, that the Government of India or the Government of a State may 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 be sued, "if this Constitution had not been enacted", and thirdly, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution. So far as the Supreme Court is concerned, *State of Rajasthan Vs. Vidyawati, AIR 1962 SC 933* is the first post-Constitution judgment on Liability of the State in Tort.	

	That was a case where the driver of a Government jeep, which was being used by the Collector of Udaipur, knocked down a person walking on the footpath by the side of a public road. The injured person died three days later, in the hospital. The legal representatives of the deceased sued the State of Rajasthan and the driver for compensation / damages for the tortious act Committed by the driver. It was found by the court, as a fact, that the driver was rash and negligent in driving the jeep and that the accident was the result of such driving on his part. The suit was decreed by the trial court, and also by the High Court. The appeal against the High Court judgment was dismissed by the Supreme Court. The Supreme Court *in State of Rajasthan Vs. Vidyawati,* which held as under: "The State of Rajasthan has not shown that the Rajasthan Union, its predecessor, was not liable by any rule of positive enactment or by Common Law. It is clear from what has been said above, that the Dominion of India, or any constituent Province of the Dominion, would have been liable in view of the provisions aforesaid of the Government of India Act, 1858. We have not been shown any provision of law, statutory or otherwise, which would exonerate the Rajasthan Union form vicarious liability for the acts of its servants, analogous to the Common Law of England. It was impossible, by reason of the maxim "The King can do no wrong", to sue the Crown for the tortious act of its servant. But it was realised in the United Kingdom, that that rule had become outmoded in the context of modern developments in statecraft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up. Section 2 (1) of the Act provides that the "Crown shall be subject to all those liabilities, in tort, to which it would be subject, if it were a private person of full age and capacity, in respect of torts committed by its servants or agents,	

	subject to the other provisions of this Act. As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the Common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also. It has not been claimed before us, that the common law of the United Kingdom, before it was altered by the said Act with effect from 1948, applied to the Rajasthan Union in 1949, or even earlier. It must, therefore, be held that the State of Rajasthan has failed to discharge the burden of establishing the case raised in Issue No. 9, set out above. "Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of tortious acts committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to "be sued in tort or in contract, and the Common law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for tortious acts of its servant. This Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of State of Bihar Vs. Abdul Majid, (1954) SCR 786: (AIR 1954 SC 24 5), this Court has recognised the right of a Government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on	

	Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Article 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But, so long as the Legislature has not expressed its intention to the contrary, it must be held that the law is what it has been, ever since the days of the East India Company. However, a different note was struck by the Supreme Court itself in *Kasturi Lal Vs. State of UP, AIR 1965 SC 1039.* In that case, the plaintiff had been arrested by the police officers on a suspicion of possessing stolen property. On a search of his person, a large quantity of gold was found and was seized under the provisions of the Code of Criminal Procedure. Ultimately, he was released, but the gold was not returned, as the Head Constable in charge of the malkhana (wherein the said gold was stored) had absconded with the gold. The plaintiff thereupon brought a suit against the State of UP for the return of the gold (or in the alternative) for damages for the loss caused to him. It was found by the courts below, that the concerned police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations. The trial court decreed the suit, but the decree was reversed on appeal by the High Court. When the matter was taken to the Supreme Court, the court found, on an appreciation of the relevant evidence, that the police officers were negligent in dealing with the plaintiff's property and also, that they had also not complied with the provisions of the UP Police Regulations in that behalf. In spite of the said holding, the Supreme Court rejected the plaintiff's claim, on the ground	

	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. The power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly categorized as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained." Having thus rejected the claim, the Supreme Court made the following pertinent observations in *Kasturi Lal Vs. State of UP (AIR 1965 SC 1039,):* "Before we part with this appeal, however, we ought to add that it is time that the Legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim from immunity in cases like this, on the same lines as has been done in England by the Crown Proceedings Act, 1947. It will be recalled that this doctrine of immunity is based on the common law principle that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and, as such, cannot be responsible for the negligence or misconduct of his servants. Another "aspect of this doctrine was that it was an attribute of sovereignty that a State cannot be sued in its own courts without its consent. This legal position has been substantially altered by the Crown Proceedings Act, 1947 (10 and 11 Geo. 6 c. 44). As Halsbury points out, "Claims against the Crown which might, before 1stJanuary, 1948, have been enforced, subject to the grant of the royal fiat, by petition of right may be enforced, as of right and without a fiat, by legal proceedings taken against the Crown. That is the effect of S. 1 of the said Act.	

