Chapter - VI

LEGAL FRAMEWORK OF NEGLIGENCE & JUDICIAL TREND IN INDIA
India is a common law country and most of the judicial techniques are of common law origins. The law of negligence is no exception to it. However the law of negligence in India has evolved into two distinct domains i.e. statutory negligence and open-ended principles of negligence derived from case laws. In this chapter, the research scholar has taken an overview of the significant legislations wherein negligence has been statutorily attributed to the defendant by virtue of act/omission and then analyzed the judicial approach to it as well as the open-ended principles of negligence by discussing relevant case laws. Realizing that the horizon is too broad to cover within the scope of this work, the research scholar has discussed a few significant and relevant legislations in the following paragraphs.

**The Motor Vehicles Act, 1988:**

Originally enacted in the year 1939, during the British rule in India, the Motor Vehicles Act has undergone a sea of changes between 1939 and 1988. The act has been amended comprehensively in the year 1988 in tune with the welfare State ideals of India and in order to meet the growing demands of its people. The Motor Vehicles Act, 1988, between sections 165 and 176 comprehensively provides for the establishment of claims tribunals by the state governments, the procedure for applying compensation by the victims, procedure and powers of the claim tribunals in making the awards, liability of the insurance companies, enabling the state government to make rules, awarding interest on the compensation amount, providing for appeals etc. The characteristic feature of the act is that it accepts and fixes the cases of road accident victims as tortuous liability upon the culprits who cause the road accidents. The insurance companies are burdened with vicarious liability in paying compensation amount to the victims, though they may not be directly causing any accident.
While awarding compensation to an accident victim, the tribunal takes into account the nature of the injury he suffered, whether it is simple or grievous and if grievous, the duration of the treatment he has taken for treatment, the medical expenses involved, the percentage of permanent disability the victim has sustained, his loss of income etc. In order to assess the permanent disability of the victim, the Tribunal invariably relies upon the medical opinion of a medical expert.

**The Fatal Accidents Act, 1855:**

The Fatal Accidents Act 1855 provides specifically for payment of damages by any person who by wrongful act, neglect or default cause the death of another person. The Act gives certain relatives of the person killed a right to claim damages in their own name. The damages are assessed in accordance with the pecuniary loss occasioned to the relations by the death, which is based on the earning capacity of the deceased during the normal expectation of his life, prior to his death. An employer may be liable to pay damages for injury arising from an accident caused by the negligence of the employer, Defects in machinery, Carelessness of the fellow employee etc. Contributory negligence, i.e. negligence on the part of the injured workmen does not fully absolve the employer from his liability. There is no limit to the amount of damage, which of may be awarded to the aggrieved party.

**The Consumer Protection Act, 1986:**

This Act was introduced to safeguard the interests of ordinary consumers in their daily transactions like the buying of goods or hiring of services. Some of the rights that are protected include the right to information about the goods or services, the right not to be given defective goods, unfair trade practices, faulty services, exploitation etc. A consumer has been defined as any person who either buys goods or hires or avails of any services. This definition has been expanded by the courts and now it includes amongst others, medical patients in government and private hospitals, persons allotted houses by the government etc. The Act provides for a three-tier forum to redress consumer disputes. The District Forum consist of one president and two other members (one of whom is to be a woman). The president of the Forum is a person who is, or has been qualified to be
a District Judge, and other members are persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. They can hear the case involving amount of Rs. Twenty Lacs. It is situated in the District head quarters. A State Commission has jurisdiction in whole of the State for which it is constituted. It can hear the cases involving the amount more than rupees twenty lacs and up to rupees one crore. It has also jurisdiction to hear appeal against the orders of District Forum of that particular State. It is situated in the capital of the State. The National Commission consists of a president, and four other members (one of whom is to be a woman). The president should be the one who is or has been a Judge of the Supreme Court, and the members should be the persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. Apart from the above, the Act also promotes consumer education.

The Carrier Act 1865:

The object of the Act was not only to limit the liability of the carriers, but also to declare the liability if the carriers any contract of bargain which seeks to defeat the liability of the carriers as enacted by law would defeat the provisions of the Act. A common carrier may be any individual, firm or company, which transports goods as regular business for money, over land or inland waterways. A common carrier is an insurer of goods, but there are certain exceptions to this rule. He is not liable for any loss or damage to goods caused by an act of God or natural calamity, like the vehicle being struck by lightening. He has no liability in case of injury caused by "enemies of the state e.g. foreign with whom the country may be at war. He cannot be held responsible for loss due to any inherent vice or natural deterioration of goods in transit viz., evaporation of liquids, deterioration of fruit etc. He is not liable for any loss due to neglect on the part of consignee.

The Indian Railways Act, 1890:

The Indian Railways Act, 1890 lays down the duties and liabilities of the railway administration as a career of goods. These are similar to the duties and
liabilities of common careers. Railways are liable for loss, destruction or non-delivery of goods arising from any cause except the acts of God, war or public enemies, fire, explosion or any unforeseen risk, arrest, restraint or seizure under legal process, restrictions imposed by the Central or State Governments, natural deterioration or wastage due to inherent defect, vice or quality of goods; latent defects, and any act of omission or negligence on the part of consignor or his agents.

The Railway Claims Tribunal Act, 1987:

A perusal of the objective of the Act reveals that it is an Act to provide for establishment of a Railway Claims Tribunal for inquiring into and determining claims against a railway administration for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it to be carried by railway or for the refund of fares or freight or for compensation for death or injury to passengers occurring as a result of railway accidents [or untoward incidents] and for matters connected therewith or incidental thereto.

The substantive liability of the railway administration for loss, destruction, damage, non delivery or deterioration of goods entrusted to them for carriage and for death or injuries or loss to a passenger in a railway accident or untoward incident is laid down in The Railways Act 1989. The consignor/consignees and passengers or their representatives prefer claims for compensation for loss of and damage to, booked goods and are not satisfied with the decisions of the railway administration, file suits in courts of law. Claims for compensation for death of or injury or loss etc to passengers in train accidents are at present settled by claims commissioners. As the litigation in the courts of law and before the claims commissioners is very protracted, it has been decided to set up a specialized Tribunal for speedy adjudication of such claims. The setting up of such a claims Tribunal with Benches in different parts of the country, and with judicial and technical members, will provide much relief to the rail users by way of expeditious payment of compensation to the victims of rail accidents and to those whose goods are lost or damaged in rail-transit.
Public Liability Insurance Act, 1991:
A perusal of the objective of the Act reveals that it is an Act to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for matters connected therewith or incidental thereto. Sec 3 of the Act, imposes liability to give relief in certain cases on principles of no fault - (1) Where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in the Schedule for such death, injury or damage. Sub Sec (2) of Sec 3 states that in any claim for relief under sub-section (1) (hereinafter referred to in this Act as claim for relief), the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.

Article 300 of the Constitution of India:
The doctrine of sovereign immunity has got its genesis in Article 300 of the Indian Constitution, which reads as (1) The Governor 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: (a) 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. However the development of case law through judicial precedents has now severely curtailed the protection from liability for the state, for negligence by its employees.
Apart from the above stated legislations, there is number of other statutes like the Workmen's Compensation Act 1923 which provides that compensation shall be provided to a workman for any injury suffered during the course of his employment or to his dependents in the case of his death. Each of these above legislations has been discussed by the research scholar in this chapter as well as in the preceding chapter.

