CHAPTER – II

RELEVANT PROVISIONS REGARDING COMPENSATION IN TORTS AND CRIME

The Parliament in England introduced the Fatal Accident Act, 1846, popularly known as Lord Campbell’s Act. In India, the same was followed by enactment of the Fatal Accidents Act, 1855, almost on the pattern of the English Fatal Accident Act. Claims for compensation for death caused in accidents, including death in motor accident, had, under the Fatal Accident Act, 1855, to be laid before the civil court whereby the rigor of the principle of *actio personalis moritur cum persona* was to a major extent ameliorated. However, the maxim *actio personalis moritur cum persona* was confined only to case of personal, physical or bodily injuries and not to the claim for loss caused to the estate of the deceased and accidental death of a person certainly constituted a loss to the estate of the deceased by depriving his dependents of that estate which the deceased could accumulate through his earnings. Claims for loss of estate of the deceased caused by tortfeasor were, therefore, protected under Section 306 of the Indian Succession Act, 1925 which provided that all claims and demands whatsoever and all rights to prosecute or defined any action or any special proceeding existing in favour of or against a person, at the time of his decease, survive to and against executors or administrators, except causes of action for defamation, assault, as defined in the Penal Code, or other personal injuries not causing death of the party and except also cases where, after death of the party the relief sought could not be enjoyed or granting it would be nugatory. Thus, the maxim *actio personalis moritur cum persona* came to be considerably abrogated or modified by Section 306 of the Indian Succession Act, 1925.¹

This chapter deals with Relevant Provisions Regarding Compensation in Torts and Crime. It deals with Criminal Liability in Motor Accidents. In this chapter an attempt has been made to study the nature and scope of penal liability of owners, agents and drivers of vehicles involved in accidents. This chapter also explains the various provisions of Indian Penal Code, which have direct bearing

¹ *Harihar Mohanty v. Union of India*, 1996 (2) ACC 438 (Orissa).
with the cases involving motor driven vehicles. This chapter also throws light on the
application of various principles like, No Fault Liability, Act of God, Absolute and
Vicarious Liability, Negligence, Contributory Negligence and application of
document of *res ipsa loquitur*\(^2\) etc. in grant of compensation. The case law relating to
Motor Vehicle Accident Cases, which have been judicially determined in High
Courts and the Supreme Court of India have been studied, examined, analyzed and
critically commented upon for the purpose of appreciating the judicial invocation
and application of the evidentiary principles of No Fault Liability, Contributory
Negligence, *res ipsa loquitur* in negligence cases, Act of God, Absolute and
Vicarious Liability etc. These cases cover motor accidents of the nature of both
collision as well as non-collision. The word “collision” is used in this chapter as a
case where there is collision between two or more motor vehicles, like collision
between car and bus etc. The word “non collision” is used in this chapter as a case
where there is no collision between two or more motor vehicles, although these may
have been hitting a wall or tree\(^3\) or a human being.

The expression ‘other personal injuries not causing the death of the party’
affirms death of victim as loss to estate of the deceased. Death having been excepted
from the scope of the above maxim, the application thereof stands shrunk only to
cases of such personal injury where after death of the party, the relief of
compensation could not be enjoyed or granting it would be fruitless, but so far as the
relief granted can be rightfully enjoyed by heirs, successors or legal representatives
of the deceased, compensation even in cases of personal injuries ultimately causing
death of the party cannot be denied. Supposing for instance, the victim of an
accident succumbs to his injuries after a fortnight since accident, the costs of
treatment and even the expenses on his funeral and the amount spent on his special
nourishment, transport and wages of persons engaged to wait upon him, would
certainly amount to loss to his estate, and the relief in that respect shall not die with
death of the victim, though the notional amount of compensation for his physical
pain and suffering, which as psychic agony is constituted his personal experience
not forming part of his estate, can be forfeited because of and after his death, since

\(^2\) *Doctrine of res ipsa loquitur* means ‘ things speak for themselves’.

same could not be enjoyed by the victim and granting it would be nugatory so far as the victim is concerned.

When, in course of time, the progress of arts and sciences, brought about an industrial revolution the world over, the manual tools and implements of artisans were replaced by machines and the hackney carriages by speedy automobiles, deaths and bodily injuries doubled their toll, at work and on roads, and other legislations became essential to cope with such situations. There is gradual improvement in the automotive technologies also. It is also noticed that there is greater flow of passengers and freight with the least impediments. Due to increase, in the number of vehicles and the frequency of their movement, the road accidents have also gone up. Thereby, increasing the number of victims of road accidents. Sometimes, it is found that whole of the family has died in the road accident leaving behind the kids only. On the other hand it is also reported that due to road accidents people have become permanently disable, causing a permanent loss to their earnings, sometimes he is not in position to do any work. The notable legislative activity in recent years is creation to a certain limit of no fault liability, in respect of death or bodily injury resulting in a motor accident, by addition of Chapter VIIA.4

In Poonam Verma v. Ashwini Patel & others5 it was held by the Supreme Court that negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. The breach of duty may occur either by not doing something which a reasonable man, under a given set of circumstances, would do, or by doing some act which a reasonable prudent man would not do. In motor accident cases negligence is understood as failure in duty to take care which implies the degree of care that ought to be taken by a reasonable man in a given set of circumstances.

The law of torts as administered in India in modern times is the English law as found suitable to Indian conditions and as modified by the Acts of the Indian Legislature.6 Its origin is linked with the establishment of British Courts in India.

An important branch of law which has remained uncodified in India is the law relating to civil wrongs. Some of the most important rights of a person which

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4 The Motor Vehicles Act, 1939.
the law protects from injury are rights to the security of his person, his domestic relations and his property and reputation. The liability for a tort may arise from intentional wrongdoing, negligence or out of an absolute liability imposed without any default on the part of the person held liable. It may be a vicarious liability as that of a master for his servant's tort; or a breach of duty under a statute, for example, the duty of an employer under the Factories Act. "The law on the one hand allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them. At the other extreme, it may on grounds of policy throw the absolute risk of certain transactions on the person engaged in them, irrespective of blameworthiness in any sense. Most liabilities in tort lie between these two extremes. In the law of tort parties are brought into relation not by mutual agreement but under a general obligation emanating from the social duties which the well being of a community requires.

The law of tort covers a wide range of situations, including such diverse claims as those of a passenger injured in a road accident, a patient injured by a negligent doctor, a pop star libeled by a newspaper, a citizen wrongfully arrested by the police, and a landowner whose land has been trespassed on. As a result, it is difficult to pin down a definition of a tort; but, in broad terms, a tort occurs where there is breach of a general duty fixed by civil law. When a tort is committed, the law allows the victim to claim money, known as damages, to compensate for the commission of the tort. This is paid by the person who committed the tort (known as the tortfeasor). Other remedies may be available as well or instead. In some cases, the victims will only be able to claim damages if they can prove that the tort caused some harm, but in others, which are described as actionable per se, they only need to prove that the relevant tort has been committed.

2.1 DEFINITION OF TORT

The term tort is the French equivalent of the English word ‘wrong’ and of the Roman law term ‘delict’. The word tort is derived from the Latin word tortum which means twisted or crooked or wrong and is in contrast to the word rectum which means straight. Everyone is expected to behave in a straightforward manner.

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7 Holmes, The Common Law, (1881) 145.
and when one deviates from this straight path into crooked ways he has committed a tort. Hence tort is a conduct which is twisted or crooked and not straight. As a technical term of English law, tort has acquired a special meaning as a species of civil injury or wrong. It was introduced into the English law by the Norman jurists. The person committing a tort or wrong is called a tort-feasor or wrong-doer, and his misdoing is a tortuous act. The principle aim of the Law of Torts is compensation of victims or their dependants.

Tort now means a breach of some duty independent of contract giving rise to a civil cause of action and for which compensation is recoverable. In spite of various attempts an entirely satisfactory definition of tort still awaits its master. In general terms, a tort may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages. Some other definitions for tort are given below:

“Tortuous liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.”

“A tort is a civil wrong for which the remedy is a common action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other mere equitable obligation.”

Sir Frederick Pollock- Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including reference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person:–

a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.
b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.
c) It may be an act violation the absolute right (especially rights of possession or property), and treated as wrongful without regard to the actor’s intention or

13 Salmond and Hueston, Law of Torts (1992), 14, 15.
knowledge. This, as we have seen is an artificial extension of the general conceptions which are common to English and Roman law.

d) It may be an act or omission causing harm which the person so acting or omitting to act did not intend to cause, but might and should with due diligence have foreseen and prevented.

e) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits, to avoid or prevent.

2.2 TORT AND CRIMINAL LAW

A crime is a wrong which is punished by the state; in most cases, the parties in the case are the wrongdoer and the state, and the primary aim is to punish the wrongdoer. By contrast, a tort action is between the wrongdoer and the victim, and the aim is to compensate the victim for the harm done. It is therefore, incorrect to say that someone has been prosecuted for negligence, or found guilty of libel, as these terms relate to the criminal law. There are, however, some areas in which the distinctions are blurred. In some tort cases, damages may be set at a high rate in order to punish the wrongdoer, while in criminal cases, the range of punishments now includes provision for the wrongdoer to compensate the victim financially (though this is still not the primary aim of criminal proceedings, and the awards are usually a great deal lower than would be ordered in a tort action). A judgement of acquittal passed by Criminal Court is not very much relevant for granting compensation in motor accident case\textsuperscript{14}. There are cases in which the same incident may give rise to both criminal and tortious proceedings. An example would be a car accident, in which the driver might be prosecuted by the state for dangerous driving, and sued by the victim for the injuries caused.

A hundred years ago, the law of tort, with all its flaws, was almost the only way of gaining compensation for accidental injury, but its role has declined with the development of insurance and social security. For these the issue of fault is usually irrelevant. The social security system, the vast majority of accident victims who need financial support get it not from the tort system, but through social security benefits\textsuperscript{15}. This is because most accident victims do not sue anybody, either because the accident was not (or cannot be proved to be) someone else’s fault, or because

\textsuperscript{14} Mahadeb Roy v. Sikha Das, 1999(1) TAC 140: 1999 ACJ 1042 (Cal.).
\textsuperscript{15} Rajasthan State Road Transport Corporation v. Jhami Bai Kanhiyal, AIR 1987 Raj 68.
they do not realize they could sue, or because for some reason (often cost) they decide not to. They may be unable to work for a long period or even permanently and, unless they have insurance, state benefits will be their only means of financial support. Benefits vary depending on the person’s needs, and how much they have paid into the system while working, but are unlikely to provide for more than the bare essentials of life – unlike tort compensation, which is designed as far as possible to give an accident victim back the standard of living he or she enjoyed before the accident. The social security system tends to provide support for injury victims more quickly, and with less uncertainty than the tort system, but its drawbacks are the very low levels of support, and the continuing stigma attached to accepting state benefits.

A road accident, may give rise both to criminal prosecutions and to tort actions. Tort, which deals with civil liability, is concerned with claims by private individuals against other individuals or legal persons. Criminal law is concerned with prosecutions brought on behalf of the state for breaches of duties imposed upon individuals for the protection of society. Criminal prosecutions are dealt with by criminal courts and the standard of proof is more stringent than in civil cases. The consequences of finding of criminal guilt may be regarded as more serious for the individual concerned than the consequences of civil liability.

Both areas of law are concerned with the breach of duties imposed by law, but the criminal law has different priorities. It is concerned with the protection of society by deterring wrongful behavior. It is also concerned with the punishment of criminals. These concerns may also be found in tort, but are secondary to the main objective of compensation. A motorist who is speeding is far more likely to be worried about being caught by the police than being sued by a person whom he may happen to injure if he is negligent. Nevertheless, tort does have some deterrent value. For example, motorists who have been negligent have to pay higher insurance premiums. The Law of Torts is fashioned as “an instrument for making people adhere to standards of reasonable behavior and respect the rights and interests of one another.”

16 Sanaullah v. Sanjiva Anna Shetty, 1981 TAC 92 (Bom).
17 Setalvad, Common Law in India, 109.
2.3 INSURANCE AND THE LAW OF TORT

Underpinning the modern tort system is the system of insurance which provides payment of compensation in most tort cases. Indeed, it is usually not worth the trouble and expense of claiming in tort unless the defendant is insured (or is very wealthy). It is possible to insure against liability in tort in relation to many different activities. Motorists are compelled by statute to insure against liability for injuries to third parties and passengers, and manufacturers insure against harm caused by their products. Employers and occupiers take out insurance policies to cover the cost of accidents. Insurance is also important in relation to sporting and educational activities, and clubs and schools are covered by insurance policies. Many large public bodies carry insurance, but some act as their own insurers, taking upon themselves the risk of paying damages if they are found liable. First party insurance should not be overlooked. This type of insurance allows individuals to buy policies that will compensate them if they are injured, regardless of the fault of others. To some extent, insurance can influence the way in which people behave. Thus, motorists are aware that their insurance premiums will be higher if they are found negligent and may be encouraged to take fewer risks. Some motorists have to pay higher premiums because they fall into a high risk category. Figures published in 1999 indicate that young men under the age of 25 years are three times more likely to die in a road accident than women of the same age group, and are much more likely to be involved in accidents than older motorists. To allow for this, young men pay higher premiums than other motorists.