	Section 2 provides for the liability of the Crown in tort in six classes of cases covered by its clauses (1) to (6). Clause (3), for instance, provides that where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been, if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown. Section 11 provides for saving in respect of acts done under prerogative and statutory powers. It is unnecessary to refer to the other provisions of this Act. Our only point in mentioning this Act is to indicate that the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State, in regard to claims made against it for tortious acts committed by its servants, was really based on the common law principle which prevailed in England; and that principle has now been substantially modified by the Crown Proceedings Act. In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told, when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature." *Distinction between Sovereign and Non-Sovereign Functions* This distinction between sovereign and non-sovereign functions was considered at some length in *N. Nagendra Rao Vs. State of AP (AIR 1994 SC 2663); (1994) 6 SCC 205*. All the earlier Indian decisions on the subject were referred to. The court enunciated the following legal principles, in its judgment:	

	"In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of the power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but, since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government, in exercise of its executive action, be sued for its decision on political or policy matters. It is in (the) public interest that for acts performed by the State, either in its legislative or executive capacity, it should not be answerable in torts. That would be illogical and impracticable. It would be in conflict with even modern notions of sovereignty". The court in the above case suggested the following tests – "One of the tests to determine if the legislative or executive function is sovereign in nature is, whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising (the) armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matters is impliedly barred." The court proceeded further, as under: "But there the immunity ends. No civilized system can permit an executive to play with the people of its county and claim that it is entitled to act in any manner, as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political	

	system today can p lace the State above (the law) as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of (the) State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity, the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for (the) sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown out, merely because it was done by an officer of the State; duty of its officials and right of the citizens are required to be reconciled, so that the rule of law in a Welfare State is not shaken". The court emphasised the element of Welfare State in these words: "In (a) Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order, but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers, for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. Which are among the primary and	

	inalienable functions of a constitutional Government, the State cannot claim any immunity. The Court linked together the State and the officers: "The determination of vicarious liability of the State being linked with (the) negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable, the State cannot be sued." In the case of *Jay Laxmi Salt Words (P) Ltd vs State Of Gujarat, 1994 SCC (4) 1, JT 1994 (3) 492 judgement dated 4 May, 1994* the Supreme Court of India observed that injury and damage are two basic ingredients of tort. Although these may be found in contract as well but the violations which may result in tortious liability are breach of duty primarily fixed by the law while in contract they are fixed by the parties themselves. Further in tort the duty is towards persons generally. In contract it is towards specific person or persons. An action for tort is usually a claim for pecuniary compensation in respect of damages suffered as a result of the invasion of a legally protected interest. But law of torts being a developing law its frontiers are incapable of being strictly barricaded. Liability in tort which in course of time has become known as 'strict liability', 'absolute liability', 'fault liability' have all gradually grown and with passage of time have become firmly entrenched. 'Absolute liability' or "special use bringing with it increased dangers to others"(Rylands v. Fletcher') and 'fault liability' are different forms which give rise to action in torts. The distance (sic difference) between 'strict liability' and 'fault liability' arises from presence and absence of mental element. A breach of legal duty wilfully, or deliberately or even maliciously is negligence emanating from fault liability but injury or damage resulting without any intention yet due to lack of foresight etc. is strict liability. Since duty is the primary yardstick to determine the tortious liability its ambit keeps on widening on the touchstone of fairness, practicality of the situation etc. In Donoghue v. *Stevenson (1932) AC 562: 1932 All ER Rep 1 10 (1978) AC728 :(1977) 2*	

	All ER492 a manufacturer was held to be liable to ultimate consumer on the principle of duty to care. In *Anns v. Merton London Borough Council* it was, rightly, observed: "[T]he broad general principle of liability for foreseeable damage is so widely applicable that the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not....."	

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