While the above provides for statutory negligence, the law of negligence in India has evolved with judicial pronouncements. Judiciary in India initially applied common law principles on the law of negligence received from Common Law Jurisdiction and applied the same in appropriate cases. In a suit for damages for negligence Nagpur High Court ruled that there must be duty to take care: a breach of that duty and such breach was the proximate cause of loss or injury. In a case where the defendant had stored large quantity of cotton on the ground floor of his residential house for a long lime without any verification and unwatched and the cotton ignited with the consequences that the adjoining house was destroyed, the Allahabad High Court held that the defendant was liable in damages to the plaintiff for negligence.\textsuperscript{691} In a case where the vendor sold goods wrongly labeled and acting upon the label damage was caused to the purchaser, the court held that the vendor's plea of contributory negligence failed as the vendor had his duty to put on right labels\textsuperscript{692} The Calcutta High Court ruled "...negligence is the effective cause of an injury when it has in fact caused that injury as a direct and natural consequence. When negligence has once been established, liability follows for all the consequences which are in fact the direct and natural outcome of it, whether the injury was a consequence foreseen or not. To determine liability the law will consider the proximate and not remote cause of an injury."\textsuperscript{693} The Indian courts do not impose any duty upon the occupier of land to lake care to a trespasser but such a duty lies in the case of a licensee. The Bombay High Court holds the view that in the case of a licensee, the occupier of land had a duty not to set any thing in the nature of a trap on the land and to warn the licensee against any concealed danger.\textsuperscript{694} Calcutta High Court also held the same view.\textsuperscript{695}

\begin{itemize}
  \item \textsuperscript{691} 1926.A11 695.
  \item \textsuperscript{692} 34 I.C.373.
  \item \textsuperscript{693} 47 C. 1027: 33 C.I..J. 72
  \item \textsuperscript{694} 1932 Bom. 452.
\end{itemize}
State of Bihar v S. K. Mukherjee\textsuperscript{696} the facts were that the plaintiff respondent filed a suit claiming damages on account of the fatal accident met by his son, Raghunath, due to a wrongful act and apparent negligence on the part of the appellant Raghunath who was in the employment of the appellant-State was returning from Birpur to Vardal in the course of his employment.

On his way he was crossing the river Kosi in a boat belonging to the Kosi Project Department of the appellant. The boat capsized in the river and Raghunath and two others died by drowning in the river. It was contended by the plaintiff that the death of Raghunath was due to the negligence of the officers of the appellant in not providing the boat with any life saving device and that the boat was old and worn out.

The High Court of Patna, while confirming the decision of the trial Court, while considering the rules framed under the Bengal Ferries Act noted that there was no specific mention in them about the provision of the life saving device. The Court, however, held that the liability of the master, is not limited to failure to perform statutory obligations so as to make him liable for negligence and that the master owes a duty to his servants to see that reasonable care was taken for the kilter's safety. After analyzing the evidence the Court observed:

The River Kosi is well known for its furious and turbid current. It is thus obvious that the danger involved in crossing River Kosi is of greater magnitude than involved in crossing comparatively mild Rivers. In my considered opinion, a prudent or reasonable man, while providing a boat for carrying its (sic) employees in such a river during rainy season and flood, would be required to provide life saving device, in view of the hazardous nature of journey involving greater amount of risk than an ordinary river crossing. Mere provision of a boat having no leakage, painted and in proper working condition is not enough to ensure safe journey in such a perilous river, but provision for some life saving device becomes necessary in view of the magnitude of the risk to minimize it. The provisions for transport mean provision for a safe transport, which in turn,
implies provision for safely in case of hazards in such a river. The imminence of risk and perilous nature of journey by boat at that point in River Kosi, especially during rainy season as in the instant case, made it obligatory on the part of the defendant to provide life saving device on the boat in question and its failure showed lack of reasonable care and precaution, which a master was exacted to take in a situation like this and it amounted to an act of negligence on the part of (he defendant on the facts and in the circumstances of the case."

In a case where a young child aged about 6 years was on the left side of the road and when he was trying to cross the road to reach his school on the other side of the road, he was knocked down by a motorcyclist. Goa High Court held that the motorcyclist, as a reasonable man, could have guessed that the child would cross the road any moment. The Court held the motorcyclist liable to pay compensation.

In a case where a person was knocked down by a goods train at a railway station and had suffered death, the Allahabad High Court held that the deceased was in a position of a licensee or an invitee on the tracks and the accident occurred on account of the high speed of the goods train. The care and skill needed at such a speed was not employed by the driver and that the accident was due to the negligence and fault on the part of the railways.

In a case where the plaintiff-respondent was traveling in a double-decker bus belonging to the defaulting appellant and had his seat just over the rear left wheel of the bus and the inner lyre of that wheel had a burst causing the plaintiff to suffer serious injury and where the defendant pleaded that the accident was due to latent defect not discoverable by the exercise of reasonable care, the Calcutta High Court relying on the decisions in Henderson v Henry & Sons and Madhya Pradesh State Road Transport Corporation v Sudhakar, held that the appellant

697 AIR 1976 Goa 1
698 Imman v Union of India AIR 1976 All. 85.
699 (1969) 3 All E. R. 756
700 AIR 1968 M.P. 47

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could not rely on the latent defect, because the evidence of due care as alleged to be taken by the appellant was unsatisfactory and unreliable.

In a case where the plaintiff-respondent, a young boy attending a school, alighted from a bus at place conspicuously marked as a zone "School Zone" and was crossing the road and where he was in the process of closely following 2-3 students who were ahead of him and had just crossed the road and where the plaintiff while was half-way across a police van, registered in the name of the defendant, dashed against the plaintiff causing him serious injury, Karnataka High Court held\(^701\) that the driver was put on notice of the situation which should have compelled him to slow down the vehicle and drive the same with necessary caution like any other prudent man. The Court followed the decision in \textit{London Passenger Transport Board v Upson}\(^702\). In this case the House of Lords held: "No speed is reasonable which is not adjusted to the circumstances of the moment, including the fact that the driver is approaching a pedestrian crossing and may have to pull up quickly and within a very short distance."

In \textit{Johorilalv P.C.H. Reddy},\(^703\) the facts were: The plaintiff appellant was driving a scooter rickshaw from a side road to the main road. When he reached the junction of the main road and the side road, he saw an army truck coming fast from one side of the main road, and, therefore, stopped the scooter rickshaw so as to let the truck pass. The latter, however, dashed against the scooter rickshaw overturning it and causing serious injuries to the plaintiff. The Rajasthan High Court held that the defendant was not driving the truck rashly. The Court, however, found that as the defendant had allowed one other person to sit on the left side when he was driving the vehicle having its steering wheel on the left, this must have obstructed his left vision and prevented him from locating the rickshaw at the road junction. According to Section 83 of the Motor Vehicles Act, the driver of a motor vehicle is not to allow any person to sit or stand in such a manner or position as to hamper the driver in the control of the vehicle. The Court, therefore, held that the violation of the mandatory rule contained in Section 83 per se

\(^{701}\) \textit{Supdt. of Police Dharwar v N.B. Golgali} AIR 1975 Kant. 138

\(^{702}\) (1949) A. C. 155

\(^{703}\) AIR 1975 Raj 232.
established the negligence of the defendant truck driver, and that he was liable for causing the accident.