There is, of course, a counter-argument concerning insurance, that people who are aware that they are insured are likely to be less careful because they can be confident that their insurance company will compensate any victims of their wrongful activity. Insurance can also create problems of waste, because it is impossible to predict when liability will arise and people may over-insure. It has also been claimed that in some cases insurance may motivate decisions in the law of tort, so that in road accident cases, judges may be more willing to find in favour of claimants because they know that there will be a source of compensation available to support them through insurance. A judge may find the defendant legally to blame

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though morally he should not be responsible\(^{21}\). Despite this, there are several cases in which judges have stated that the insurance positions of the parties should be ignored when determining liability\(^{22}\). Nevertheless, insurance is a useful way of spreading the cost of compensating people who suffer injury as a result of negligence. Insurance allows people to recover damages for negligent driving from close relatives, so easing the burden of caring within families.

The *objectives* of the law of tort can be summarized as follows:

- **Compensation**
  The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.

- **Protection of interests**
  The law of tort protects a person’s interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various torts have been developed for these purposes. For example, the tort of nuisance protects a person’s use or enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.

- **Deterrence**
  It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others. This is encouraged by insurance companies. The deterrent effect of tort is less obvious in relation to motoring, though the incentives to be more careful are present in the insurance premium rating system.

- **Retribution**
  An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a

\(^{21}\) *Nettleship v. Weston* (1971) 2 QB 691.
\(^{22}\) *Morgans v. Launchbury* (1973) AC 127.
more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.

• **Vindication**

Tort provides the means whereby a person who regards him or herself as innocent in a dispute can be vindicated by being declared publicly to be ‘in the right’ by a court. However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.

• **Loss distribution**

Tort is frequently recognized, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re-distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant’s insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover insurance payments will bear the cost. The process is not easily undertaken and it involves considerable administrative expense which is reflected in the cost of the tort system itself. There are also hidden problems attached to the system, such as psychological difficulties for claimants in using lawyers and courts, and practical difficulties such as the funding of claims which may mean that many who deserve compensation never receive it. It has been suggested that there are other less expensive and more efficient means than tort for dealing with such loss distribution.

• **Punishment of wrongful conduct**

Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

Law is any rule of human conduct accepted by the society and enforced by the state for the betterment of human life. In a wider sense it includes any rule of human action, for example, religious, social, political and moral rules of conduct. However only those rules of conduct of persons which are protected and enforced
by the state do really constitute the law of the land in its strict sense. According to Salmond, the law consists of rules recognized and acted on by courts of justice. The entire body of law in a state (corpus juris) may be divided into two, viz, civil and criminal.

Civil law: The term may be used in two senses. In one sense it indicates the law of a particular state as distinct from its external law such as international law. On the other side, in a restricted sense civil law indicates the proceedings before civil courts where civil liability of individuals for wrongs committed by them and other disputes of a civil nature among them are adjudicated upon and decided. Civil wrong is the one which gives rise to civil proceedings, i.e., proceedings which have for their purpose the enforcement of some right claimed by the plaintiff as against the defendant. For example, an action for the recovery of debt, restitution of property, specific performance of a contract etc.

Criminal Law: Criminal laws indicate the proceedings before the criminal courts where the criminal liability of persons who have committed wrongs against the state and other prohibited acts are determined. Criminal proceedings are those which have for their object the punishment of the wrong doer for some act of which he is accused. He who proceeds criminally is an accuser or prosecutor demanding nothing for him but merely the punishment of the accused for the offence committed by him. Criminal courts are authorized within certain limits and in certain circumstances to order payment of a sum as compensation to the person injured out of the fine imposed on the offender.

2.4 THE LAW OF TORTS IN INDIA

Under the Hindu law and the Muslim law tort had a much narrower conception than the tort of the English law. The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs. The law of torts in India is mainly the English law of torts which itself is based on the principles of the common law of England. This was made suitable to the Indian conditions appeasing to the principles of justice, equity and good conscience and as amended by the Acts of the legislature. Its origin is linked with the establishment of

24 Section 357 of the Code of Criminal Procedure.
British courts in India. The expression justice, equity and good conscience was interpreted by the Privy Council to mean the rules of English Law if found applicable to Indian society and circumstances. The Indian courts before applying any rule of English law can see whether it is suited to the Indian society and circumstances. The application of the English law in India has therefore been a selective application. Further, in applying the English law on a particular point, the Indian courts are not restricted to common law. If the new rules of English statute law replacing or modifying the common law are more in consonance with justice, equity and good conscience, it is open to the courts in India to reject the outmoded rules of common law and to apply the new rules.

It has also been held that Section 9 of The Code of Civil Procedure, which enables the civil court to try all suits of a civil nature, impliedly confers jurisdiction to apply the Law of Torts as principles of justice, equity and good conscience. Thus the court can draw upon its inherent powers under Section 9 for developing this field of liability. In a more recent judgment of Jay Laxmi Salt Works (p) ltd. v. State of Gujarat, Sahai, J., observed: truly speaking the entire law of torts is founded and structured on morality. Therefore, it would be primitive to close strictly or close finally the ever expanding and growing horizon of tortuous liability. Even for social development, orderly growth of the society and cultural refineness the liberal approach to tortious liability by court would be conducive.

2.5 DIFFERENCE BETWEEN CRIME AND TORT

Being a civil injury, tort differs from crime in all respects in which a civil remedy differs from a criminal one. There are certain essential marks of difference between crime and tort they are:

1. Tort is an infringement or privation of private or civil rights belonging to individuals, whereas crime is a breach of public rights and duties which affect the whole community.

2. In tort the wrong doer has to compensate the injured party whereas in crime, he is punished by the state in the interest of the society.

3. In tort the action is brought about by the injured party whereas in crime the proceedings are conducted in the name of the state.

4. In tort damages are paid for compensating the injured and in crime it is paid out of the fine which is paid as a part of punishment. Thus the primary purpose of awarding compensation in a criminal prosecution is punitive rather than compensatory.

5. The damages in tort are unliquidated and in crime they are liquidated.

2.6 RESEMBLANCE BETWEEN CRIME AND TORT

There is however a similarity between tort and crime at a primary level. In criminal law the primary duty, not to commit an offence, for example murder, like any primary duty in tort is in rem and is imposed by law. The same set of circumstances will in fact, from one point of view, constitute a crime and, from another point of view, a tort. For example every man has the right that his bodily safety shall be respected. Hence in an assault, the sufferer is entitled to get damages. Also, the act of assault is a menace to the society and hence will be punished by the state. However where the same wrong is both a crime and a tort its two aspects are not identical. Firstly, its definition as a crime and a tort may differ and secondly, the defences available for both crime and tort may differ. The wrong doer may be ordered in a civil action to pay compensation and be also punished criminally by imprisonment or fine. If a person publishes a defamatory article about another in a newspaper, both a criminal prosecution for libel as well as a civil action claiming damages for the defamatory publication may be taken against him. There was a common law rule that when the tort was also a felony, the offender would not be sued in tort unless he has been prosecuted in felony, or else a reasonable excuse had to be shown for his non prosecution.\(^{29}\) This rule has not been followed in India\(^{30}\) and has been abolished in England.\(^{31}\)

2.7 NATURE OF TORTS

Historically tort had its roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages. However tort is a species if civil injury or wrong. The distinction between civil and criminal wrongs depends

\(^{29}\) Smith v Saiwyn, (1914) 3 KB 98; 111 LT 195.

\(^{30}\) Keshab v. Maniruddin, (1908)13 CWN 501.

\(^{31}\) Section 1, Criminal Law Act, 1967.
on the nature of the remedy provided by law. A civil wrong is one which gives rise to civil proceedings. A civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused. Sometimes the same wrong is capable of being made the subject of proceedings of both kinds. For example assault, libel, theft, malicious injury to property etc. in such cases the wrong doer may be punished criminally and also compelled in a civil action to make compensation or restitution. Not every civil wrong is a tort. A civil wrong may be labeled as a tort only where the appropriate remedy for it is an action for unliquidated damages.

Every wrongful act is not a tort. To constitute a tort,

# There must be a wrongful act committed by a person;
# The wrongful act must be of such a nature as to give rise to a legal remedy and
# Such legal remedy must be in the form of an action for unliquidated damages.

**Wrongful Act**

An act which prima facie looks innocent may becomes tortious, if it invades the legal right of another person. In *Rogers v. Ranjendro Dutt*[^32], the court held that, the act complained of should, under the circumstances, be legally wrongful, as regards the party complaining. That is, it must prejudicially affect him in some legal right; merely that it will however directly, do him harm in his interest is not enough. A legal right, as defined by Austin, is a faculty which resides in a determinate party or parties by virtue of a given law, and which avails against a party (or parties or answers to a duty lying on a party or parties) other than the party or parties in whom it resides. Rights available against the world at large are very numerous. They may be divided again into public rights and private rights. To every right, corresponds a legal duty or obligation. This obligation consists in performing some act or refraining from performing an act. Liability for tort arises, therefore when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.

**Damage**

In general, a tort consists of some act done by a person who causes injury to another, for which damages are claimed by the latter against the former. In this

connection we must have a clear notion with regard to the words damage and damages. The word damage is used in the ordinary sense of injury or loss or deprivation of some kind, whereas damages mean the compensation claimed by the injured party and awarded by the court. Damages are claimed and awarded by the court to the parties. The word injury is strictly limited to an actionable wrong, while damage means loss or harm occurring in fact, whether actionable as an injury or not. The real significance of a legal damage is illustrated by two maxims, namely, *Damnum Sine Injuria* and *Injuria Sine Damno*.

**Damnum Sine Injuria (Damage without Injury)**

There are many acts which though harmful are not wrongful and give no right of action to him who suffers from their effects. Damage so done and suffered is called *Damnum Sine Injuria* or damage without injury. Damage without breach of a legal right will not constitute a tort. They are instances of damage suffered from justifiable acts. An act or omission committed with lawful justification or excuse will not be a cause of action though it results in harm to another as a combination in furtherance of trade interest or lawful user of one’s own premises. In *Gloucester Grammar School Master Case*[^33] , it had been held that the plaintiff school master had no right to complain of the opening of a new school. The damage suffered was mere damnum absque injuria or damage without injury. The case *Acton v. Blundell*[^34] , in which a mill owner drained off underground water running into the plaintiff’s well, fully illustrate that no action lies from mere damage, however substantial, caused without the violation of some right.

There are moral wrongs for which the law gives no remedy, though they cause great loss or detriment. Loss or detriment is not a good ground of action unless it is the result of a species of wrong of which the law takes no cognizance.

**Injuria Sine Damno (Injury without Damage)**

This means an infringement of a legal private right without any actual loss or damage. In such a case the person whose right has been infringed has a good cause of action. It is not necessary for him to prove any special damage because every injury imports a damage when a man is hindered of his right. Every person has an absolute right to property, to the immunity of his person, and to his liberty, and an

[^33]: *Gloucester Grammar School*, (1410) 11 Han IV, 47.
[^34]: (1 843) 12 M & W 324.
infringement of this right is actionable per se. actual perceptible damage is not, therefore, essential as the foundation of an action. It is sufficient to show the violation of a right in which case the law will presume damage. Thus in cases of assault, battery, false imprisonment, libel, trespass on land, etc., the mere wrongful act is actionable without proof of special damage. The court is bound to award to the plaintiff at least nominal damages if no actual damage is proved.

2.8 THEORY OF “COMPENSATION” AND “DAMAGES”

“Compensation” means anything given to make things equivalent; a thing given to or to make amends for loss, recompense, remuneration or pay\textsuperscript{35}. The term compensation is used to indicate what constitutes or is regarded as equivalent or recompense for loss or deprivation. Ordinarily, the word ‘Compensation’ connotes equivalency, which adequately remunerates for a loss or deprivation\textsuperscript{36}. The term compensation etymologically suggests the image of balancing one thing against another. Its primary signification is equivalent and the secondary and more Common meaning is something given or obtained as an equivalent. In Kulsum Bai v. Kallu\textsuperscript{37}, M.P. High Court held that compensation includes a claim for damages. Every injury imports a damage and ‘damage’ is that which is supposed to be compensated by the award of ‘damages’.

“Damages” may be defined as pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another. In other words ‘damages’ are the recompense given by process of law to a person for the wrong that another has done to him\textsuperscript{38}. A punitive sense is attached with the word “damages”. Damages are reparation for conscious wrong in violation of another’s right and object is, apart from compensating the aggrieved party, to punish the wrong-doer.

“Damages” are defined\textsuperscript{39} as pecuniary compensation or indemnity, which may be recovered in the Courts by any person, who has suffered loss, detriment or injury, whether to his person, property or rights through the unlawful act or omission or negligence of another.

\textsuperscript{35} State of Gujarat v. Shantilal Mangaldas, AIR 1969 SC 634.
\textsuperscript{36} Commissioner of Income Tax v. Sham Lal, AIR 1969 SC 634.
\textsuperscript{37} 2000 (2) TAC 748.
\textsuperscript{38} Benoy Bhushan v. Sabitiri, AIR 1977 Cal 199.
\textsuperscript{39} Black’s Law Dictionary, 6\textsuperscript{th} Edn. 389.
The award of compensation for damages cannot be considered either punitive or in the nature of a reward. A distinction was being drawn between the scope and ambit of the words ‘damages’ and ‘compensation’. The word ‘compensation’ was interpreted to be wider in its context than the word ‘damages’. The theory of damages is that they are a compensation and satisfaction for the injury sustained. The sum to be awarded for reparation of the damages suffered should, as far as possible, be such as will put the injured party in the same position as he would have been, if he had not sustained the wrong for which he is getting damages.

**Remedy**

The law of torts is said to be a development of the maxim ‘ubi jus ibi remedium’ or ‘there is no wrong without a remedy’. If a man has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without remedy; want of right and want of remedy are reciprocal. Where there is no legal remedy there is no legal wrong. But even so the absence of a remedy is evidence but is not conclusive that no right exists.

