

## APPLICATION OF TORT IN LIABILITY INSURANCE

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### ABSTRACT

The article discusses various torts vis-à-vis liability insurance and their application in Indian Market.

In the wake of attacks on World Trade Centre and the very recent Mumbai carnage, things have changed drastically and dramatically all over the world. There is pervasive sense of uncertainty and insecurity all over the places. Alarmed by the rise of insecurity to their lives and properties, people all over the world are looking at insurance, otherwise an unsought after product with renewed vigour. Right from the mighty corporate world to the ordinary man on the street, everybody seems to be making this enquiry whether his life or property stands covered under the destructive peril called terrorism or not. In most property insurance in India, it is either an inbuilt cover or it comes as an add on cover. But most damages in life arise by various torts, which are covered by different liability policies.

In India, liability insurance is still in the nascent stage. But in days to come liability insurance will be in great demand owing to great economic and technological advancement made by the country in different spheres. The advancement, however, brings along with it a slew of exposures, hitherto, unheard in this part of the country. In liability insurance, we deal only with legal liability and its financial consequences. Legal liability means any liability that arises under law.

Tort is one of the chief sources of most liability losses. Tort is a civil wrong, which leads to a liability under civil law. In other words, a tort is a civil wrong arises out of breach of duty for which damages are recoverable under law. Each word in this definition has got a specific meaning. In the first place, it is a civil wrong and thus different from a crime which is punishable by the state in the form of fine and / or imprisonment or both. It also presupposes the existence of duty and thus it binds and regulates the conduct of every member of the society both as an individual and also as a group by creating mutual obligation. It is because of the existence of law of tort that the civil society functions so effortlessly and efficiently for it binds every

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member of the society to take care for the other. It is thus also different from contract, which binds only the parties to the contract in the event of breach of duty. Another important difference is in terms of measure of damages. The damages awarded for breach of contract attempts to put the injured party in the position they would have enjoyed had the contract been performed but in tort we try to put the injured party in the same position, he enjoyed just prior to the damage occurred. Tort thus, is guided by the principle of indemnity. There are many torts but in insurance and in particular in liability insurance, we normally talk of a select few torts only like *Negligence, Nuisance, Trespass, defamation, breach of statutory duty, Strict liability etc.* In developed countries like the USA and UK, one gets policies based on all the above torts. In India, however, most liability policies currently in use like public liability policy, product liability policy, or professional indemnity policy are based on tort 'negligence' but we also have policy like CGL which also covers Personal and Advertising injury liability. 'Slander or damage to reputation falls under personal injury. Advertising injury protects companies from charges of negligence that result from the promotion of its own goods or services. Policy covering environment impairment liability, (based on tort 'nuisance') by providing wider pollution coverage and by closing the current gap as provided by the CGL policies are also coming to the Indian market. Some limited cover of IPL (Intellectual property liability) is also being given in the Directors' and Officers' liability policy'.

The duty of care in most types of tort is the central concept and, therefore, it is presumed that a person would not injure the other person who is his neighbour. The whole concept of duty of care took a new direction in the famous case of '*Donoghue v. Stevenson*' (1932). Lord Atkin's famous words in what is now popularly known as 'Neighbour Principle', the concept of duty of care finds a new interpretation. It goes like this 'The rule that you are to love your neighbour becomes in law; you must not injure your neighbour, and the lawyer's question: who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions, which you can reasonably foresee, would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in action' This landmark verdict propounded a universal duty in law to take care. It also in the process clearly brought to the fore as to who can claim relief for injury or damage for an act or omission.

If we analyze civil wrong, we find that it is a wrong, which arises due to breach of duty of care, which must give rise to civil cause of action for which compensation or damages are recovered. This civil wrong or civil cause of action essentially leads to legal liability. The word legal liability denotes those specific responsibilities and obligations that can be enforced at law. An act or omission, which causes injury or damage, invites legal liability either in the

form criminal liability or civil liability or both. But a tort is a civil wrong and as such the criminal liability is not dealt in it. In civil liability, the action is brought by the injured party against the wrongdoer according to law, resulting in payment of compensation or damage to the former. It may be noted here that the fine, fixed in criminal liability against the wrongdoer, doesn't go to the aggrieved party rather it goes to the state.