In *Chaurasia and Co. Chhairapur v Pramila*, the facts were: When the driver of a passenger bus belonging to the defendant company reached a causeway over a river, he found the flood waters of the river flowing over it. The water over the cause-way was about two feet deep and the stones embedded on the sides were completely submerged and not visible. The water was rising. The driver of the bus, in spite of all this, instead of wailing for the water to recede, tried to drive the bus over the cause-way. In this attempt the bus skidded and its wheel got stuck up in the stones embedded on the sides of the cause-way. The passengers remained inside the bus, but when they found the water rising, they climbed over the top of the bus. After some time the bus was swept away and the passengers were thrown in the surging waters. Some of them were rescued but seven persons died. On a petition by the dependants of the deceased, it was, *inter alia*, contended by the appellant that there was no negligence on the part of the bus driver. It was argued that the water over the cause-way was not much and that it was not unreasonable to attempt to cross the cause-way. It was pointed out that a police vehicle had crossed the river before the bus attempted to cross it.

The Madhya Pradesh High Court negatives the contention of the defendant and held; in the circumstances, it was extremely dangerous for the safety of the passengers to drive the bus over the cause-way and that the driver should have waited till the water receded. The Court, therefore, held that the driver was clearly in breach of his duty which he owed to the passengers for their safety and was, therefore, negligent.

In *Union of India v Hindustan Lever Ltd.*, the Punjab High Court relying upon the decisions in *Bally v Geddes*, (1938) I K. B. 156 and *Caswell v Powell Duffryn Associated Collieries Ltd.*, [(1940) A. c. 152] held: "In case of statutory negligence neither the defence of contributory negligence nor that of composite negligence can be open or available to the wrong doer". The Court further held

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704 AIR 1975 M.P. 31
705 AIR 1475 Punjab 259
that Union of India was liable for the accident caused due to the negligence of the gate-man on duty.

In Collector, Ganjam v Chandramma Das\textsuperscript{706} the facts were: Two persons who had been to the Medical College Hospital on business died of serious injuries caused by the sudden fall of the can ever portico slab of the out-patient block of me Hospital. In the suits by the dependent numbers of the deceased for compensation it was contended by the defendant that the sudden collapse of the portico was due not to defective construction but to reasons beyond the control of anybody and to sudden heavy rain accompanied by thunder and lightning which must have resulted in heavy vibrations causing heavy movement not provided in the normal design.

The Orissa High Court concurring with the decision of the lower Court negatives the contentions of the defendant and decided in favour of the plaintiffs-respondents. The Court relied upon the decisions in Municipal Corporation of Delhi v Subhagwanti,\textsuperscript{707} and Shyam Sunder v State of Rajasthan.\textsuperscript{708} The Court observed:

"The collapse of cantilever portico which was newly constructed speaks its own story. There was no critique, thunder or lightning by which it fell down. The fall must be ascribed to the inherited defect in the construction. Public honesty has very much deteriorated in recent aims. It is more or less a matter of common knowledge that contractors do not give the requisite quantity of cement and stone in the construction of building which would guarantee safety. Obviously there must have been bad design: If there was no defect it is difficult to imagine that the portico of such a costly building would collapse within two or three years of its construction. The maxim \textit{res ipsa loquitor} fully applies to the facts of the case. It was exclusively within the special knowledge of the defendant to explain how the portico of a new building collapsed. They have failed to do so by any satisfactory account."

\textsuperscript{706} AIR 1975 Orissa 205.
\textsuperscript{707} AIR 1966 SC 17
\textsuperscript{708} AIR 1974 SC 890
In Primal Banwarilal v Union of India, the Calcutta High Court observed:

"The categories of negligence are never closed and there will always remain room for diversity of views in determining the standard of care expected of the hypothetical reasonable man. It is ultimately left to the judge to decide what, in the circumstances of a particular case, the reasonable man would have done. The factors which guide the judge in the creative process depend upon the judgment of the relative values of the conflicting interests involved. How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others.

In Ganga Sugar Corporation v Sukhbir Singh, the facts were: A jeep owned by the Appellant Corporation was being driven by Lal Singh, the driver. After going some distance the driver found his way blocked by a Barat Party; thereupon he got down from the jeep, leaving the ignition keys in the jeep and went away for some work. While driver had gone away, some one drove the jeep and caused an accident causing serious injuries to Sukhbir Singh, the plaintiff respondent.

Mathur J. held that Lal Singh was guilty of negligence in leaving the keys in the jeep as he ought to have anticipated that some one would get into the jeep and try to drive it. The Court also formulated certain rules:

I. It is not correct that in every case when the damage is caused by the intervention of a third party, driver and the masters are not liable;

II. The driver and consequently the master, in such cases are liable if the driver was guilty of initial negligence and if, as a reasonable man, he could have anticipated the intervention of a third party.

III. The driver, and consequently the master, will not be responsible if the damage is caused by a fresh independent cause which in the circumstances, the driver, as a reasonable man, could not have anticipated.
In *Sushama Mitra v M. P. S. R. T. Corporation*, the Madhya Pradesh High Court held:

"I have not been referred to any Indian or English authority in which the duty of care may have been recognized in favour of a passenger who keeps his elbow out. But absences of a direct precedent to cover the facts of the instant case do not imply that no duty situation can be recognized in this case".

In *Kailas Sizing Works v Bhivandi Municipality*, the plaintiff/appellants filed a suit for recovery of a sum of Rs. 1,00,012.00 as damages for loss caused to their property by flood water due to the negligence of the defendant. The principal defence taken by the defendant was that a suit of this nature was barred by the provisions of Sec. 167 of the Bombay District Municipalities Act, 1901.

The Bombay High Court rejected the contention of the defendant and held that the execution of the work by constructing the nullah and by putting a slab on it was carried out with willful and wanton negligence without good faith causing damage to the plaintiffs property which was proved at Rs.54, 560.00 and a decree for that amount was passed in favour of the plaintiffs. The High Court took the view that the immunity provided in the Act was not absolute immunity in view of the acts done by the Municipality negligently. The Court laid emphasis on "good faith" i.e. honesty and not on negligence. The Court further held, "If the municipality acts in discharging of statutory duties, as long as it acts honestly, no action will be taken against it even if it acted negligently. But if it did not act honestly, the negligence would be actionable." Good faith was explained by the Court as upright mental attitude and clear conscience. A person who acts in spite of the knowledge and consciousness that injury to some one is likely to result from his act of omission, or acts with wanton or willful negligence in spite of such knowledge or consciousness, cannot be said to act with uprightness and, therefore, he cannot be said to act with honesty or in good faith.

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711 AIR 1974 MP 68.
712 1979 Bom 127.
In *Ishwar Devi v Union of India*, the facts were; the deceased boarded a stationary bus which was standing at bus slop on a twenty feet wide road about five or six feel behind another bus. When the deceased was on the foot-board and most part of his body was outside the bus, the conductor of the bus who was standing near the door gave the signal bell to the driver to start the bus and (the bus moved passing by the side of the front bus but so closely that the deceased got squeezed between the two buses and sustained fatal injuries. The heirs of the deceased claimed a sum of Rs. 4, 50,000.00 as compensation under Section 110A of the Motor Vehicles Act.

The claim case was dismissed by the Claims Tribune on the ground that a rash and negligent act was not established. The Delhi High Court held that the bus was stationary when the deceased boarded it and that when he was still on the foot-board with a part of the body outside the bus, the conductor gave the bell and the bus moved crushing the deceased between the two buses. High Court emphasized that the safety of the public who traveled by the public conveyances was the primary concern of the conductor and the driver.