Thus to conclude, law of torts is a branch of law which resembles most of the other branches in certain aspects, but is essentially different from them in other respects. Although there are differences in opinion among the different jurists regarding the liability in torts, the law has been developed and has made firm roots in the legal showground. There are well defined elements and conditions of liability in tort law. Negligence, in its modern nuances, including contributory and composite negligence, concerns the tempo of social life surrounding human reciprocity. It is a pre-condition of any civil society that no one shall conduct his affairs in a way so as to result in loss, damage or injury to the mind, body reputation or property of another. Accident, being casualty cannot, therefore, be a matter of contract, and being a wrong independent of contract, it is a tort litigated under the hammer of negligence wherein compensation is the usual relief granted to the aggrieved.

The quantum of compensation cannot be equal in two cases, even if the origin of wrong be identical, since the same accident may cause death of one but only a scratch or abrasion to the other. It is the difference which imports the idea of

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42 Abbot v. Sullivan, (1952)1 KB 189(200).
liability, quantitatively, the extent and qualitatively, the kind of liability. Whatever the injury or damage, no compensation can be awarded unless there are grounds to make the wrongdoer liable.\footnote{Dr. R.G.Chaturvedi, \textit{Law of Motor Accident Claims and Compensation} (2005) 2.} Liability is, therefore, the main plank, the conduit pipe or the buckle which joins together the injury or loss and the damage or compensation, and works differently in tort than in any other civil wrong. \textit{Rylands v. Fletcher}\footnote{(1868) LR 3 HL 330; (1861-73) All ER 1.} is a classic case on the concept of liability, stretched to its extreme by House of Lords, in the nomenclature of strict, absolute unqualified or the unexceptionable liability. Although liability is the basis for any action in law, yet it in the law of torts, it operates with a bit of technicality. Jurists hold the words malfeasance, misfeasance and nonfeasance as synonymous with the compendious expression tort and the above three are read as equivalent to tort which dictionarily means breach of duty leading to damage and the meaning attached to it in law is the same.

Winfield has defined tortuous law arising from breach of a duty primarily fixed by law, this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.\footnote{Jay Laxmi Saltworks (P) Ltd. v. State of Gujarat, 1994 (4) SCC 1.}

Injury and damages are, thus, two basic ingredients of tort. Although these may be found in contract as well but the violations of which may result in tortuous liability are breach of duty primarily fixed by the law while in contract they are fixed by parties themselves. Further, in tort the duty is towards persons generally. In contract, it is towards specific person or persons.\footnote{Ibid} An action for tort is usually a claim for pecuniary compensation in respects of damage suffered as a result of the invasion of a legally protected interest. But laws 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 the passage of time have become firmly entrenched. Absolute liability or special use bringing with it increased dangers to others.\footnote{Ibid}

The entire law of torts is founded and structured on the moral 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 finally the ever- expanding and growing horizon of tortuous liability. In the interest of social development, orderly growth of society and cultural refinement, a liberal approach to tortuous liability is conducive. In between strict liability and fault liability, there may be numerous circumstances in which one may be entitled to sue for damages. What are fundamental is injury and not the manner in which it has been caused. Strict liability, absolute liability, fault liability and neighbour proximity are all refinements and developments of law by English Courts. Once the occasion for loss or damage is failure of duty, whether general or specific, the cause of action under the law of tort arises, though same may be due to negligence, nuisance, trespass, inevitable mistake etc., or may even be otherwise.

When the wrongful act, which has resulted in a single damage, was done by two or more persons, not independently of one another but in furtherance of a common design, the persons involved in such wrongful act are called joint tortfeasors. When two or more persons are engaged in a common pursuit and one of them in the course of and in furtherance of that commits a tort, both of them will be considered as joint tortfeasors and liable as such. Persons having certain relationships are also treated as tortfeasors. The common examples of the same are: principle and his agent, master and his servant and partners in a partnership firm. If an agent does a wrongful act in the scope of his employment for his principal, the principal can be made liable along with the agent as a joint tortfeasors. The distinction between joint tortfeasors and independent tortfeasors lies in the fact that in the case of former there is concurrence not only in the ultimate consequences but also mental concurrence in doing the act; in the case of latter, on the other hand, there is merely a concurrence in the ultimate result of the wrongful act independently done. In case of joint tortfeasors, the claimants are entitled to claim entire compensation from all or any of the drivers, owners or insurers involved in the accident, without compensation, contribution, apportionment or indemnity among them.

48 Ibid
49 Ibid
50 Dr. R.K.Bangia, Law of Tort (1997) 74 & 75.
51 U.P.State Road Transport Corporation v. Rajani, 2007 ACJ 1771.
Negligence, according to law of torts is a mode of committing certain torts and it denotes the mental element. Negligence is considered separate tort, which means a conduct that creates a risk of causing damage, rather than a state of mind.

In Ramwati v. Oriental Insurance Co. Ltd.\textsuperscript{52}, where Allahabad High Court has defined Negligence is a name of some sort of activities of a person in a single abbreviated and concluded form and such conclusion can be drawn only on basis of full described activity of the person attributed to be negligent. In Managing Director, Tamil Nadu State Transport Corporation v. Ayyammat\textsuperscript{53}, it was observed by the Madras High Court that negligence is a relative and comparative term so that no rigid formula or mathematical ratio can be laid down to determine what constitutes negligence under particular circumstances. The liability for compensation in any accident case, founded on negligence is technically described as arising out of damage caused by breach of duty. The axis around which the law of negligence revolves is duty to take care, duty to take reasonable care. However, the concept of duty, its reasonableness and the standard of care required, cannot be put in straitjacket and cannot be rigidly fixed. Right of yesterday is duty of today\textsuperscript{54}. Whether the defendant owes a duty to the plaintiff or not depends on the reasonable foreseeability of the injury to the plaintiff. If at the time of the act or omission the defendant could reasonably foresee injury to the plaintiff he owes a duty to prevent that injury and failure to do that makes him liable. Duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.\textsuperscript{55} To decide culpability we have to determine what a reasonable man would have foreseen and thus form an idea of how he would have behaved under the circumstances.\textsuperscript{56} In deciding as to how much care is to be taken in a certain situation one useful test is to enquire how obvious the risk must have been to an ordinary prudent man.\textsuperscript{57}

\textsuperscript{52} 2005(2) ACC 492 (All) DB.
\textsuperscript{53} 2007 ACJ 66 (Mad.) DB.
\textsuperscript{55} Bourhill v. Young, (1943) A.C.92.
\textsuperscript{56} Veeran v. Krishnamoorthy, AIR 1966 (Ker.) 172.
\textsuperscript{57} Mysore State Road Transport Corporation v. Albert Dias, AIR, 1973 (Mysore) 240.
2.9 NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND APPLICATION OF RES IPSA LOQUITUR

Black’s Law Dictionary\(^{58}\) defines the term Negligence as “omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do or the doing of something which a reasonable and prudent man would not do”.

In Managing Director, Tamil Nadu State Transport Corporation v. Ayyammat,\(^{59}\) it was observed that negligence is not only commission of an act but is also an omission to do something which a reasonable man would do or is obliged to do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe for the protection of the interests of another person, the degree of care, precaution and vigilance, which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are correlative. Negligence means either subjectively a careless state of mind or objectively careless conduct. Negligence is not an absolute term, but is a relative one, it rather a comparative term. What constitutes negligence varies under different conditions and in determining whether negligence exist in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. To determine whether an act would be or would not be negligent, it is relevant to determine, if any reasonable man would foresee that the act would cause damage or not.

In Municipal Corporation of Greater Bombay v. Laxman Iyer,\(^{60}\) The omission what the law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is negligent act. In Poonam Verma v. Ashwini Patel & others\(^{61}\) it was held by the Supreme Court that negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do or doing something which a prudent and reasonable man

\(^{59}\) 2007 ACJ 66 (Mad.) DB.
\(^{60}\) AIR 2003 SC 4182.
\(^{61}\) AIR 1996 SC 2111.
would not do. The breach of duty may occur either by not doing something which a reasonable man, under a given set of circumstances, would do, or by doing some act which a reasonable prudent man would not do. In motor accident cases negligence is understood as failure in duty to take care which implies the degree of care that ought to be taken by a reasonable man in a given set of circumstances. In *M S Grewal v. Deep Chand Sood*[^62] it was held that negligence is breach of duty or lack of proper care in doing something. It is want of attention and doing something which a prudent and reasonable man would not do.

### 2.10 CONTRIBUTORY NEGLIGENCE AND COMPOSITE NEGLIGENCE

The expressions contributory negligence and composite negligence are having different meanings. Contributory negligence has been defined as “a plaintiff’s own negligence that played a part in causing the plaintiff’s injury and that is significant enough to bar the plaintiff from recovering damages.”[^63] Contributory negligence is defence whereas composite negligence is a fact situation involving joint or combined negligence.

Composite negligence is defined as “where a person is injured without any negligence on his part but as a combined effect of the negligence of two other persons”. If due to negligence of A and B, Z has been injured. Z can sue both A and B for the whole damage. There is clear distinction between the contributory negligence and composite negligence. The term contributory negligence applies solely to the conduct of a plaintiff. In *Sombathina Ramu v. T. Shrinivasulu*,[^64] it was held that contributory negligence means that there has been an act of omission on the part of plaintiff, which has materially contributed to the damage. It was further held that where a person is injured without any negligence on his part but as result of the combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled by Polock as injury by composite negligence.[^65]

[^64]: 2009 ACJ 187 (AP).
[^65]: Ibid.
2.11 NEGLIGENCE AND TORTIOUS LIABILITY: INTER RELATION OF INDIAN PENAL CODE

Under Sec 279, Indian Penal Code, Death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another’s negligence. There must be direct nexus between the death of the person and rash and negligent act, case was decided Suleman v. State of Maharashtra. Remote nexus is not enough. Sec 279 covers only those cases which relate to driving on public way endangering human life while offence under Sec 304-A extends to any rash and negligent act falling short of culpable homicide. So where prosecution made no efforts to prove that there was any rash or negligent act on the part of the driver, the accused was acquitted although he had run over the deceased.

According to Sec 279, whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to one thousand rupees, or with both.

**Section 279, Indian Penal Code** requires two essentials, *viz.*

(a) Driving of a vehicle and

(b) Such driving must be so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any person, case was decided Padmacharan Naik v. State of Orissa. For Sec 279 to apply the rashness or negligence must be criminal rashness or negligence.

**Rash and Negligent driving and defence of automatism**

Generally, it is a defence that the act or omission or, even, event with which the accused is charged was involuntary, case was decided Wool Mington v. Director of Public Prosecution. An act, omission to act or event on the part of the accused is involuntary where it is beyond his control, where it is beyond the control of that person’s mind, the situation is known as one of automatism. Sec 304-A, defines,

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69 1982 Cr LJ NOC 192(Ori).
70 1961 Mad LJ (Cr)325.
71 (1935)AC 462 (482).
whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

**Rash or Negligent Act**

Criminal rashness is hazarding a dangerous act with the knowledge that it is so and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal Negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was imperative duty of the accused person to have adopted. The hazard must be of such a degree that injury was most likely to be occasioned thereby.

For criminal negligence it must be shown to secure conviction that the act was done with the consciousness of risk that evil consequences of death were likely to flow there from and/or there was mens rea in the doing of the negligent act alleged against the accused and case was decided *Pritam Singh v. State.*

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from the neglect of the civic duty of circumspection. A rash act is primarily an overhasty act and is opposed to a deliberate act, even if it is partly deliberarte, it is done without due thought and caution. Criminal rashness is hazarding a dangerous act with the knowledge that it is so and that it may cause an injury. There is breach of positive duty.

**Death to Be Direct Result of Rash or Negligent Act**

Death must be direct result of the rash or negligent act of accused and the act must be efficient cause without intervention of another’s negligence. It must be the *Causa Causans*; it is not enough that it may have been the *causa sine qua non.* There must, therefore, be a direct nexus between death of a person and a rash and

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73 cut L T 723.
negligent act of the accused. A case was decided *Satya Prakash Chowdhury v. State of MP.*

**Section 279, 338 And 304-A: Inter Relation**

All the three sections speak of rash and negligent act. Sec 279 IPC punishes the offence of driving a vehicle in a manner “so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person”, Section 338 punishes a person who causes grievous hurt to any person by doing any act “so rashly and negligently as to endanger human life”; and section 304-A provides the punishment for causing the death of any person “by doing any rash or negligent act not amounting to culpable homicide”.

When an accident occurs from a collision between a motor vehicle and a Railway engine or train, the consensus of opinion is that the tribunal will have jurisdiction if the motor vehicle was solely or jointly responsible for the accident but if the accident is entirely due to negligence of the railway employees, the tribunal will have no jurisdiction. Where there was collision between taxi and train held that claim against joint tortfeasor to pay compensation was tenable before the motor vehicle claims tribunal. Case was decided *Union of India v. Bhagwati Prasad.*

**Triple concept of Negligence**

The only ingredients necessary for the tort of negligence are the triple concept, duty, breach and damages. It is only when these three ingredients co-exist that a suit for negligence can lie. Thus there can be no negligence unless there is a duty imposed by law. “The idea of negligence and duty are strictly co-relative, and there is no such thing as negligence in the abstract. Negligence is simple neglect of some care which we are bound towards somebody.”