Civil liability in India arises mainly under common law. This in turn is mainly based on English common law, which is body of law comprising past legal decisions, customs and usages. In India, this law is applied keeping in mind the circumstances existing today in India. Civil liability also arises under statutory law. In India, Workmen's Compensation Act 1923, the PLI<sup>1</sup> Act, 1991 are two good examples of civil liability under statutory law. The Consumer Protection Act, 1986 also gives rise to civil liability. Civil liability may also arise under contract, which may arise under a contract between two or more parties. The purpose of liability insurance is to provide indemnity to the insured in respect of financial consequence of legal liabilities. The purpose is to indemnify the legal liability and no other liability. Contractual liability is thus excluded from the purview of the liability policy.

Torts, which give rise to legal liability, are many of which Negligence, Nuisance, Trespass, Breach of statutory duty, strict liability, defamation are the ones, which are very common torts. Negligence is the most common tort. It is defined as "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do". The definition calls for reasonable prudence and not extraordinary or exceptional prudence. But the question to be addressed is whether all actions or failure to take actions causing injury or damage give rise to a claim under tort. The fact remains that all acts or omissions, which cause injury or damage, would not automatically give rise to a claim under 'Negligence'. Any injury or damage without commissioning legal wrong or '*Damnum Sine Injuria*' as it is popularly known would not give rise to a claim under Negligence. In order to prove Negligence, the aggrieved party has to prove that the tortfeasor (wrongdoer) owed a duty of care to him, which was subsequently broken, and as a breach of this duty and the aggrieved party (plaintiff) suffered damages or loss and this breach of duty was the proximate cause of the damage or loss. It is not easy to establish duty of care. *Lord Atkin's* 'Neighbour Principle' paved the way for a universal duty in law to take care. The duty of care owed in a given set of circumstances depends on:

- (1) whether the act or omission that caused the damage was foreseeable or not. There was duty of care if the damage caused was foreseeable.

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<sup>1</sup> *PLI - Public Liability Insurance*

- (2) the person injured or the property damaged must be in contemplation or in other word in close proximity to the acts or omissions called in action.

Having addressed and established the existence of duty of care, the plaintiff needs to show the breach of this duty. The plaintiff can prove this if he can prove that on two things i.e. (a) Standard of care and (b) Amount of care – the wrongdoer (defendant) faulted. In ensuing standard of care, while deciding upon the damage particularly in terms of frequency and severity, the words of ‘*Lord Dunedin in Fardon V. Harcourt –Rivington*’ (1932) had far reaching effect. According to him, ‘ People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities’. The standard of care expected from the tortfeasor is dependent on his age, occupation, knowledge and other pertinent factors. The standard care is what an ordinary person exercises in his day-to-day life and doesn’t call for use of any specific skill. In case of use of specialized skill also, the requirement is of a skill that an ordinarily skilled member of that specialized profession possess. It is to be understood here that no exceptional ability is assumed while judging standard of care. Even from skilled professionals – the expectation is that he would exercise such skill or care as is expected from an average member of his profession and which is viewed as fair, reasonable and competent. This is made easy if that particular skill area has evolved a commonly accepted method of doing things. If the person possessing specialized skill complies with this accepted method, he is presumed to have taken standard care.

The breach of duty must result in damages. The word damages include bodily injury, illness, disease; loss or damage to material property and Economic loss. *It is to be remembered that only the compensatory damages are paid. Punitive or Exemplary or Multiplicative damages are not paid as they are awarded mostly for wanton disregard of law. Paying such damages would be unethical also.*