In *M/s. Mukesh Textile Mills (P) Ltd. v H. R. Subramanya Sastri & Ors.*, the facts were: The defendant was the owner of a sugar factory. Adjacent to the Sugar factory, the plaintiffs owned large extents of land, which were cultivated by a water channel, which ran in between the premises of the defendants' Sugar factory and the plaintiffs' lands. Now the defendant stored large quantities of molasses, a byproduct in the manufacture of sugar, in a mud tank, which was close to the plaintiff's land, separated only by the said water channel. Admittedly, rodents had burrowed holes into the earthen embankment of the tank, which renders its walls weak, and as a result, one night, there was a breach of the tank and a large quantity of molasses in the tank overflowed and emptied them into the water channel and through the water-channel, inundated, and spread the plaintiff's land. The inundation of water, fully laden with the molasses, damaged the standing paddy and sugarcane crops raised by the plaintiff.

713 AIR 1969 Delhi 185.
714 AIR 1987 Karnataka 87 (DB.).
In the facts and circumstances of the case question arose, whether the defendant could be held liable for the damage caused to the plaintiff's crops by the breach of his molasses filled tank. The Court held:

“... the defendant was wholly liable for the damage caused to the plaintiff's crops by the breach of his molasses tank. The liability of the defendant rested at least on two principles. One was that the defendant, who had stored large quantities of molasses in a mud tank, had the duty to take reasonable care in the matter of maintenance, in a suite of good repair of the embankments of the tank. The duty, no doubt, was not simply to act carefully but not to cause injury carelessly”.

It was admitted in the instant case that the rodents had burrowed boles into the earthen embankment of the tank rendering its walls weak. Both from the foreseeability test and of initial causation it had to be held that the defendant was liable. The defendant could reasonably have foreseen that damage was likely to be caused if there was a breach of the tank. There was clearly a duty situation and the defendant had omitted to do what a reasonable man, in those circumstances, could have done or would not have omitted to do. The damage that was likely to occur to the neighbouring land by a breach of a tank in which was stored 8000 tones of molasses was reasonably foreseeable, endangering a duty situation. No defence was forthcoming that the tank had been inspected periodically and all reasonable steps taken to keep it in a state of good repair.

So far as the first principle is concerned the court relied upon the principle laid down in Donoghue v Stevenson.

The second ground of liability was this: The defendant by storing a large quantity of molasses on the land had put the land to a non-natural user, and if a person collected on his premises, things which were intrinsically dangerous or might become dangerous, if they escaped, he had a liability, if things so stored escaped and caused damage. The Court followed the decision reported in [1868] L. R. 3 H. L. 330. The Court further held: There was yet another side. By storing a large quantity of a liquid close to the plaintiff's boundary, the defendant chose to assume a relationship with an outsider and the law required of him to conduct
himself as a reasonable man with adequate skill, knowledge and resources would have conducted himself. The Court relied upon the decision in *British Railway Board v Harrington*,\(^7\) which formulated the following principle:

"If a person chooses to assume a relationship with a member of the public, say by setting out to drive a car or to construct a building fronting a highway, the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources. He will not be heard to say that in fact he could not attain that standard he ought not to assume the responsibility which the relationship involves.....But an occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him. When they do so he must act in a human manner— that is not asking too much of him but I do not see why he should be required to do more."

The Court in conclusion observed;

"Thus looked at from any side, the present one was a clear case of a duty-situation and also one of omission to discharge it on the part of the defendant, rendering the defendant liable for the consequence of the escape of the fluid from tanker. The plea of *novus actus interveniens* was not available to the defendant. The chain of events set into motion by the negligence of the defendant, in improper maintenance of the tank, which resulted in the breach of the tank and the damage caused to the neighbour's crops, constituted a direct and uninterrupted chain of events. It all happened in the night. The molasses contaminated the water in the channel and, through it, the crops. There was no conscious act of volition of an independent 3rd-party superimposed on the chain of events. Therefore, the defence of "*novas actus interveniens*" could not be availed of in the instant case."

In a case where a female patient had died as a result of an operation performed by the doctor-surgeon, but for failure to prove negligence, the Madhya Pradesh High Court made a distinction between a mistaken diagnosis and

negligent diagnosis and refused to hold that there was any negligence on the part of the defendant surgeon. The Court further held that there was no negligence, even though there might have been an error of judgment on the part of the doctor.\textsuperscript{716} The court observed that the defendant surgeon was keen to have the patient's urine examined before undertaking the operation but unfortunately the sample of urine could not be obtained despite catheterization. Naturally, therefore, he had to satisfy himself with the clinical examination done. The blood pressure was normal; the patient had no history of hypertension, no edema, no anemia, no retinal changes, and no symptoms of uremia indicative of kidney disease. Some such symptoms, had they been present, would have warned the surgeon to take precautions against the possibility of the Kidneys being diseased. Renal failure is generally associated with arterial hyper-tension. Kidneys are, therefore, considered as a part of cardio-vascular-renal disease. For granular casts, microscopic examination was necessary and a technician usually was not trained to give microscopic findings.

Where a person entrusts a motor vehicle for repairs to another person, he would be liable for accidental injuries caused by the use of the motor vehicle in the workshop even if he himself was not to be blamed. Motor Vehicle is an inherently dangerous and hazardous object.\textsuperscript{717}

The passengers who travel by bus generally are in the habit of sitting adjoining to windows and rest their arms on the window-sills or in the window railing in such a manner that the elbows are projected from the windows to some extent. In such cases when accident takes place injuring arms or elbows, Gujarat High Court held:\textsuperscript{718}

"The duty in such cases consists in taking precautions to ensure that a passenger who is selling with his arm or any part of his body resting on the window sill or the window rail or in such a way that it reasonably protrudes there from, does not receive any injury when the vehicle crosses an on-coming vehicle and, for that purpose, he is expected to drive the

\textsuperscript{716} J. N Shrivastava v Ram Behari Lal AIR 1982 M.P. 132.
\textsuperscript{717} Devinder Singh v Mangal Singh AIR 1981 Pt. II.53.
\textsuperscript{718} Gujarat State Transport, Ahmedabad v Keshavalal Somnath Panchal, AIR 1981 Guj. 205.
vehicle in such a manner as to leave sufficient space between the two vehicles. Similar is the duty owed by the driver of the vehicle coming from the opposite direction while crossing a passenger bus".

Where a driver while driving a truck had to swerve to the right to save a cyclist and, in doing so, caused the death of a pedestrian. Punjab High Court held that there was distinction between a mere error of judgment and negligence. The action of the driver could not be termed rash or negligent.719

In Safdar Hussain v Union of India,720 the facts were:

"The chief booking clerk was rendering a gratuitous duty in addition to his own by keeping the cash in an iron safe in accordance with the usual practice of placing the key of the safe-almirah and locking it with his personal lock before leaving for home. One day the almirah lock was found broken open and the cash in the safe was found missing."

The question of standard of care to be taken by the employees arose. To answer the question Allahabad High Court relied upon the Halsbury’s Laws of England721 which provides:- The rule is that, "nor can any one be said to be negligent merely because he fails to make provision against an accident which he could not be reasonably expected to foresee".

The court observed that the railway had not provided any special place to keep their key of the safe almirah on leaving duty and the practice to leave it hidden in one’s almirah was consistent with that of the previous clerk, nor were there rules or orders for keeping it in one’s personal custody. Thus, the conduct of the employee could not amount to negligence, so as to render him liable.