**Tort and Wrong- Distinction**

Negligence is often used in the sense of careless conduct without reference to any duty to take care. The use of the term in this sense has introduced some confusion into the subject and has tended to obscure the true meaning of negligence as a part of law of Tort. When there is duty to take care, the standard of care is

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74 1990 Cr Lj NOC 132 (MP).
76 A.I.R. 2002 SC 1301.
77 *Thomas v. Quartermaine*, (1887) 18 QBD 685.
frequently that of the reasonable man, although this is not always so, and consequently, failure to take reasonable care and negligence are sometimes used as synonymous terms regardless of whether or not there is any duty, cast. Similarly, there is a thin line and distinction between expression ‘tort’ and ‘wrong’. They are also, at times, colloquially treated as synonyms.\textsuperscript{78}

\section*{2.12 CRIMINAL NEGLIGENCE}

Criminal negligence means failure to exercise reasonable and proper care and precaution to guard against injury either to the public or to an individual.\textsuperscript{79} Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury.\textsuperscript{80} To constitute either of the offences under Section 279 or Section 304-A, Indian Penal Code, proof of criminal rashness or criminal negligence was essential. Mere non-observance of the requirements of the rules framed under the Motor Vehicles Act or driving a vehicle which was not in its ideal condition would not necessarily amount willful rashness or negligence required to constitute an offence under Section 279 or 304-A. criminal rashness or negligence which was required to constitute an offence either under Section 279 or 304-A cannot be attributed to the petitioner beyond reasonable doubt. As he was driving the vehicle “slowly and carefully” conviction of the petitioner under Sections 304-A and 279 cannot be maintained.\textsuperscript{81}

The requirement of culpable rashness under Section 304-A, Indian Penal Code is more drastic than negligence sufficient under the law of Tort to create liability.\textsuperscript{82} To make a person liable for criminal negligence and rashness, it was necessary to show a nexus between the wrongful act of an accused and the injuries received by others. Injuries suffered must be the immediate result of the wrongful act and not a remote consequence. In spite of the element of criminal intent involved in the offence of mischief, the act of mischief is necessarily rash and reckless act of Tort.\textsuperscript{83}

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\textsuperscript{78} Gujrat State Road Transport Corporation v. Kamlaben Valjibhai Vora, 2002 (3) TAC 465.
\textsuperscript{79} State of Gujrat v. Dr. Maltiben Valgibhai Shah, 1994 ACJ 375 (Guj).
\textsuperscript{80} Ibid.
\textsuperscript{81} Prem v. State, 1991 TAC 135 (Ori).
\textsuperscript{82} N.K.V. Bros. (Pvt.) Ltd. v. M. Karunai Anmal, 1980 TAC 204 (SC).
\textsuperscript{83} Kacharmal Kishanlal Mahajan v. Chainram Kishanlal Mahajan, 1992 (2) TAC 205: 1992 ACJ 986 (MP).
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2.13 RULE OF LAST OPPORTUNITY

The rule of last opportunity means that he who had last opportunity of avoiding the accident, notwithstanding the negligence of other, is solely responsible. Doctrine of last opportunity is explained in simplest way in the matter of *Municipal Corporation of Greater Bombay v. Laxman Iyer*\(^84\), Where an accident is due to negligence of both parties, substantially, there would be contributory negligence yet even in such a case, whichever party could have avoided the consequence of other’s negligence would be liable for the accident. The decision in the matter of *Davies v. Mann*\(^85\) is said to be the originator of the rule of last opportunity, though the word as such do not appear in the judgment. In that case, the plaintiff had left his donkey in the lane with its forefeet fettered. The donkey was run over by a wagon going a little too fast. The plaintiff succeeded since the defendant could have avoided the accident though the plaintiff was also at fault in turning the donkey in to the lane with its forefeet fettered. Doctrine of last opportunity cannot be applied in case of children who are seldom held guilty of contributory negligence.

2.14 DOCTRINE OF ALTERNATIVE DANGER

It is also called as “the dilemma principle”, “choice of evils” or the agony of moment. Where the plaintiff is suddenly put in a position of imminent personal danger by the wrongful act of the defendant and he takes a reasonable decision to avoid the danger and acts accordingly and suffers injuries consequently, the defendant is liable. A person put in sudden and imminent danger must not be expected to exercise the same coolness and wisdom which he would have displayed apart from the emergency.

Where the defendant has been guilty of negligence, the plaintiff is required to show that degree of care for his own safety which a reasonable man in his position is expected to show. The defendant cannot escape full liability if by his negligence he puts the plaintiff in a position of imminent peril causing to take a mistaken step which a reasonable man would not have taken had he not to act immediately.\(^86\)

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\(^84\) 2004 ACJ 53.

\(^85\) (1882) 10 Mand W. 546.

2.15 CONTRIBUTORY NEGLIGENCE AND CHILDREN

A distinction must be drawn between children and adults, for an act, which would constitute contributory negligence on the part of an adult, may fail to do so in the case of child or young person, the reason being that a child cannot be expected to be as careful for his own safety as an adult. So, there cannot be a case of contributory negligence on the part of children because a child cannot be expected to be as careful for his own safety as an adult, therefore, a plea of contributory negligence cannot be availed when a child is involved in an accident.87

In *Taj Hussain v. Misru Khan*88 where offending truck was being parked at the place of accident where children were playing and while the truck was being taken on reverse hitting a boy of 12 years causing 100% permanent disability. Apportionment of liability by the tribunal on the basis of contributory negligence was held unsustainable. Claimant being 12 years of age cannot be said to be of such an age as reasonably to be expected to take precautions for his own safety and he had no road sense or experience of his elders. Therefore, he is not to be found guilty of contributory negligence. Truck driver should have taken extra precaution to save the pedestrians. In *Malikdhinar English Medium School v. A.Babudeen*89 where a girl of 3½ years alighted from the school bus and the driver started the bus suddenly without caring for the safety of the child and in that process the vehicle ran over the child resulting in her death on the spot, it was held that since a child age 3 ½ years can hardly be blamed for negligence, the driver of the bus was guilty since it was duty of the driver to take care of the child. In *Sudhir Kumar Rana v. Surinder Singh*90 where a minor scooterist who had no driving license, collided with mini truck and sustained injuries, it was held that the scooterist could not be held guilty of contributory negligence merely because he had no license.

In *Hughes v. Macfie* a girl aged seven years while she was crossing the railway line through a wicket gate was knocked down by an engine. It was held that the proximate cause of the accident was the negligence of her in not looking out for a passing engine when she was crossing the line and since she was capable of apprehending danger she was guilty of contributory negligence. Where, however, an

88 2006 (1) ACC 30 (Raj.).
89 2006 ACJ 1711 (Mad.) DB.
90 2008 ACJ 393 (MP) FB.
infant is guilty of what in a grown-up man would be mere negligence and nothing beyond it, he may recover.\textsuperscript{91}

\section*{2.16 DOCTRINE OF APPORTIONMENT OF DAMAGES}

It is based on Maritime Conventions Act, 1911. According to the doctrine, the liability is apportioned or distributed between the plaintiff and the defendant, basing on their respective shares in the commission of the tort. In other words, this doctrine reduces compensation to the injured and reduces liability to the wrongdoer. According to Section 1 (i) of the Law Reforms (Contributory Negligence) Act, 1945, the compensation is reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damages.

\section*{2.17 APPLICATION OF DOCTRINE OF \textit{RES IPSA LOQUITUR} IN COLLISION CASES}

\textit{Res Ispa Loquitur} is a rule of evidence coming in to play when circumstances suggest negligence of driver of the vehicle\textsuperscript{92}, but in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him, but is solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident but cannot prove how it happened to establish negligence. This hardship is to be avoided by applying the principle of \textit{res ispa loquitur}. The general import of the words \textit{res ispa loquitur} is that the accident speaks for itself. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more\textsuperscript{93}. In \textit{Dhanwanti v. Kulwant Singh},\textsuperscript{94} where it was held by the High Court that on the application of this principle, the burden shifts upon the respondent/ defendants to explain the accident. The maxim applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused.\textsuperscript{95}

The doctrine can extend to the cases of breach of duty, general or statutory, on part of driver. A driver is duty bound to give signal before taking a turn on

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\textsuperscript{91} (1863) ACJ 423 (HP). \\
\textsuperscript{92} \textit{Shaju v. Babu}, 2008 ACJ 1228 (Ker.) DB. \\
\textsuperscript{93} \textit{State of Madhya Pradesh v. Asha Devi}, 1988 ACJ 846 (MP). \\
\textsuperscript{94} 1994 ACJ 708 (MP) DB. \\
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National Highway. Where the driver, instead of explaining his omission, had run away from the spot he was held guilty of negligence by applying the principle of *res ipsa loquitur*. The doctrine applies when accident is admitted but its cause is doubtful. When there is direct evidence of negligence, there can be no question of applying the doctrine.

The term “collision” has been used here relating to cases where there is collision between two or more motor vehicles, like collision between car and bus etc. In collision cases where two or more motor vehicles collided together, question arises is what the position of third party who suffers due to the negligence of two or more independent persons damage is caused to a third, individual (person), where the sufferer is not driven to apply any such analysis to find out whom he can sue. Answer is he will be entitled to bring action for damages within the limits set out by the general rules as to remoteness of damage to sue all or any one of the negligent persons. It is no concern of his whether there is any duty of contribution or indemnity as between these persons through in any case he cannot recover more than what he is legally entitled.

Accidents and compensation are fundamentally the incidents of Law of Torts. Accident connotes a casualty caused by neglect of duty to others. The causa causans of an accident is not mens rea, but remissness. The attributes like animus, motive, intention etc., all tending somewhat to a future consequence are simply misfit to explain the phenomenon of accident, which very often speaks for itself, and is covered by the maxim *res ipsa loquitur*. The word approximately representing its formal cause finds its legal nomenclature in the term in negligence. It is this element of negligence which distinguishes an accident simpliciter from the anathema of inevitable accident, conceived in common parlance as Act of God, a stock phrase often deployed as defence to counter a claim for compensation on account of an accident. In the scriptural sense, all that happens is ordained by God, as the Bhagwad Gita proclaims: “all actions are performed by the modes of nature but the fool with his mind perverted by ego arrogates himself as the doer.”

97 *Parvati Bai v. Bhagwati Rambhau Shelke*, 2004 AACJ 1647 (Bom.).
It is a pre-condition of any civil society that no one shall conduct his affairs in a way so as to result in loss, damage or injury to the mind, body, reputation or property of another. Accident, being casualty, cannot, therefore, be a matter of contract and being a wrong independent of contract, it is a tort litigated under the hammer of negligence wherein compensation is the usual relief granted to the aggrieved. The quantum of compensation cannot be equal in two cases, even if the origin of wrong be identical, since the same accident may cause death of one but only a scratch or abrasion to the other. It is the difference which imports the idea of liability, quantitatively, the extent and qualitatively, the kind of liability. Whatever the injury or damage, no compensation can be awarded unless there are grounds to make the wrongdoer liable.\textsuperscript{101}

2.18 \textbf{NO FAULT LIABILITY}

Today road accidents in our country has touched a new height and road accidents are increasing day by day and resultant cases relating to motor accidents are increasing in our courts. In majority of road accident cases because of rash and negligent driving, innocent person becomes victims and because of this their dependents in many cases are virtually on the streets. Because of increasing number of motor accidents and their victims, question of payment of compensation is assuming great importance in public as well as for the courts. Generally as a rule, victims of road accidents have to first establish that the accident was due to fault of the person causing injury or damage, than only court will direct for payment of compensation. Indian legislature being aware of the magnitude of the plight of victims of road accidents has introduced several beneficial provisions to protect the interest of the claimants and to enable them to claim compensation from the owner of the vehicle or insurance company.

In 1982 Chapter VII-A was introduced in Motor Vehicles Act, 1939, wherein section 92A(1) provided that where the death or permanent disablement of any person had resulted due to an accident, the owner of the vehicle shall be liable to pay compensation in respect of such death or disablement in accordance with the provisions of Section 92A(1). Section 92A (2) provided for the fixed amount for such liability on the basis of no fault liability. The claimant was not required to

\textsuperscript{101} Mysore State Road Trans. Corpn. v. Albert Dias, AIR 1973 Mys 240.
plead or establish that the death or permanent disablement in respect of which the claim had been filed was the result of the wrongful act, neglect or fault of the owner of the vehicle. In Sohan Lal Passi v. P. Sesh Reddy it was observed by the Supreme Court that by introducing the chapter VII-A in the Motor Vehicles Act, 1939, the Parliament has provided for payment of compensation within certain limits, ignoring the principle of fault. Same is the position in the Motor Vehicles Act, 1988 and similar provisions have been retained in Chapter X of the Motor Vehicles Act, 1988.

In National Insurance Co. Ltd. v. Malathi C. Saliam it was held by Kerala High Court that claim under Section 163A of the Motor Vehicles Act, 1988 cannot be defeated on the ground that death or permanent disablement had occurred due to wrongful act, neglect or default on the part of the deceased or disabled person. Nor the quantum of compensation shall be reduced due to contributory negligence on the part of person who sustained disablement or death. In M.K. Kunnimohammad v. P.A. Ahmedkutty’s matter, the apex court has made suggestions to raise limit of the compensation payable in respect of death or permanent disablement, as a result of motor accidents, in the event of there being no proof of fault on the part of the person involved in the accident, and also in hit and run motor accidents and to remove certain disparities in the liability of the insurer to pay compensation depending upon the class or type of vehicles involved in accident. The above suggestions were incorporated in the bill of Motor Vehicles Act, 1988. Section 140 of the Act provides that in case of death or permanent disablement of any person resulting from an accident which arise out of use of a motor vehicle/s, the owner of offending vehicle/s shall be liable jointly or severally to pay compensation in respect of such death or permanent disablement. Under this section amount of compensation is a fixed amount of Rs. 50,000/- in case of death and Rs. 25,000/- in case of permanent disablement. Compensation awarded under this section does not barred the victim to claim compensation under any other law being in force, though the amount of such compensation to be given under any other law shall be reduced by the amount of compensation payable under no fault liability under this section or in

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102 Section 92A(3), The Motor Vehicles Act, 1939.
104 2005 (2) ACC 414.
105 1987 (4) SCC 284.
accordance with the structured formula laid down under schedule -2 to this Act read
with Section 163A of the Act.