A picnic party of children of a school, run by the Municipality, was taken out under the supervision of two teachers. One of the children was found drowned in a river near the picnic spot. The teachers left the party for a while after giving

719 Noher Singh v The Slate of Punjab [1979] 81 Punjab L.R. 631
720 AIR 1978 All 53.
them necessary instructions to take their meats. It was during their absence from the picnic spot that the accident occurred. In dealing with this case the Gujarat High Court observed:722 "the test would be of a reasonably careful parent; and that has to apply to the teacher under whose supervision and care the school children are sent. Accordingly, the contours of negligence in such cases are to be confined to the fact that when picnics continue to be arranged, young children cannot be left at the whim and caprice of supervising teachers."

The supervisory teachers, therefore, could not escape liability. The Court held the employer Municipal Corporation vicariously liable. But the Court considering the educational value of the picnic, directed the corporation to pay the entire decretal amount to the plaintiff.

The question of composite negligence arose in *Hira Devi v Bhabakanti*.723 The court observed: "Where a person is injured without any negligence on his part but as a result of the combined negligence of two other persons it is not a case of contributory negligence but a case of what has been described by Pollock as injury by composite negligence."

The doctrine of identification was considered in *Madras Motor and General Insurance Co. Ltd. v Nanjamma*.724 A motor car carrying nine persons including the driver had a head on collision with a lorry coming from the opposite direction. As a result seven persons including the driver of the car suffered fatal injuries. The Court held that the accident was due to negligence of both the driver of the lorry as well as the driver of the car. The Court further held that the claimants were entitled to damages in respect of death of six persons in the car and the doctrine of Identification did not exist any longer.

The Doctrine of Sovereign Immunity was raised in the *State of Orissa v Smt. Amruta Devi*.725 The Court observed:

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722 Shivkar Motasing(Smt) v Ram Naresh Muni Singh AIR 1978 Guj. 115.
724 AIR 1977 Kant 46.
725 AIR 1987 Orissa 217 (D.B) Per H.L. Agarwal & G.B.Patnaik J.
"The State is liable for the damages occasioned by the negligence of its servants by applying the principles of vicarious liability. The Government, however, is not liable for the tortious act which has been committed by its servants in exercise of its sovereign powers i.e. the power cannot be lawfully exercised by a sovereign/or a person by virtue of a delegation of sovereign rights. When the State pleads immunity against the claim for damages resulting from injury caused by the negligent act of its servants, the area of employment referable to sovereign power must be strictly determined before such a plea is upheld.

In order to sustain the plea, it has to be found out that the impugned act was committed in course of an undertaking or an employment which is referable to the exercise of the delegated sovereign powers. There is a cardinal point of distinction between an ordinary sovereign act and sovereign functions. In order, therefore, to determine the question as to whether the claim of immunity should or should not be allowed, the nature of the act, the transaction in course of which it is committed and the nature of employment of the person who committed it have all to be considered. On a scrutiny of the various decisions referred by the courts in India the principle that emerges is that by sovereign power what is meant is power which cannot be lawfully exercised except by a sovereign or a private individual delegated by a sovereign to exercise the same.

Thus the plea of sovereign immunity can be available where the powers can be exercised only by a sovereign or a person by virtue of delegation of such powers to him. Carrying on a transport operation is in the nature of a commercial venture and by no stretch of imagination can be called a sovereign Act, much less than sovereign functions”.

The Orissa High Court in State of Orissa v Padma Lochan Panda, has vividly explained the sovereign functions as follows:-

I. Sovereign powers means powers which can be lawfully exercised only by a sovereign or by a person by virtue of delegation of sovereign powers.

II. The sovereign functions of the slate must necessarily include the maintenance of the army, various departments of the Government for maintenance of law and order and proper administration of the country which would include magistracy and the police and the machinery for administration of justice.

III. Where the employment in the course of which a tortious act is committed is of such a nature that any private individual can be engaged in it, then such functions are not in exercise of sovereign power.

IV. Government is vicariously liable for tortious acts of its servants which have not been committed in exercise of sovereign functions.

V. The union and the state are liable for damages for injuries caused by their servants if such injuries would render a private employee liable.

VI. The Government is not liable for tort committed by its servants even if the act was done in exercise of sovereign power.

After the development of the constitutional jurisprudence and Human Rights jurisprudence the doctrine of sovereign immunity is now out-dated.

A police officer driving a motor vehicle in hot pursuit of a person whom he rightly suspected of having committed an arrest-able offence, did not owe to the person the same duty of care which he owed to innocent and law abiding users of the highway.727

The decision in Basildon D. C. v. J. E. Lesser Ltd.728 the English Court has formulated the following legal principle: -

i. It was an implied term of the building contract that the buildings designed as dwellings by the contractors were to be fit for habitation on completion.

ii. The plaintiff had relied on the expertise of the contractors, as system builders, to produce habitable dwellings. If such a term had not been

implied, there would have been implied a lesser term, namely, contractors were to design the buildings with the skill and care to be expected of system builder.

The plaintiff's cause of action will accrue when the physical damage to their houses had occurred. Having regard to the nature of the damage, there was an imminent danger to the safety of the occupiers of the plaintiff's houses which thereby afforded to the plaintiff's cause of action against the local authority and architects.\(^\text{729}\)

In *Emeh v Kensington A. H. A.*\(^\text{730}\) the English Court held:-

i. The plaintiff's decision not to have an abortion was not a failure to mitigate damages, because the health authority, by the negligence for which it was itself responsible, had confronted the plaintiff with dilemma whether to have the child or an abortion which she had sought to avoid by having her sterilized.

ii. There was no rule of public policy which prevented the plaintiff from recovering in full the financial damage sustained by her as the result of the negligent failure to perform the sterilization operation properly regardless of whether the child was healthy or abnormal.

iii. The plaintiff was entitled to damages for loss of future earnings, maintenance of the child, plaintiff's pain and suffering and loss of amenity, including extra care that the child would require.

In *Salmon v Seafarer Restaurants Ltd*,\(^\text{731}\) the plaintiff, a fireman, was injured by an explosion while on the defendant's premises of the purpose for fighting a fire caused by defendants' negligence. The defendants denied his liability contending that an occupier's duty of care to fireman attending his premises in the course of their work was limited to protecting the fireman from any special or exceptional risks over and above the ordinary risks necessarily incidental to the fireman's job. The Court held:

"An occupier of premises owed the same duty of care to a fireman attending his premises to extinguish a fire as he owed to other visitors"
under Sec.2 of the Occupier's Liability Act, 1957, subject to the fact that in determining whether the occupier was in breach of that duty a fireman was expected to exercise those skills which were ordinarily expected to be shown by fireman."

In *Smt. Angoori Devi & Ors. Vs Municipal Corporation of Delhi*, the facts were: The Delhi Electric Supply Undertaking (DESU) as the defendant had been having a wooden shack at the Madrasa Road, Kashmir Gate, Delhi and the said shack had been in a very bad shape. Lots of loose wires, iron pipes and other junk had been collected at the top and around the shack by the DESU. A temporary electric connection by means of loose and naked wires had been taken in the said shack from an electric pole nearby and the shack being on the road-side the drainage had also been obstructed. On the night between 17th and 18th August 1986 it had been raining was as a result of obstruction caused by the said shack water collected around it and as a result of gross negligence of the DESU and its servants the shack and the area around it had got electrified and as a result thereof Mr. Gopi Ram (the deceased) who was the husband of the plaintiff No. 1 and the father of the plaintiff Nos. 2 to 9, had died by way of electrocution from the shack. The Court held:

"Where temporary electric connection by means of loose and naked wires had been taken in a wooden shack installed on the road side by the Delhi Electric Supply Undertaking (DESU) and as a result of such loop connections, the rain water which was collected around the shack and also the area around the shack got electrified and as a result thereof 'G' died by way of electrocution while crossing such area, the death of 'G' was due to gross negligence of DESU and its servants, hence the heirs of 'G' were entitled to receive a sum of Rs. 1 Lakh by way of damages from the DESU."

In *Cherubin Gregory v State of Bihar*, the Supreme Court observed;

“A trespasser is not an outlaw, a *caput lupinum.* The mere fact that the person entering a land is a trespasser docs not entitle the owner or occupier

732 AIR 1988 Delhi 305..
733 AIR 1964 SC 205
to inflict on him personal injury by direct violence and the same principle would govern the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the trespasser. Thus in England it has been held that one who sets spring guns to shoot at trespassers is guilty of a tort and that person injured is entitled to recover. There is little difference between the spring-gun which was the trap with which the English Courts had to deal and the naked live wire in the present case is in truth 'an arrangement to shoot a man without personally firing a shot.' It is, no doubt, true that the trespasser enters the properly at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not entitled to do willfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to the trespassers or in reckless disregards of the presence of the trespassers."

In Krishnappa Naidu v Union of India 734 the Madras High Court held:

"When the gates are opened and no warning is given, the public are permitted to cross the level crossing i.e. to pass through the land belonging to the Railway within the level crossing and to that extent they fall under the category of 'licensees' during such periods. But, the moment the public approach of any train or engine—'whatever may be the source through which they acquire such knowledge, for example, the ringing of the gongs or the burning of the red lights the warning given by the gateman, etc. they are expressly prohibited under Sec.124 of the Railways Act from crossing the level-crossing. In such contingencies they would fall under the category of trespassers. So, the duty of the occupier (Railway) to the invitee or licensee does not at all arise in this case."

In Ramanerja Mudali v M. Gangan 735 the Madras High Court held:

"It is the duty of the land owner to make it known if he has to lay a live wire as a sort of fence, because, it may be only in a concealed position that there could have been any live energy passing in it."

734 AIR 1976 Mad. 95.
735 AIR 1984 Mad. 103
Where a person, while passing through the land of another at 10 P.M. to reach the land under the cultivation, received shock from the live electric wire laid in the land of the other and sustained injuries, he would be entitled to receive damages from the land owner who had laid the wire when there was no light in the neighborhood." Lord Pearson in *British Railway Board v Harrington*\(^{736}\) has laid emphasis that with the increase in the population and the greater proportion living in towns where there is less space for children to play; there is a greater temptation for them to trespass. With the progress of technology there is more and greater danger and there is considerably more need for occupiers to take reasonable steps to defer persons, especially children, from trespassing in dangerous places. In this case Best J observed:

"Humanity requires that the fullest notice possible should be given and the Law of England will not sanction what is inconsistent with humanity."

Swamikkannu J. in *Ramanerja Mudati*\(^s\) case, with regard to the application of common law principles in the same field of tort observed:

"In India also we follow the principles of law of Torts mostly propounded by the English Courts as per the law of England and when there is no specific enactment in India relevant to the Tortious Act, it is but necessary that we have to follow the principles laid down in the English decisions, also in appreciating the facts of a case in which a claim is made on the basis of a Tortious Act."

In *Subbanna Goundar & Ors. v S. Ayyaswami*,\(^{737}\) the Madras High Court held that where the deceased had trespassed into the occupier's land with the intention of stealing sugarcane grown there and came in contact with a live wire on the occupier's land and died as a result thereof, there was neither any plea nor evidence that the occupier with deliberate intention had placed a live wire as a trap and there was long unexplained delay in sending suit notice, the suit claiming damages for alleged negligence on this of the occupier in placing a live electric wire near the fence of his garden land, would be liable to be dismissed.

\(^{736}\) (1972) A.C. 877.

\(^{737}\) AIR 1993 Mad. 164.
There are numerous case laws on the duty to a trespasser. A trespasser is a person who has neither any leave nor license. The trespasser trespasses at his own risk and peril. The basic tenet therefore, is that the occupier does not owe any duty to a trespasser. The occupier also does not owe a duty to warn the trespasser of existing dangerous hazards or defects, much less to take precautions for his safety. A railway company has been held not liable to a person, traveling without a ticket and injured by collision or accident. The occupier does not owe any duty to an unexpected visitor to make his premises safe. But jurisprudential concept is that the protection of human life is the greatest law i.e. *satus pupuli suprema lex* and a man is not entitled to take law in his own hands to punish a trespasser by injuring him physically. Upon this philosophical concept of law, law of negligence imposes certain duty to occupier in dealing with the trespasser. While the occupier is not under the same duty of care which he owes to a visitor, he owes a trespasser a duty to take such slops as law of humanity will demand. For instance there must be a notice of warning that some dangerous hazards are in the occupier's premises.

In *Addie v Dumbreck*, the Court held: "The occupier owes a duty not to cause willful injury, except what is reasonably necessary to avoid the entry of a trespasser or expel him after entry." After harmonious interpretation of the duty oriented 'negligence' the judicial prescription indicates that putting up a barbed wire fence, gate with iron spikes or a wall with broken glass fall within the domain of negligence. Keeping a dog, accustomed to bile men is not an act of negligence. A thief hurl by such things is not entitled to sue the occupier. Ramaswamy Iyer laid emphasis with American Law of Restatement, "The occupier owes a duty not to do any act involving danger to trespassers in the premises with knowledge of their presence or its likelihood. With such knowledge, the occupier cannot, for instance, cause a dangerous explosion or practice of shooting in his premises.

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741 Dane v Clayton [1870] 7 Taunt P. 521.
742 Sareh v Blackburn [1830] 4 C & P. 297. at p. 300; Lennon v Fizher AIR 1924 Born 207.
743 Rama Swamy Iyer; Law of Torts. (17th Edn)
the relationship of occupier and licensee, and (ii) relationship derived from inherently dangerous nature of activity of running fast trains through a level crossing lawfully and reasonably used by the inhabitants of the village, their guests and visitors.

The ratio of case laws show that an occupier does not owe a duty to a trespasser and only on the law of humanity an occupier owes a limited duty to a trespasser and again where situation demand it in accordance with the need and desire of the society.

The Indian Carriers Act, 1865 regulates the duties and liabilities of common carriers of some classes of transactions. Generally the duties and liabilities of a common carrier are governed in India by the principles of the common law of England on the subject except where they have been departed from in the case of particular class of common carriers, e.g., by the Carriers Act or the Railways Act. A common carriers' responsibility is not within the Contract Act. The Carriers Act, 1865 was enacted not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants or agents.745 Section 3 of the Act provides:

"No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duty authorized in that behalf, shall have expressly declared to such carrier of his agent the value and description thereof".

In interpreting section 3 of the Act, Calcutta High Court held:746 "When a package containing both scheduled and non-scheduled articles is lost, the value of the non-scheduled articles may be recovered although the value of the scheduled articles cannot be recovered." In the case of mis-description of property lost in

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745 Preamble of the Carriers Act, 1865.
746 River Steam Navigation Co. Ltd. v Jamuna Das Ram Kumar. AIR 1932 Cal 344
transit Bombay High Court held,747 "Mis-description of property lost in transit
does not exonerate the carrier from his liability for the loss. The liability is limited
to the value declared and not the value of the actual contents of the package
consigned".