In Satvantkumar Harjit Singh Vig v. Aarti Jayant Lalwani\textsuperscript{106} case it was held
by the Double Bench of the Mumbai High Court that the phrase ‘has resulted from’
occurring in section 140 of the Motor Vehicles Act, 1988 does not require the death
to have occurred in the accident itself. The section is attracted even where death is
result or the consequence of the accident arising out of a motor vehicle. What is
necessary to see is whether the death is the consequence of an accident arising out of
use of motor vehicle. In New India Assurance Co. Ltd v. Mehebubanbibi\textsuperscript{107} case the
deceased was deputed by his employer to carry a damaged transformer in a tractor.
The tractor fell in to a ditch. The deceased was pressed under the damaged
transformer, sustained injuries and died in hospital. Death of the deceased had arisen
out of and in course of his employment. Though the case was not one of no fault
liability, but as the accident had occurred due to negligence of the driver of the
tractor, yet the fact of the case attract for a claim of double compensation under two
different laws, irrespective of whether the claim is based on fault liability or on no
fault liability. What is material is that a claim under the Motor Vehicles Act is no
bar to claiming compensation, if permissible, also under a different law. The Double
Bench of Gujarat High Court held that the heirs of deceased in such case could
claim compensation both under the Motor Vehicles Act for negligence of the driver
of the tractor and also under Workmen’s Compensation Act, 1923 for death
occurring out of and in the course of employment.

In Ram Singh v. Anil\textsuperscript{108} it was held by the High Court that when occurrence of
accident is proved to have arisen out of use of Motor Vehicle, it is not necessary to
plead or prove negligence of driver of vehicle under Section 163A. In a case\textsuperscript{109} a
claim under no fault liability, claimant need not plead or establish that permanent
disablement was due to wrongful act or negligence or default of owner of the other
vehicle with which the vehicle of claimant has colluded. In Pepsu Road Transport
Corp. v. Kulwant Kaur’s\textsuperscript{110} case it was held by the Supreme Court that section 140,

\textsuperscript{106} 2005 (1) ACJ 255 (Bom.) DB.
\textsuperscript{107} 2003 (2) TAC 639 (Guj.) DB.
\textsuperscript{108} 2009 ACJ 73 (MP) DB.
\textsuperscript{109} National Insurance Co. Ltd. v. Honnappa, 2008 (3) ACC 726 (Karn) DB.
\textsuperscript{110} 2009 ACJ 1329.
as it came in to effect from 01.07.1989, is not retrospective. Hence the provision amended with effect from 14.11.1994 is also not retrospective. Therefore, in accident which occurred on 30.11.1982, and decided on 16.07.1984, the claimant was entitled only Rs. 15,000/- as per provisions of Section 92A of the Motor Vehicles Act, 1939. In *New India Assurance Co. Ltd v. Shymo Chauhan* it was held by the Punjab and Haryana High Court that when a claim application is filed under Section 163A, the owner and insurer are liable to pay to the legal heirs of the deceased in case of death provided the accident has taken place or has arisen out of use of motor vehicle and the liability extends even to cases where the deceased was driver. In a case accident was caused by a stolen motor cycle, it was held that the insurer cannot avoid liability, since there was no breach of terms of policy in such case. In *Sitaram Akinchan v. Rajesh Sharma* in this case an accident was caused by a motorcyclist on 05.06.1990 and the vehicle was not insured prior to 11.06.1990, it was held that the liability falls solely on owner of the vehicle despite the plea that it was stolen at the time when accident took place.

### 2.19 VIS MAJOR

In Hindu Religion it is considered that whatever happens in the world is Act of God, yet in legal parlance, the expression Act of God is a mere short way of expressing the proposition that a common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected of him. Act of God usually denoted by the expression vis major, which is distinct from its kindred expression force majeure. The latter expression is not a mere French version of the Latin expression vis major, but is a term of wider import. Difficulties have arisen in the past as to what would legitimately be included in force majeure. Judges have agreed that strikes breakdown of machinery, which though normally not included in vis major, one included in force majeure. An analysis of rulings on the subject shows that where reference is made to force majeure the intention is to save the performing party from the consequence of anything over which he has no control. Whether

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113 2007 (4) ACC 604.
force majeure or vis major can be any defence in cases of absolute or strict liability, as opposed to liability simpliciter, since the doctrine propounded in late nineteenth century must have undergone mitigation, modification or made more absolute in course of years, is a debatable question.

In *Dhanrajmal Govindram v. Shamji Kalidas & Co.*\(^{115}\) it was held by the Supreme Court that where reference is made to force majeure the intention is to save the performing party from the consequence of anything over which he has no control. In *Sankardan Das v. Grid Corporation of Orissa Ltd*\(^{116}\) it was held that the expression Act of God signifies operation of natural forces free from human intervention, such as lightning or severe gale, snow storming, hurricanes, cyclones and tidal waves and the like, though every non-expected wind or storm cannot operate as excuse from liability if there is reasonable possibility of anticipating their happening e.g. the possibility of extraordinary floods in particular region being within competence of authorities to take precautionary steps. In *Sarda Devi v. Birbal Ram*\(^{117}\) in this matter the accident was occurred due to bursting of tyre but the owner had failed to establish that tyre was road worthy, the finding of the Tribunal that it was an Act of God was reversed by the appellate court holding that owner and driver were negligent in operating the bus with unroad-worthy tyres. In *Shamma v. Kartar Singh*\(^{118}\) in this case a tree had fallen on a jeep and a passenger sustained fatal injuries, the plea that the tree had fallen because of storm and therefore there was no negligence on the part of the driver was negated because the occupants of vehicle had warned the driver not to drive in great speed and stop the vehicle prior to accident.

In *State of Rajasthan v. Ram Prasad*\(^{119}\) in the matter claim for compensation was made under the Workmen’s Compensation Act, 1923, in respect of death of a lady worker who died of an accident which took place on account of lightning. It was held that she was working on the site and would not have been exposed to such hazard of lighting striking her, had she not been working so.

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\(^{115}\) AIR 1961 SC 1283.  
\(^{116}\) 1998 ACJ 1420.  
\(^{117}\) 2009 ACJ 2780 (Raj).  
\(^{118}\) 2008 ACJ 892 (MP) DB .  
\(^{119}\) 2001 ACJ 647 SC.
In *R.J. Foujdar Bus Service v. Ganpat Singh*\(^{120}\) in this matter a driver took the bus on the bridge when water was overflowing. The bus was washed away, resulting in death of several passengers. Accident was not an Act of God and negligence of driver was writ large. In a case\(^ {121}\) a bus had collided against a tree which caused a tyre burst in the rear wheel, causing injury to a passenger. The defence was that the tyre was in good condition and that the burst was a vis major. The evidence was that the bus was overloaded with 80-90 passengers. It was held that the tyre burst was due to overloading and that the driver was negligent in having the bus overloaded.

### 2.20 APPLICATION OF PRINCIPLE OF VICARIOUS AND ABSOLUTE LIABILITY IN MOTOR ACCIDENT CASES

The term liability gives wide suggestions. It is a broad term of large and comprehensive significance and means legal responsibility or obligation to do a thing. Liability means “the state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility.”\(^ {122}\)

In *First National Bank Ltd. v. Seth Sant Lal*\(^ {123}\) it was observed in this matter that the term ‘liability was of large and comprehensive significance and when construed in its usual and ordinary sense in which it is commonly employed, it expresses the state of being under obligation in law or in justice. Similar observations were given by the Delhi High Court in the matter of *Mohd. Yaqub v. Union of India*,\(^ {124}\) it observed that the word Liability in ordinary sense in which it is commonly employed, it expresses the state of being under obligation in law or in justice. Thus, is what the term ‘liability’ simpliciter should connote. When liability of one is substituted by that of another, that is, when one becomes liable by legal fiction for the wrong or neglect of another, the term ‘liability’ is prefixed by the appellative ‘vicarious’.

\(^{120}\) 2007 ACJ 1591 (MP) DB.  
\(^{122}\) *Andersons’ Law Dictionary*.  
\(^{123}\) AIR 1959 Pun. 328.  
\(^{124}\) AIR 1971 Del 45.
2.21 VCARIOUS LIABILITY

Normally no person is held responsible for the wrongs done by someone else. However, there are few instances wherein a person can be held liable for the conduct of another person. This liability is known as Vicarious Liability. The following relationships are the best examples of Vicarious Liability:

- Liability of the Principal for the act of his Agent
- Liability of the Partners
- Liability of the Master for the act of his Servant

Liability of the Principal for the act of his Agent When a principal authorizes his agent to perform any act, he becomes liable for the act of such agent provided the agent has conducted it in the course of performance of duties. Liability of the Partners For the tort committed by a partner of a firm, in the normal course of business of that partnership, other partners are responsible to the same extent as that of the partner who is in fault. The liability thus arising will be joint and several. Liability of the Master for the act of his Servant The liability of the master for the act of his servant is based on the principle of ‘respondent superior’, which means ‘let the principal be liable’. This principle originates from the maxim, ‘Qui Facit per Alium Facit per se’ which means ‘he who does an act through another is deemed in law to do it himself’. In tort, the wrongful act of the servant is thus deemed to be the act of the master. However, such wrongful act should be within the course of his master’s business and any act, which is not in the course of such business, will not make the master liable. In Rani Devi @ Usha Rani v. Devilal125 it was held that if vehicle is used for purpose of owner or owner’s business, the act of servant would make the owner vicariously liable for payment of compensation, but where the vehicle was driven by an unauthorized person not for owner’s purpose or owner’s business, owner would not be vicariously liable.

Expression ‘Vicarious liability’, has been defined by Peter Barrie as under:

“Vicarious Liability: where a person is liable for an act committed by someone else on his behalf. The commonest situation is employment: an employer is liable for the acts of his employee, it is the employer who will be named as the defendant (and who will hold the relevant liability insurance policy)”126.

125 2009 ACJ 858 (Raj).
The term vicarious liability has been described in Winfield & Jolowicz on Tort as follows:

“The expression ‘vicarious liability’ signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B. the fact that A is liable does not, of course, insulate B from liability, though in most cases it is unlikely that he will be sued or that judgement will be enforced against him. It is not necessary for vicarious liability to arise that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B’s tort should be referable in a certain manner to that relationship A’s liability is truly strict, though for it to arise, a case of negligence, there has to be fault on the part of B. the commonest instance of this in modern law is the liability of an employer for the torts of his servants done in the course of their employment. The relationship required is the specific one, that arising under a contract of service and the tort must be preferable to that relationship in the sense that it must have been committed by the servant in the course of his employment.”

The liability of one partner for another, that of father for his minor son, that of husband, in certain cases for the act of his wife, or that of a principal for his agent, may be other illustrations. In criminal law, it implicates the act of abettor for the act of the person abetted, and the conspirators in the act committed in pursuance of a conspiracy. Generally the doctrine of vicarious liability recognizes that a person may be bound to answer for the acts of another. Similarly in the case of corporations –the company may be liable for the acts of its employees, agents, or any person for whom it is responsible. The doctrine of vicarious liability developed originally in the context of tortious liability, was imported into the criminal law, when this type of offences were essentially absolute liability offences.

2.22 ABSOLUTE LIABILITY

Rules of Strict and Absolute Liability are based on the concept of ‘No fault liability’. At times a person may be held responsible for some wrong though there was no negligence or intention on his part to do such wrong. This rule was laid

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down by the House of Lords in *Rylands v. Fletcher*\(^{128}\) and hence it is also commonly termed as the Rule in *Rylands v. Fletcher*. In India, this rule was formulated in the case of *M.C. Mehta v. Union of India*\(^{129}\), wherein the Supreme Court termed it as ‘Absolute Liability’ This rule was also followed in the case of Indian Council for Enviro-Legal Action *v. Union of India* (1996), Section 92A of the Motor Vehicles Act, 1939 also recognises this concept of ‘liability without fault’. The ingredients of the Rule of Strict Liability are:

- Some hazardous thing must be brought by the defendant on his land.
- There must be an escape of such thing from that land.
- There must be a non-natural use of the land.

**Exceptions to the Rule of Strict Liability:**

- If the escape of the hazardous good was due to plaintiff’s own fault or negligence.
- Vis Major or Act of God is a good defence in an action under the Rule of Strict Liability.
- In cases where the wrong done has been by someone who is a stranger and the defendant has no control over him.
- Cases where the plaintiff has given his consent to accumulate the hazardous thing in the defendant’s land for the purpose of common benefit.
- Any act done under the authority of a statute

Where an enterprise is engaged in a hazardous or inherently dangerous activity, 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 a vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*\(^{130}\).