The Madras High Court has attributed the status of an insurer to the
common carrier. The Court, therefore, held748: "It follows that notwithstanding the
fact that there is no negligence on the part of the common carrier, he is liable to
compensate the owner of goods for the loss of the goods that occurred during the
transit thereof by the lorry belonging to the carrier." The Court further held: "It is
the elementary duty of a common carrier to enquire, whenever a person presents
the consignee's note whether he is the proper person or his authorized agent. They
cannot absolve themselves of their obligation to deliver the goods consigned to the
proper person by merely entering into a contract with the consignor that they will
not be liable for mis-delivery or wrong delivery. In India a common carrier is
subject to two distinct classes of liability, one for loss as an insurer and the other
for loss under his obligation to carry safely. A person who suffered loss by a
common carrier's breach of his common law obligations can maintain a suit
independent of contract." The Court also held, "A common carrier is insurer of
goods which he contracts to carry and he is liable for all loss of, or injury to those
goods while they are in the course of transit unless such loss or injury is caused by
the act of God or by the Suite enemies or in the consequence of inherent vice in
the thing carried or is attributable to consignor's own fault. Exception to the
general liability of a carrier or a bailee in general has to be construed strictly. The
carrier cannot escape its liability by merely contending that he entered into the
contract with the consignor and that he is absolved from all liability for mis-
delivery or wrong delivery. The term mis-delivery should, if used in exception
clause, be held to cover no more than accidental mis-delivery by mistake or error." and not deliberate mis-delivery. It is the elementary duty of a carrier to enquire
whenever a person presents the consignor's note whether he is the proper person
or its authorized agent.

747 1979, 3 Bom 120 at pp. 129, 130.
748 Konda Ram Eswara Iyer and Sons (M/s) v M/s. Madras Bangalore Transport Co. AIR 1964 Mad
516.
In a case where goods entrusted to a common carrier were re-entrusted to another carrier, the suit was filed for recovery of loss or damages by the first common carrier against the re-entrusted carrier. Andhra Pradesh High Court held:749 "It is only the owner of goods and not his agent, who is entitled to benefit under Sec. 8 of the Act. The suit was, therefore, not maintainable".

Assam, Rajasthan and Bombay High Court like Madras High Court also held:750 "Even if it were found that the carriers took as much care of the goods as a man of ordinary prudence would, under similar circumstances, they would be liable if the loss was not occasioned by any act of the God or the King's enemies, which, in case of a Republican State, would mean the enemies of the Suite."

Section 6 of the Act provides:

"The liability of the common carrier for the loss or damage to any properly delivered to him to be carried, and not being of the description occasioned in the schedule to the Act, shall not be deemed to be limited or affected by any public notice."

Assam High Court after consideration of section 6 of the Act has imposed onus upon the common carrier to prove that the carrier was not negligent. The Court held.751 "Before a common carrier can take advantage of a special contract, whereby he is exonerated from liability in case of damages due to navigational perils, he must establish that his steamer has to face the peril of navigation in the course of its voyage; he and his agents have taken all reasonable care and exercised all necessary diligence in avoiding the peril but in spite of it all the steamer sustained damage with the consequential damage to the goods of the consignor. If these facts are not proved, Section 6 of the Act will be attracted and the carrier will be held liable for the damages."

With regard to limitation of liability of the common carrier the Privy Council held:752

750 River Steam Navigation Co. Ltd. and Others v Shyam Sundar Tea Co, AIR 1955 Assam 65 (72).
751 Muralidhan Mohanlal and Others v River Steam Navigation Co. Ltd. AIR 1967 Assam 79 (82).
752 As Per Lord Atkinson Shaw, in AIR 1924 SC. 40 (42).
"What is required to limit the liability of 'Carrier' is that the nature of the contract entered into must either have limitation of liability under the Act made expressly and in writing or the facts must be such that the contractor was engaging in a different type of business from that of common carriers".

In the case of continuous carriers, the Madras High Court held: 753

"In the case of common carriers (1) when goods have to be carried with the aid of different transport agencies in order to arrive at the destination, the carrier with whom the contract is made at one end is, in the absence of any contract limiting the liability to his own transport system, liable for the loss or destruction of the goods on portions beyond his own system or in consequence of acts or default of persons other than his own servants; (2) In the absence of a contract to the contrary, the consignor cannot hold the company, with whom he does not contract liable for damages, when all that can be complained of is non-feasance, though such company may be liable in tort for breach of duty arising from the mere fact that he has undertaken the liability of carrying goods or property belonging to another; (3) When there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sent at the option of the consignor."

Section 7 of the Act deals with the liability of owner of railroad or tram road constructed under Act XXII of 1863, not limited by special contract. The section runs as follows:-

"The liability of the owner of any railroad or tram road, constructed under the provisions of the said Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any special contract, but the owner of such railroad or tram road, shall be liable for the loss or damage to property delivered to him to

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753 India General Navigation and Railway Co. Ltd. (Appellants) v The Dehari Tea Company Ltd. and Ors. (Respondents), AIR 1918 Mad 341.
be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants".

But Sec. 7 dealing with railroad has been repeated by the Indian Railways Act, 1890; it is replaced by Sec. 72 of the Act 9 of 1890.

Section of the Carriers Act provides:

"Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of Section 3 apply and in respect of which declaration required by the section, has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants."

Section 9 of the Act provides:

"In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents."

Section 9 thus relieves the plaintiff from burden of showing that the loss or damage or non-delivery was owing to any negligence or criminal acts. Law presumes negligence. Negligence is presumed by the loss of goods. Loss from unknown cause is presumptive proof of negligence, for example, occurrence of fire without any explanation as to origin of it is evidence of negligence. Thus onus of proving negligence of the carrier is not upon the person who seems to make the carrier liable.

754 River Steam Navigation Co. Ltd. and Anr. v Syam Sunder Tea Co. AIR 1955 Assam 65 (72).
755 Madura Co. Ltd. v P.C. Xavier AIR 1931 Mad. 115 (117).
756 River Steam Navigation Co. Ltd. and Anr v Bisc. AIR 1928 Cal 371 (376).
758 B.K. Abdulla Yelinji Manni v M.S. Kadambali Thayachennu Kestava AIR 1963 Ker. 198, 199.
The modem communication system is the nerve of the society. But with the development of communication system, accident cases have tremendously increased. That is why, most of the countries, in dealing with heaps of motor accident cases, have formed claims Tribunals whereas other cases of negligence are still decided by the civil court, although some of the negligence cases relating to "service" are concurrently decided by the Consumers Forum and civil courts. Therefore, on account of priority, the legal principles on motor vehicle accidents in India are discussed below:

(A) "... drivers are entitled to drive on the assumption that other users of the road whether drivers or pedestrians, will behave with reasonable care."759

The principle relates to the general duty imposed upon the drivers and the pedestrians.

(B) "The owner of a car when he lakes or sends it on a journey for his own purposes, owes a duty of care to other road users if any of them suffers damage from negligent driving of the car whether by the owner himself or by an agent to whom he had delegated the driving, the owner is liable."760

The principle relates to the duty imposed upon the owner of a car for using his motor car for any purpose whatsoever and by any person whosoever.

(C) "To leave street car in the street is not to be an invitation or license to children to play upon it, although the company knows that it attracts them."761 The principle prescribes that a person leaving his car on the street owes no duty to inquisitive children.

(D) The passengers who travel by bus and sit adjoining a window very often rest their arms on the window-sill or on the window railing in such a manner that the elbow is projected from the window to some extent. The duty in such cases consists in taking precautions to ensure that a passenger who is sitting with his arm or any other part of his body resting on the window-sill or the window-rail or in such a way that it reasonably protrudes there-from does not receive any injury when the vehicle crosses an oncoming vehicle and, for that purpose, he is expected to drive the

761 People v Beardsley, 150 Mich. 206 113, N.W. 1128
vehicle in such a manner as to leave sufficient space between the two vehicles. Similar is the duty owed by the driver of the vehicle coming from the opposite direction while crossing a passenger bus.\textsuperscript{762} The decision costs a duty to the bus owners to fence the window-sill of buses so as to prevent from causing harm to the passengers. The breach of such duties to the passengers will entail damages to the passengers for placing their elbows outside the windows.