**Absolute Liability and State**

State cannot claim sovereign immunity in Motor Accident cases. The already devastated legal heirs of deceased victim of the vehicle accident involving government vehicle now, no longer have to run from pillar to post to get compensation which is denied to them on the ground of government vehicle engaged in so called sovereign duty and thus claim sovereign immunity which is an

\(^{128}\) (1868) LR 3 HL 330; LRI. Ex. 265.
\(^{129}\) AIR, 1987 SC 1086.
\(^{130}\) *Rylands v. Fletcher*, (1868) LR 3 HL 330.
archaic concept. No civilized country in this world which claims itself to be founded on the notions of the welfare state, shun its liability towards accident victims and their legal heirs involving its own vehicle on the ground they were doing a government duty, thus, entitled to act in any manner as it is sovereign. No legal system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his life or property illegally by negligent act of employees or officers of the State without any remedy. The Government and its functionary have trend to deny their liability towards the poor victim or the legal heir victim of state negligent act by raising the plea of the sovereign immunity, showing their apathy towards the victims which reflects the medieval mindset borrowed from the British Raj.\textsuperscript{131}

The Motor Accident Claims Tribunal awarded the compensation to the poor widowed lady whose husband died in an accident cause by the Air Force Vehicle. The Air force filed an appeal in the High Court that it is not liable to pay compensation as its vehicle was exercising a sovereign function, an oft repeated plea taken by various departments of governments to shun their liability towards the accident victim. Advocate Neeraj Arora took the noble cause to fight for justice for the poor lady pro bono and represented the poor lady in the Delhi High Court against the irresponsible behavior of the Air Force. Advocate Neeraj Arora argued at length the dichotomy between sovereign and non-sovereign functions citing leading judgments of Apex Court and various High Courts which shows that the doctrine of sovereign immunity has no application so far as claims for compensation under the Motor Vehicles Act is concerned.\textsuperscript{132}

The Hon'ble Mr. Justice J.R. Middha, taking the note of the important constitutional issue that whether the “Doctrine of Sovereign Immunity” is available to defeat the claim for compensation under the Motor Vehicles Act, 1988 appointed Amicus Curie and also requested the Additional Solicitor General to assist the case. The legal luminaries submitted that the Motor Vehicle Act, 1988 was a special law and no exception had been carved out in the statute in respect of use of government vehicle for defense purposes. It was also submitted that the doctrine of sovereign immunity had no place in Indian Jurisprudence citing the judgment of the Hon'ble

\textsuperscript{131} Neeraj Arora, State cannot Claim Sovereign Immunity in Motor Accident Cases, Accessed on www.wordpress.com\textbackslash theme.htm on 19.06.2010 at 2.32p.m.
\textsuperscript{132} Ibid.
Apex Court in *State of Rajasthan v. Vidyawati*. The said principle has been reiterated by the Supreme Court in a large number of decisions and in one of the decisions; the concept was described as ‘Old and Archaic’. In addition to the judgments of the Supreme Court, there are a substantial number of judgments of various High Courts which have rejected the plea of sovereign immunity. The doctrine of sovereign immunity is based on the supremacy of the monarchy of the England. In India, which is a parliamentary democracy governed by the Constitution, there is no equivalent to monarch. The Hon’ble Mr. Justice J.R. Middha took note of the contentions raised against the illogical principles of sovereign immunity reflecting the apathy of the state towards the poor victims of the accident involving government vehicles and rightly observed that it did not behoove the State to take cover under the principle of sovereign immunity only to shun liability for the consequences of the negligence of its servants. However, before passing any final verdict on the issue, the Hon’ble Mr. Justice J.R. Middha considering the adverse implications of the government raising the plea of sovereign immunity in claims under the Motor Vehicles Act, 1988 despite clear and well settled law by the Hon’ble Supreme Court issued the direction to the Ld. Attorney General seeking its opinion as to in how many cases, the state has taken or raised the plea of “sovereign immunity” in pending motor accident claim cases in various courts and tribunals and also directed the Attorney General to consider the possibility of issuance of a circular/Government of India directive in respect of all pending motor accident claim cases as well as cases that may arise in future.

The aforesaid directions of the Hon’ble Mr. Justice J.R. Middha are judicious, well thought-out, highly commendable as it seeks out to curb the government apathy and irresponsible behavior in motor accident cases once and for all not only in present pending cases but also the similar cases which may arise in future through the country. The Ld. Solicitor General Mr. Gopal Subramaniam in his communiqué dated 19th May, 2010 addressed to the Hon’ble High Court of Delhi opined that taking into account correct legal position as enumerated above, a clear office memorandum should be issued to the effect that the defence of sovereign immunity not be pleaded by Department of Government in cases

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134 Ibid.
135 Ibid.
involving compensation arising out of motor vehicle accidents involving the use of Government vehicles on Government duty and advised the Ministry of Law & Justice to issue the said memorandum. Thus, the aforesaid direction of the Hon’ble Justice Mr. J.R. Middha has paved a new foundation for justice and corrected a grave constitutional error in form of doctrine of sovereign immunity which can now no more be pressed as defence by the government departments to shun their liability towards its poor subjects.

Black’s Law Dictionary\(^\text{136}\) defines the term Negligence as “omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do or the doing of something which a reasonable and prudent man would not do”.

\section{2.23 THE MOTOR VEHICLES ACT, 1988}

Section 140 of the Act deals with “liability to pay compensation in certain cases on the principle of no- fault”. According to Section 140(1) of the Act\(^\text{137}\), where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall or as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

According to Section 140(2) of the Act, the amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be a fixed sum of twenty five thousand rupees and the amount of compensation payable under that sub-section in respect of permanent disablement of any person shall be a fixed sum of twelve thousand rupees.

In \textit{Managing Director, Tamil Nadu State Transport Corporation v. Ayyammat}\(^\text{138}\) it was observed that negligence is not only commission of an act but is also an omission to do something which a reasonable man would do or is obliged to do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe for the protection of the interests of another person, the degree of care,

\begin{footnotesize}
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\item \(^{136}\) Black’s Law Dictionary, 6th Edition.
\item \(^{137}\) The Motor Vehicles Act, 1988.
\item \(^{138}\) 2007 ACJ 66 (Mad.) DB.
\end{itemize}
\end{footnotesize}
precaution and vigilance, which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are correlative. Negligence means either subjectively a careless state of mind or objectively careless conduct. Negligence is not an absolute term, but is a relative one, it rather a comparative term. Negligence varies under different conditions and in determining whether negligence exist in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. To determine whether an act would be or would not be negligent, it is relevant to determine, if any reasonable man would foresee that the act would cause damage or not. In *Municipal Corporation of Greater Bombay v. Laxman Iyer.* The omission what the law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is negligent act.

In motor accident cases negligence is understood as failure in duty to take care which implies the degree of care that ought to be taken by a reasonable man in a given set of circumstances. In *M S Grewal v. Deep Chand Sood* it was held that negligence is breach of duty or lack of proper care in doing something. It is want of attention and doing something which a prudent and reasonable man would not do. In *Gujarat State Road Transport Corporation v. Kamla Ben Valjibhai Vora* it was held that negligence is careless conduct. An act is negligent when done either from error of judgement or on account of mistake or wrong judgement without involving intention of the doer. In *Sheela Kumari Singh v. G.S.Atwal & Co. (Engg) Pvt. Ltd* it was held by the High Court that negligence on the part of both the drivers of vehicles cannot be ruled out when accident has been taken place in the middle of road.

The study of case laws relating to collision of Motor Vehicle Accident has been classified in to four categories viz.

(a) Light motor vehicles colliding with light motor vehicles
(b) Heavy motor vehicles colliding with light motor vehicles

140 2001 ACJ 1719.
141 2002 ACJ 780.
142 2006 ACJ 980 (Jhar.) DB.
(c) Heavy/light motor vehicles colliding with scooters/motor cycles and
(d) Heavy motor vehicles colliding with heavy motor vehicles

(a) **Light Motor Vehicles Colliding With Light Motor Vehicles**

In *New India Assurance Co. Ltd. v. Shymo Chauhan* ase\(^{143}\) it was held by the Punjab and Haryana High Court that where claim application is filed under section 163A, the owner and insurer are liable to pay to the legal heirs of the deceased in case of death provided the accident has taken place or has arisen out of use of motor vehicle and the liability extends even to cases where the deceased was driver. In *Oriental Insurance Co. Ltd. v. Meena Vairiyal*\(^{144}\) it was held by the Supreme Court of India that the legislature while enacting the Act of 1988 introducing section 163A, giving the victim an option either to proceed under section 166 or section 163A of the Act. Once they approach the tribunal under section 166, they have to take upon themselves the burden of establishing negligence of the driver or owner of the vehicle whereas if they approach under section 163A, compensation has to be awarded accordingly to Second Schedule without establishing fault or negligence.

In *Sohan Singh v. National Insurance Co. Ltd.*\(^{145}\) In a claim application filed by parents for death of their son driving jeep belonging to his mother and met with accident due to his own negligence, it was held that the claim application was not maintainable even under Section 163 for the reason that the liability falls on the owner and a person cannot be both claimant and respondent. In a case\(^{146}\) where the accident was caused because a car had suddenly come in front of speeding jeep, statement of the jeep driver that he was slowly driving was not acceptable since had he been slow, he could have stopped the vehicle at once. The driver was held rash and negligent.

In *Zoological Park v. S. Kaynana Raman*\(^{147}\) it was held by Madars High Court that a driver cannot be exonerated from his negligence merely because criminal proceedings were decided in his favour. In *Rohtan Singh v. Chander Kala*\(^{148}\) it was held by the High Court of Punjab and Haryana that the registered owner of the offending vehicle is vicariously liable for the damage caused by the

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143 2006 ACJ 923.
144 AIR 2007 SC 1609.
145 2009 ACJ 2869.
147 2008 ACJ 133; Sindhu v. Sekar, 2009 (1) ACC 828 (Mad.) DB.
148 2010 (1) TAC 140 (P&H).
driver in an accident. In *Laxmiben Pravinchandra Barot v. Thakore Prabatji Babuji* 149 where a person having consumed poison was being taken to hospital in a matador which met with an accident causing death of that person, and it was proved that poison had not spread to entire body but dash of Matador was very heavy, death was held attributable to negligence of driver of Matador.

(b) **Heavy Motor Vehicles Colliding With Light Motor Vehicles**

In *Gajanad v. Virendra Singh* 150 in an accident between a Matador and a truck resulting in death of driver and inmates of matador, the tribunal dismissed the claim application on the ground that claimants did not implead the owner and the insurer of matador. It was held by the Madhya Pradesh High Court that Tribunal has erred in dismissing the claim application on account of non-impleadment of owner and insurer of matador since there was no necessity to apportion inter se liability of joint tortfeasors. In *Oriental Insurance Co. Ltd v. Parveen Juneja* 151 where in a collision between a car and a stationary tractor trolley, the victims were passengers in the car, it was held by the Punjab and Haryana High Court that no question of contributory negligence of drivers of both vehicles can arise and the claimants in such case of composite negligence can sue any of tortfeasors.

In *Rachna v. Himachal Road Transport Corporation through its General Manager, Shimla and others* 152 the driver of the corporation bus was said to have suffered a fit of epilepsy and the bus hit a stationary jeep and then rolled down the road killing and injuring several passengers, the driver contended that the accident was due to the defective condition of the bus and denied that he was suffering from fits of epilepsy. The Corporation contended that the driver was recently employed and he had produced certificate from Chief Medical Officer and that the accident was inevitable. The Corporation failed to discharge the onus to prove that it had taken all dues care to ensure that it was entrusting the bus to be driven by a person who was capable in all respects to do so. The accident was not inevitable. The doctrine of *res ipsa loquitur* is applicable irrespective of the fact that the claimants were able to present partial account how the accident happened. In this case, it is stated that “a defendant cannot plead that the plaintiff is not entitled to rely upon the

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150 2010 ACJ 145.
151 2003 ACJ 378.
152 1990 A.C.J. 840   H.P.
doctrine of res ipsa loquitur merely because the plaintiff is able to present partial account of how an accident happened. The plaintiff can rely upon it for further inferences essential to the winning of his case; the partial explanation may make it more obvious that an inference of negligence on the part of the defendant can be drawn.”

In *Angoori Devi v. Megh Raj*153 in case of collision between a car and stationary tractor trolley the victims in the accident were passengers in the car. It was held that there was no question of contributory negligence and the claimants in a case of composite negligence of drivers of two vehicles can sue any of tortfeasors. Since composite negligence is a situation where loss or damage is no negligence on is own part. In *Sakharibal Hasanali Makarsi and others v. Girish Kumar Rupchand Gadia and others*154 a truck driven at fast speed dashed against a taxi coming from the opposite direction resulting in the death of the taxi driver and a passenger in the taxi, and another passenger sustained injuries. The Tribunal held that the accident was an act of God as it was caused by bursting of tyre of the taxi. Rejecting the contention of the Tribunal the Allahabad High Court held that the principle of *res ipsa loquitur* is applicable and it is established that truck was driven rashly and negligently and the defendant were held liable. In *National Insurance Co. Ltd. v. Sahiba Khatun and others*155 a dumper dashed against a stationary jeep on the wrong side of the road in open mine area resulting in death of an occupant and the driver of the jeep. The Tribunal raised adverse inference for non-examination of dumper driver and on the basis of F.I.R. Charge-sheet spot map, post-mortem report and applying principle of *res ipsa loquitur* held that the accident occurred due to rash negligent act of the dumper driver. The Appellate Court observed that through the jeep was wrongly parked; it was stationary in the open area, easily visible, the driver of the dumper had the last opportunity to avoid the accident and upheld the findings of the Tribunal.

In *Mangal and others v. Subhadrabai and another*156, is an appeal against dismissal of the claim for compensation filed before the Motor Accident Claims

153 2003 ACJ 293 (Del).
154 1997 A.C.J. 95 Bom.
155 2000 A.C.J. 168 M.P.
156 1981 A.C.J. 156 Kar.
Tribunal. Here the accident took place on the off side of the road from the direction in which the truck was proceeding. The car being on its correct side, the truck hit the off side of the front door of the car and caused the death of the driver of the car. Thereafter, the truck proceeded to distance of 15 to 30 feet, hit a tamarind tree and stopped, which itself attracted the maxim *res ipsa loquitur*, as contended by counsel for the plaintiff. But the evidence is that all the tyre of the truck including the tyre which burst was brand new without any defect either patent or latent. Thus it is true that evidence on record was that the first respondent and her driver used all reasonable care in and around the management of tyre. Thus it was held, affirming the judgment of the tribunal that the accident in question was inevitable and the maxim is not applicable in the sense that the accident was not due to rash or negligent driving of the defendant truck driver. Thus the appeal failed in this case, the court referred to cases such as *Barkway’s case*¹⁵⁷ and *Laurie’s case*¹⁵⁸, in giving its judgment. The court also referred to the principle underlying the maxim ‘res ipsa loquitur’ as stated in Halsbury’s Laws of England¹⁵⁹, that wherever the facts already established are such that the proper and natural inference arising from them proves that the injury complained of was caused by the defendant’s negligence or where the event charged as negligence “tells its own story” on the part of the defendant, being clear and unambiguous then, the maxim *res ipsa loquitur* applies. Thus the burden is on the defendant to disprove his liability stating that he had taken all reasonable care, failing which he would be held liable in negligence.

In the case of *United India Fire and General Insurance Co. Ltd. v. Maddi Suseela and others*¹⁶⁰, a lorry crashed into an Ambassador car as a result of which all the inmates of the car died on the spot. The lorry owner (1st defendant) filed a counter stating innocence on the part of the driver in the sense that there was total absence of rash and negligent driving on the part of his driver. The insurance company (2nd defendant) filed the counter stating that the accident was due to the negligent driving of the car driver and thus the car driver contributed to the accident to a greater extent. The lorry was coming at a high speed with passengers; it failed to turn to the left side of the road because of curves. As a result it went to the wrong

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¹⁵⁸ *Laurie v. Regian Building Co., Ltd.* (1942) 1 K.B. 152.
¹⁶⁰ 1979 A.C.J. 110 A.P.
side and hit the car. The learned counsel for the plaintiffs pleaded that the above maxim res ipsa loquitur has to be applied in this case, where as the counsel for the lorry owner alleged that the accident was nothing but the result of the rash and negligent driving of the car driver. The serious nature of the accident is apparent from the fact that the accident which took place in broad daylight caused the death of all the persons sitting in the car except plaintiff who became unconscious. In the absence of any eye witness before the court to speak to the factum of the occurrence of the accident and having regard to the fact that the lorry driver also who could have been available for being examined to speak of the concurrence of the accident died, the court came to the conclusion that this is a case where the drivers of both the vehicles must be presumed to be negligent. The court referred to the following two cases in support of the judgement viz. Koh Hung Keng v. Low Pee L.T. Co.\(^{161}\) and Puspa Bai v. Ranjit G.P.\(^{162}\) and also referred the learned views of Salmond\(^{163}\) in support of their findings. Thus in the present case, the plaintiff’s witness who could be said to have witnessed the occurrence in the way that he fell unconscious when the occurrence took place and having regard to the peculiar circumstances standing upon the occurrence of this accident the doctrine of res ipsa loquitur applies and the persons who are opposing the claim of the plaintiffs did not discharge the onus cast on them on account of the applicability of the doctrine. Thus the plaintiffs are entitled to the compensation they claimed.

(c) Heavy/Light Motor Vehicles Colliding With Scooters/Motor Cycles

In Anitha v. Bangalore Water Supply and Sewerage Board\(^{164}\) where the eye witnesses had neither stated that deceased drove the vehicle rashly or negligently or at high speed nor that accident occurred due to negligence on part of deceased, the finding of the Tribunal that deceased was responsible for accident to the extent of 80% was reversed by the appellate court, holding that the accident occurred due to negligence on the part of Bangalore Mahanagara Palika whose driver drove the vehicle and hit the deceased scooterist. In New India Assurance Co. Ltd. v. Debajani Sahu and others\(^{165}\) case, a bus came from behind at a fast speed and dashed against

\(^{161}\) 1967 A.C.J. 303.
\(^{162}\) 1971 A.C.J. 343 and 346.
\(^{164}\) 2010 ACJ 27 (Kar) DB.
\(^{165}\) 2000 A.C.J. 1512 Ori.
a scooter going ahead, ran over the scooterist causing his death. The claimants’ version was corroborated by a witness and the driver was not examined to rebut his evidence. The principle of *res ipsa loquitur* is applicable to the circumstances of the case and an adverse inference is drawable against the driver. The Tribunal held that the bus driver was rash and negligent in causing the accident.

In *Kapil Kaur and others v. Union of India and others* a military truck running at a fast speed hit a scooter going ahead on the left side of the road resulting in death of the scooterist. The defence was that the scooterist could not control his scooter and it struck against the truck on its left side bumper. The Tribunal relied upon statement of the relative of the deceased that the truck driver was not to be blamed for the accident and found that the claimants failed to establish negligence of the truck driver. In a case a motor cyclist dashed against the bus coming from the opposite direction and sustained fatal injuries. The allegation was that the bus driver drove the bus in rash and negligent manner and caused the accident. The Tribunal appreciated the evidence and held that the claimants failed to prove rash and negligent driving of the bus. The driver of the bus deposed that the deceased came from the opposite direction driving his motor cycle rashly and negligently at a high speed. By seeing this, he took his bus to his left side and stopped it. But the motor cyclist could not control his motor cycle and dashed against the stationed bus and fell down from the motor cycle and sustained injuries and nothing could be elicited in his cross examination. The Tribunal finding is upheld in appeal.

(d) **Heavy Motor Vehicles Colliding With Heavy Motor Vehicles**

In *Raghib Nasim and another v. Naseem Ahmad and another* case, an accident between HRTC bus and private bus coming from opposite directions resulted in the death of a passenger travelling in the private bus. The driver of the HRTC bus stated that he was driving at a slow speed when the private bus at fast speed tried to overtake another bus, thereby causing the accident. Site Plan established that the HRTC bus was on the extreme left side. It was held that the accident was caused due to the sole negligence of the private bus driver. In this connection it is mentioned, “When a person is injured without any negligence on his

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166 2000 A.C.J. 864, P & H.
167 *Padmabai and others v. Madhya Pradesh State Road Transport Corporation and another*, 2001 A.C.J. 785, M.P.
168 1986 A.C.J. 405 All.
part but as a result of negligence on the part of another person or due to the combined negligence of two persons, it is not a case of contributory negligence. The question of the contributory negligence arises in a case where the injured or the deceased had contributed to the accident. In a case of composite negligence, the person wronged has a choice of proceeding against all or any or more than one of the wrong-doers. Every wrong-doer is liable for the whole damages if it is otherwise made out”.

In *Jamla Bi v. Gurmit Singh*\(^{169}\) where driver of a truck put his loaded truck on jack. The jack slipped and the truck, and fell on a mechanic who was attending to that other truck nearby. The mechanic died. The tribunal held the driver of both the trucks to be equally negligent. In appeal, it was held that the truck on jack should have first been unloaded before being put on jack and as the driver of the truck on jack was solely responsible for the accident. In *Kothai v. Oriental Insurance Co. Ltd*\(^{170}\) where logs protruding outside the offending truck hit against a bus resulting in death of a passenger in bus. Both drivers were blaming each other. The finding of the tribunal that accident occurred solely due to negligence of the truck driver was upheld by the High Court. In *Basant Kaur v. Chatarpal Singh*\(^{171}\) there was accident between trucks A and B resulting in death of driver of truck A. owner of truck A informed the widow of the deceased driver that death was caused because of rash and negligent driving on part of driver of truck B. the tribunal dismissed the claim on ground that negligence of driver of truck B had not been proved. In appeal it was held that facts were enough to record a finding that driver of truck B was alone responsible for causing the accident. In *Haryana State v. Krishan Kumar*\(^{172}\) where a truck came on wrong side of the road and there was collision with another truck coming from opposite direction on its correct side. Defence was that accident was due to inevitable accident due to mechanical fault. There was no evidence of mechanical failure despite due care and caution to check roadworthiness of the vehicle from time to time. The other truck had been damaged. The driver of the first truck was held to be rash and negligent.

\(^{169}\) 2003 ACJ 1035 (MP).
\(^{170}\) 2003 ACJ 991 (Mad.).
\(^{171}\) 2003 ACJ 369 (MP).
\(^{172}\) 2003 ACJ 549 (P&H).
Application of Doctrine of *Res Ipsa Loquitur* in Non Collision Cases

Non collision Motor Accident Cases relates to those cases where there is no collision between two or more motor vehicles, although these may have been hitting a wall or tree or a human being. The study of Judicial Determination of Non-collision cases by various High Courts and Supreme Court of India have been divided in the following categories:

**Motor Vehicles Hitting Pedestrians**

In a case\(^{173}\) where a tractor trailer hit a pedestrian and driver and owner of the vehicle remains ex-parte in the matter and post mortem conducted after 10 days of accident could not suggest that deceased was under influence of liquor, and evidence of witness and widow of deceased was consistent, driver of tractor trailer was held rash and negligent. In *Mishri Bai v. Munna*\(^{174}\) where a matador dashed against a person standing on footpath but the tribunal dismissed the claim on the ground that FIR was lodged after 22 days, it was held in appeal that deceased had died in accident by use of matador.

In *Rajasthan State Co-op Diary Federation v. Brij Mohan Lal and Others*\(^{175}\) case, a tanker hit a pedestrian resulting in his death. The defence was that the deceased was crossing the intersection of two main roads and was in the middle when she moved backward because of an approaching car from the opposite side and she struck against the tanker. The driver speed away after the accident. The driver was the best person to depose about the circumstances of the accident, but he was not examined. The Tribunal drew adverse inference and on the principle of *res ipsa loquitur* found that the tanker driver was rash and negligent in causing the accident. The Tribunal’s finding was upheld in appeal. In the matter of *Banwari Lal Aggarwal v. Jeewan Kumar Badu*\(^{176}\) where a boy standing on roadside was hit by a vehicle. The fact had been proved by eye-witness. It was held that the evidence of eye-witness directly in Tribunal cannot be ignored on the basis of contents of criminal charge sheet or on unfounded evidence led by defence. The findings of the tribunal that the boy was guilty of contributory negligence was set aside by the High Court and the driver of the vehicle alone was held negligent.

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\(^{173}\) *Mithu Rani Sadar v. United India Insurance Co. Ltd.*, 2006 ACJ 2868 (Cal.) DB.

\(^{174}\) 2007 (1) ACC 911 (MP) DB.

\(^{175}\) 1990 A.C.J.118, Raj.

\(^{176}\) 2002(3) ACC 160.
Motor Vehicles Hitting Cyclists

In *Hemu Bai v. Satish*\(^\text{177}\) where a maruti van came at fast speed and hit a cyclist from behind resulting in his death. Driver of the van who was the best witness to the manner of the accident was not examined. It was held by the Madhya Pradesh High Court that driver of the van was rash and negligent. In *Ramilyak Ram v. Umrawati Devi*\(^\text{178}\) where a cyclist was dashed against by a truck, causing death of one of riders of the cycle. The surviving rider deposed that no horn was blown by the driver and that he himself was thrown away into a field. Tribunal’s findings that death did not occur because of accident was reversed by the High Court and driver of the truck was held responsible for the accident.

In *Chairman-cum-Managing Director, Bihar State Road Transport Corporation v. Manju Bhushan Sinha and others*\(^\text{179}\) a bus came at fast speed and hit a cycle-rickshaw from behind throwing away its occupants more than 10 feet away on the road, injuring them, and one of the passengers succumbed to his injuries. The defence was that two rickshaws were trying to overtake each other and they were being driven negligently. The bus did not stop after accident and traversed to the right side of the wide road and broke the boundary wall of the open ground to the length of 21 feet. The defendants failed to examine the driver and this failure leads to adverse inference. The manner of the accidents clearly goes to show that the bus was driven rashly and negligently. The Tribunal applied the doctrine of *res ipsa loquitur* and held that the bus driver was rash and negligent in causing the accident. The Tribunal’s finding was upheld in appeal by the High Court of Patna. In *Ravi Kumar v. Manager, Indian Textile Co-operatives Ltd.*\(^\text{180}\) accident between a car and a cycle carrying a pillion rider, the cyclist was held guilty of contributory negligence.

Motor Vehicles Involved in Accident While Trying to Save Cattle

Where the vehicles are driven by the driver at a fast speed and due to their negligence, the drivers could not control the vehicles, and because of cattle on the road the vehicles turned turtle. The principle of *res ipsa loquitur* clearly applied in

\(^{177}\) 2007 ACJ 1159.

\(^{178}\) 2002 ACJ 1146 (HP) DB; Bhaswarlal v. Kabulsingh and others, 1989 ACJ 189, MP.

\(^{179}\) 1992 ACJ 1073, Pat.

\(^{180}\) 2006(1) ACC 184 (Karn,) DB.
such cases. In *Shivlal and Others v. Rukmabai and Others*\(^{181}\) case, the driver of a tractor driving at an excessive speed lost control when faced with a cow and the tractor turned turtle causing death of a passenger. The driver contended that to save the cow he swerved the tractor and thereafter tried to bring it to a proper side in the consequent jolt, the deceased caught hold of the steering resulting in the accident. This version of the accident does not find place in the report lodged by the driver immediately after the accident. A heavy vehicle like tractor does not normally turn turtle without negligence. The maxim *res ipsa loquitur* is applicable. The owner/driver failed to produce credible material to rebut the presumption of negligence. It was held that the negligence of the tractor driver was the cause of accident.