(E) "As a rule, mere proof that an event has happened or an accident has occurred the cause of which is unknown, is not evidence of negligence." But the peculiar circumstances constituting the event or accident in a particular case, may themselves proclaim "in concordant clear and unambiguous voices," the negligence of some body as the cause of the event or accident. The reason for the requirement that the event must be within the control of the defendant is that where he has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred\textsuperscript{763}.\textsuperscript{763} The decision makes a distinction between general proof of negligence and exceptional cases where the maxim \textit{res ipsa loquitur} will apply.

(F) There is a distinction between a mere error of judgment and negligence. Where there is a mere error of judgment, the acts complained of cannot be termed rash and negligent.\textsuperscript{764} The decision rules that error of judgment is an exception to the law of negligence.

(G) Keeping the gate of a Railway level crossing open is an "open invitation" to passers-by to cross. He is not then bound to look carefully (before crossing) as he would be if there had been no such invitation, since (in the absence of warning) he is entitled to assume that the conditions are usuat.\textsuperscript{17765} The decision imposes duty upon the Railway Authorities to the public using level crossing with gates for the kilter, safety and security. The decision also rules that keeping the level crossing gate open is an invitation to the public to cross the level crossing without looking at either side of the level crossing.

\textsuperscript{762} \textit{Gujarat State Road Transport, Ahmedabad v Keshavlal S Panchal}, AIR 1981 Guj. 205,
\textsuperscript{763} \textit{Syed Akbar v State of Karnataka}, AIR 1979 S.C. 1848.
\textsuperscript{764} \textit{Mohan Singh v the State of Punjab} [1979] Punj. L.R. 631.
\textsuperscript{765} \textit{Krishna Goods Carriers (P) Ltd., Delhi v Union of India}, AIR 1980 Delhi 92.
Inviting passengers to travel precariously on the top of an overcrowded bus was itself a rash and negligent act on the part of the conductor. The decision has correctly ruled that the bus owners including their servants have duty not to allow any passenger on the top of a bus. The consent of the passengers to board on the top of the bus will not absolve the bus owners of his duty to the passengers.

Nor can any one be said to be negligent merely because he fails to make a provision against an accident which he could not be reasonably expected to foresee. The decision relates to the exception to the rule of foreseeability test. But the exception does not apply to statutory provision.

"Where the owner of a truck could not explain as to how the brake of his vehicle suddenly failed, it could not but be the presumption of his negligence merely by proving the latent defects in it." This decision relates to the application of the maxim, 'res ipsa loquitur'.

"A Ticketless passenger traveling in a bus if killed due to an accident caused by the negligence of the driver, his heirs are entitled to compensation." The decision rules that whoever travel in the bus whether on payment of bus fare or not is a passenger. As soon as the bus starts from a particular place, its duty also starts for safe journey of all the passengers irrespective of gratuitous, Ticketless or Ticket holders.

Gratuitous passengers if suffered injury due to negligent driving of a car are entitled to compensation. The decision imposes duty upon the car owner and car driver for safe journey of the gratuitous passengers. The decision makes no distinction between gratuitous passengers and paid passengers.

No speed is reasonable which is not adjusted to the circumstances of the movement, including the fact that the driver is approaching a pedestrian crossing and may have to pull up quickly and within a very short distance. The decision pragmatically rules of reasonable speed of a vehicle. The speed which the driver can control in case of any emergent

766 Rural Transport Service v Bazlum Bibi, AIR 1980 Cal. 165
768 Antina Begum v Ram Prakash AIR 1978 All 526.
769 M P.S.R.T Corp. v Zenabhai AIR 1977 SC 2206:
771 London Passenger Transport Board v Upson [1949] 1 All E.R. 60 (III.)
situation is reasonable speed. Therefore, uncontrollable speed of vehicle always falls within the category of rash and negligent driving.

(N) (a) It is not correct that in every case where the damage is caused by the intervention of a third party, the driver and the master are not liable: The decision rules that the driver of a vehicle has duty to drive the car cautiously and with foreseeability that harm may cause by the third party intervention. Such third party intervention is an anticipatory occurrence which may occur any time on the road connecting with lanes;

(b) The driver and consequently the master, in such a case are liable if the driver is guilty of initial negligence and if, as a reasonable man, he could have anticipated the intervention of a third party; and

(c) The driver and consequently the master will not be responsible if the damage is caused by a fresh independent cause which, in the circumstances the driver, as a reasonable man, could not have anticipated.\(^772\) The decision relates to the law of causation in negligences. The question of proximity and remoteness, have been dealt with in this decision. The duty in the instant case has been made to be pendulum of a clock. The court, here, connected the duty of driver with his foreseeability. Other drivers' sense of anticipation will determine the liability of the wrong-doing driver."

(O) (a) The standard to determine whether a person has been guilty of negligence is the standard of care which, in the given circumstances, a reasonable man could have foreseen.

(b) The test is foreseeability, not probability.

(c) The more serious the consequences if care is not taken, the greater is the degree of care which must be exercised.

(d) While the initial burden of proof of negligence is on the claimant, barring exceptional cases, the principle 'res ipsa loquitur' comes into play.\(^773\) The decision highlights the ingredients of negligence cases."

\(^772\) Ganga Sagar Corporation v Sukhber Singh AIR 1974 All 113

\(^773\) Mangi Lal v Parasram, A1R1971 M.P 5 (FB) 20
In *M.C. Mehta v. Union of India*\(^{774}\) led by Justice P N Bhagwati the Supreme Court of India developing a new doctrine to attach liability the Court commented that;

We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or is injured. Does the rule in *Rylands v. Fletcher* apply or is there any other principle on which the liability can be determined? The rule in *Rylands v. Fletcher* was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's willful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country.

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\(^{774}\) AIR 1987 SC 1086 Para 32
We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country.

We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher. We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an

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accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Despite the ambiguity prevailing as to the absolute liability principle, it was nevertheless upheld in Union Carbide Corporation v. Union of India\textsuperscript{775}. Though it upheld the principle of absolute liability, the Supreme Court failed to evolve any new principles of liability of its own, with respect to multi-national corporations operating with inherently dangerous technologies in developing countries. The Court could have addressed a variety of dimensions to the problem of liability such as protection of environment, permissibility of ultra hazardous technology and fixation of standards for disaster liability of multi nationals operating in developing countries. It however held that an inquiry into these aspects would delay the matter, which would defeat the purpose of granting immediate relief to the victims. Thus, the "Polluter Pays" principle, although emphatically stated in MC Mehta, had merely secured a toehold with the Union Carbide case.

**Summing Up:**

The Bhopal Gas tragedy was the worst industrial calamity in human history. The nature and enormity of the damage caused by the disaster and its aftermath disclosed the stark realities of a developing nation more importantly; it exposed the inability of the legal system to combat the situation, especially in the realm of environmental management. This automatically opened the floodgates of legal thought to combat it. With India’s integration into world economic order, challenges confronting the judiciary are abound, which will definitely seek answers to questions, whose origins are may not be essentially “Indian” in nature.

\textsuperscript{775} AIR 1992SC 248