In *Bhagwandas and another v. National Insurance Co. Ltd. and another*\(^{182}\) case, a truck overturned due to excessive speed resulting in the death of several persons and injuries to many. The driver contended that two buffaloes were crossing the road and as he applied brakes, there was sudden breakdown of some parts of the truck which resulted in its overturning. There was no corroborative evidence about the breakdown of the truck. It is evident that it was drizzling and the truck was driven at a fast speed. It was held that the principle of *res ipsa loquitur* was applicable and the accident occurred on account of the rash and negligent driving.

**Motor Vehicles Falling in Ditches, Canals, Washed Away in Floods, Hitting Culverts etc.**

In *Himachal Road Transport Corporation v. Himi Devi and others*\(^{183}\), plaintiff filed a suit to recover damages. Some passengers were traveling in a bus. The bus had been taken very near the outer edge of the road from where it fell in to the Khud. As many as nine persons, including the driver, were killed and many received injuries. The bus in question was a condemned bus. The bus was overloaded and it had to be started by pushing it over some distance. In the circumstances of this case the maxim *res ipsa loquitur* was applied. The buses are not supposed to leave the road and roll down into khuds. If they do so, a heavy burden lies only on the appellant to show that all reasonable care had been taken and there was no negligence. The defendants were held liable.

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\(^{181}\) 1987 A.C.J. 341, M.P.

\(^{182}\) 1990 A.C.J. 495, M.P.


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In *Triveni Prasad and others v. Indrapal Kachhi and others* 184, a boy was working as casual labourer for filling tractor-trolley with soil and on the date of accident went for work. He was brought back injured to his house in the trolley and he succumbed to his injuries. The owner of the tractor-trolley did not deny his employment and the fact that he went in the tractor for his duty. The driver of the tractor said that the boy went in the tractor. The defendant’s evidence is not clear how the boy met with the accident and what happened when he was on duty. Medical evidence revealed that there were eight injuries on the person of the boy and opines that these injuries could be caused by tractor accident. It was held that the principle of *res ipsa loquitur* was applicable and the boy died in accident with the tractor.

In *State of Punjab v. Harbhajan Lai Kochhas and others* 185, where a passenger bus belonging to state of Punjab left the last stop and traveled a distance of about 200 meters, the bus went off the road rolled down into the khad. Some of the passengers had died while some received injuries. It was averted that the accident took place due to rash and negligent driving of the driver defendant. The passengers found that the driver driving the bus in an irresponsible manner and warned him twice for that. The driver was in the habit of suddenly applying the brakes and giving a great jolt to all the passengers. The driver overtook some stationary vehicle near the place of the accident and while he did do lost control of the bus because of its speed, with the result that the bus went off the road and rolled down the khad. The driver could not control the bus and for that reason it rolled down immediately. There was no evidence on record to show that at the time of the accident the steering got jammed. The High Court of Himachal Pradesh held that the facts as described no doubt prove that the maxim of *res ipsa loquitur* is applicable in the circumstances of the present case. The court found that the bus had no latent defect, it should not have gone off the road and rolled down the khad but for the negligence on the part of the defendant driver. Hence defendants were held liable.


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184 1997 A.C.J. 269, M.P.  
185 1980 A.C.J. 437 H.P.  
186 *Barkway v. South Wales Transport Co. Ltd.*, (1941) 3 All E.R. 322.  
187 1976 A.C.J. 183 S.C.  
188 1976 A.C.J. 183 S.C.  
189 1976 A.C.J. 183 S.C.
Passengers Falling Down While Boarding/Sitting on the Vehicle

In Gousipala Manemma v. Andhra Pradesh State Road Transport Corporation and another\textsuperscript{190} case, the driver accelerated speed of the bus without caring to see that all the passengers had boarded the bus safely and a passenger who was boarding the bus was thrown out and sustained fatal injuries. The driver, despite shouting by other passengers, did not stop the bus. A friend of the deceased who was travelling with him corroborated the claimant’s version. The F.I.R. did not contain the number of the bus and the name of the driver and it shows that the deceased fell down from the bus while boarding due to accidental slip. The Tribunal did not believe the evidence of the claimant’s witness on the ground that he was a friend of the deceased. The driver who was the best witness to explain the circumstances of the accident was not examined. The tribunal held that there was no negligence of the bus driver. The Appellate Court applied the doctrine of res ipsa loquitur and observed that once the accident was proved by the claimant, it was for the corporation to prove that there was no negligence of the bus driver. Therefore the Appellate Court reversed the finding and held that bus driver was rash and negligent in causing the accident.

Motor Cycle/Scooter Accident Involving Pillion Riders

In S.K. Bhatia and another v. Jaspal Singh Mann and another\textsuperscript{191} case, a motor cycle going a fast speed skidded and the pillion rider (second person sitting on a motor cycle) sustained fatal injuries. The doctrine of res ipsa loquitur was applicable and the motor-cyclist was negligent in causing the accident since it is not a case of collusion between two vehicles. In a case\textsuperscript{192} a scooter skidded and fell in a nalla resulting in the death of pillion rider. The defence was that the scooter skidded due to bajri lying on the road. The scooterist admitted to having seen the bajri but continued to drive at the same speed. Skidding of the vehicle across the 20 feet wide road indicates that the vehicle was being driven at fast speed and the scooterist failed to take necessary precautions while driving. Tribunal applied the doctrine of res ipsa loquitur and held that accident occurred due to rash and negligent driving of the scooter. The tribunal’s finding was upheld in appeal.

\textsuperscript{188} 1976 A.C.J. 118 S.C.
\textsuperscript{189} 1980 A.C.J. 38 S.C.
\textsuperscript{190} 2001 A.C.J. 901, A.P.
\textsuperscript{191} 1990 A.C.J. 13, H.P.
\textsuperscript{192} Tilak Singh v. Shahi Bijulwan and Others, 1999 A.C.J. 661, H.P.
Parking Vehicles on Public Places Leaving the Key

In Venkatachalam v. Sundarambal Ammal and another case, the driver parked the bus in the bus stand. The driver and the conductor left the bus unattended with the ignition key in the bus. A third person drove the bus out of the stand and dashed against a shop causing damage to the building shutter, cycles etc. The owner of the bus contended that the third person was not connected with him, he was not authorized and there was no relation of master and servant between the owner and the third person. It was held that the owner of the bus is liable for the damages because the driver was negligent and he did not take due precaution in taking away the ignition key so as to rule out the possibility of somebody meddling with the bus and as such the owner was vicariously liable for the damages. The doctrine of res ipsa loquitur was applicable.

Accident Due to Explosion of Tankers/Fire in Motor Vehicles

Oriental Fire and General insurance Co. Ltd. v. Suman Navnath Rajguru and Others is a case of accident caused by or arising out of use of vehicle in a public place. The deceased was walking along the road when an oil tanker parked near the footpath, exploded. The deceased was seriously injured and succumbed to injuries later. The insurance company contended that it was not liable as the vehicle was not in state of locomotion. It was held that the injury arose out of use of vehicle and owner and insurer held liable. In another case, wife and children of the deceased who died in the accident were the plaintiffs. After traveling for 4 miles from the last stop the engine of the truck caught fire. As soon as the fire was seen the driver cautioned the occupants to jump out of the truck. Consequently the deceased and other persons jumped out of the truck. While doing so the deceased struck against the stone lying by the side of the road and died instantaneously. The Supreme Court referred, in this case, to the following cases and authorities, i.e., judgement of Earl C.J. in a case, arkway v. S.Wales Transport Co., and John G. Fleming view regarding burden of proof and the application of res ipsa loquitur.

193 1983 A.C.J. 513, Mad.
195 Shyam Sunder and others v. The State of Rajasthan, 1974 A.C.J. 296 S.C.
196 Scott v. London and St. Katherine Docks, (1865) 3 H & C. 598.
197 (1950) 1 All E.R. 292.
Motor Accidents Due to Tyre Burst

In Sewassam Alias Sewan v. Nanhe Khan alias Asgar Beg and others\textsuperscript{199} case, a truck driven at excessive speed turned turtle and a labourer in the truck sustained injuries. The owner/driver contended that the accident took place due to tyre burst. Where mechanical defect or tyre burst is pleaded as cause of accident, then responsibility lies on the owner/driver to discharge the burden. Absence of reasonable explanation affords presumption that the accident arose for want of care and the doctrine of res ipsa loquitur applies. It was held that the driver of the vehicle was responsible for the mishap.

In J & K State Road Transport Corporation v. Presiding Officer M.A.C.T. and others\textsuperscript{200} case, the tyre had burst and the vehicle swerved to a side killing a pedestrian. No evidence to show the mileage down by the tyre and that the tyre was periodically examined, and it was in a roadworthy condition. It was held the owner was held liable. In Ganga Rama and another v. Kamalabai and others\textsuperscript{201} defendant driver was driving the taxi in a rash and negligent manner as a result of which the front right tyre burst and the taxi left the road, went on its off-side and toppled, as a result of which the two passengers in the taxi died on the spot. Plaintiffs were related to one of the deceased. The law on this point was settled when the vehicle which was admitted in control of the driver, left the road, went on its off side and toppled, without doubt, the doctrine res ipsa loquitur was attracted. The burden shifts to the defendant. The defendants alleged that the accident was inevitable. The tyres were new. The front right wheel tyre burst, as a result of which the driver lost control over the vehicle. The vehicle turned a somersault. There was no evidence produced before the tribunal in that behalf. Hence the driver and the owner i.e. defendants failed to discharge the onus placed on them to establish that they had taken all care and precaution to keep the tyre roadworthy. Thus the court held that the defendants were liable.

Motor Accidents Due to Mechanical Breakdown

In Anandi Ravji Vats v. Oriental Insurance and others\textsuperscript{202} a case of breaking away of universal joint the bus driver, at fast speed, knocked down a pedestrian girl

\textsuperscript{199} 1987 A.C.J. 354, M.P.
\textsuperscript{200} 1987 A.C.J. 945, J & K.
\textsuperscript{201} 1979 A.C.J. 393 Kar.
\textsuperscript{202} 1988 A.C.J. 129, Bom; Ram Dulare Shukla v. Madhya Pradesh State Road Transport Corporation and others, 1970 A.C.J. 120 M.P.
causing injuries. The driver contended that it was not the bus which knocked the injured, but the universal joint of the bus suddenly stripped itself apart and hit her and this was an inevitable accident as the eventuality could not be foreseen. No evidence to the effect that vehicle was subjected to rigorous periodical check within reasonable time before embarking upon the journey and each part was found in perfectly fit condition and subsequent breaking away of the universal joint could not be attributed to the initial weak or fault condition. Coming out of such a part would give rise to the presumption that the requisite initial care was not taken by the driver or the owner. Respondents failed to rebut this presumption. Trial court accepted the condition of the driver and dismissed the insured’s suit. It was held in appeal that failure to take care constitutes negligence and owner and driver are liable; owner’s liability is not only vicarious for the negligence of the driver, but he is himself negligent in not keeping the vehicle in a roadworthy condition.

2.24 CONCLUSION

To constitute a tort there must be a wrongful act, whether of omission or commission, but not such acts as are beyond human control and as are entertained only in thoughts. An omission is generally not actionable but it is so exceptionally. Where there is a duty to act an omission may create liability. A failure to rescue a drowning child is not actionable, but it is so where the child is one’s own. A person who voluntarily commences rescue cannot leave it half the way. A person may be under duty to control natural happenings to his own land so as to prevent them from encroaching others’ land. The obligation to make reparation for damage caused by a wrongful act arises from the fault and not from the intention. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair it necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. A thing which is not a legal injury or wrong is not made actionable by being done with a bad intent. It is no defence to an action in tort for the wrong doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. A want of knowledge of the illegality of his act or omission affords no excuse, except where fraud or malice is the essence of that act or omission. For every man is
presumed to intend and to know the natural and ordinary consequences of his acts. This presumption is not rebutted merely by proof that he did not think of the consequences or hoped or expected that they would not follow. The defendant will be liable for the natural and necessary consequences of his act, whether he in fact contemplated them or not. Liability for tort generally depends upon something done by a man which can be regarded as a fault for the reason that it violates another man’s right. But liability may also arise without fault. Such liability is known as absolute or strict liability.

Every possible effort has to be made that there is no accident on the road and no one suffers any injury or any mishap on the road. But the fact is that the accidents do occur and they occur at an alarming rate, and if the medical care and attention is provided to the victims in time not only congestion on the roads can be reduced but it may help removing traffic hazards, we can also save the pain and suffering of the seriously injured victims and bring some solace and comfort for the family members of the victims of road accidents. While our Legislature has made Laws to cover every possible situation, yet it is well high impossible to make provisions for all kinds of situations. Our country can ill-afford the loss of a precious life when we are building a progressive society and if any person engaged in industry, office, business or any other occupation dies, a mess is created which is bound to result in a serious setback to the industry or occupation concerned.

Article 21 of the Constitution mentions "No person shall be deprived of life or personal liberty except according to procedure established by law." When death occurs due to road accident involving a motor vehicle, it is deprivation of life otherwise than according to the procedure established by law. Similarly when accident results in Injury the personal liberty may be curtailed, again, otherwise than according to the procedure established by law. Enforcement of Article 21 is the obligation of the State. The minimum that the State could do was to provide for 'no-fault' liability. The State was reminded of this obligation by the Supreme Court and it was observed,

"The time is ripe for serious consideration of creating no-fault liability."