Bodily injury has been defined as any impairment of a person’s physical or mental condition. The reference to impairment of mental condition is subject to contention. It is now an accepted practice that mere shock, grief, worry or anxiety don’t become of their own (per se) adequate base for action, however, if they result into physical harm, then compensation are payable. The psychiatric damages often pose problem as the dual tests of foreseeability and proximity become very difficult to establish. How can one foresee that a particular individual would suffer nervous shock or psychiatric damages because of one’s act or omission? And how to address the proximity test, i.e. whether a person claiming to have suffered loss because of above reasons was sufficiently close in terms of both time and space? In that case anybody even remotely connected with the injured person would claim damages on this count. The concept of both foreseeability and proximity needed a relook. In *Capoc V. Wright (1991)*, the House of Lord laid down certain guidelines to be followed in order entertains a claim by addressing the problem of remoteness. The psychiatric damage claimed must be an upshot

of a sudden shock and not the cumulative effect of a problem. The element of foreseeability is an important consideration for the court but more than this they should also look for elements of directness and proximity while deciding who can seek a claim under psychiatric damages. The element of directness comes when courts try to decide who can stake a claim. Only close ties of blood or ties through marriage are allowed to take claims. At times even close acquaintances that can show loving relationship are also allowed to claim also. The proximity of the sufferer of the loss with the accident in terms of time and space was given a new meaning by the House of Lord. The person claiming to have undergone shock must prove that the shock to his system was produced by the direct sight or sound of the accident or its immediate aftermath. The word immediate aftermath means that the after effects or consequences of an accident that were not only fresh and immediate but also very unpleasant. Another thing of importance is the 'means', which created the shock. It is the direct visual communication of the horror of the accident, which is required. Direct visual communication would also include screams or sound of the accident also. Direct communication of the accident would, therefore, not include televised report or any account following the accident.

*Now, Let us take a look at the other component of damage i.e. economic loss. The trend is not to consider Pure Economic loss. But any financial loss flowing directly from a physical damage is payable. A tort must also give rise to action for unliquidated damages– a kind of damages, which can neither be proved by evidence nor be assessed accurately mathematically.'* However, this is to be kept in mind that specific policy wordings often either expand or restrict the definitions of the above mentioned words'.

The second most common tort is Nuisance, which is defined “ as a wrong done to a man by wrongfully disturbing him in the enjoyment of his property (a private Nuisance) or, in some cases, in the exercise of a common right (a public nuisance)”. It is governed by the maxim so to use your property as not to injure your neighbour. Therefore, in order to bring an action based on nuisance, one has to show at one hand that the person caused the wrong in the course of his ownership, occupation or use of property of some kind private or public and on the other, the person suffered the damage also in the course of is occupation or use of the property.

In India, Public nuisance is defined by Section 268 of IPC. According to it, a person is guilty of public nuisance who does any act or is guilty of illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who have occasion to use any public right. Public nuisance is not a cause of civil action or in other word, not actionable under law of tort, primarily because the law doesn't allow collective actions by a number of individual complainants and is dealt by the state as criminal offence. But a person who suffers damage in addition to hardships suffered by the

public at large may bring an action for compensation for such damages on the score that the damage caused was due to a public nuisance. An aata chakki (grain crusher) running on diesel engine in a residential area became bone of contention as it caused annoyance to the people by the noise it created and also the foul smoke it emitted in the vicinity. People joined hands and brought action against the owner of the aata chakki by reporting the matter to the Police. But the owner of the house adjacent to aata chakki brought a civil action against him under private nuisance for causing physical injury to his building by constant vibration and also interfering with the health of the occupants of the building. Most private nuisance consists of act of wrongfully causing or allowing the escape of noxious things such as smoke, smells, loud music, noise, gas, vibration or things of like nature by one's own property into that of another so as to interfere with the health, comfort or causing physical injury to the property. Damages sought under private nuisance are in the form of physical damage to the property or premises or in certain cases for bodily injury or illness or for financial loss, which arise from the interference with the beneficial use of premises.

It is to be noted here that in case of negligence, we presuppose the existence of duty of care on the part of defendant or wrongdoer which was breached in order to bring an action under negligence whereas in case of nuisance we presuppose element of fault on the part of part of the person causing the nuisance. The complainant has to only show that he has suffered loss as a direct consequence of the act or omission of the wrongdoer.

There are also instances of strict liability imposed by the law. However, the 'No-fault liability' as envisaged in Section 140 Of Motor vehicle Act can be distinguished from the rule of strict liability. It is a statutory liability for which fixed compensation on account of accident arising from the use of motor vehicle is paid. But, compensation for accident due to use of motor vehicle can be claimed under common law even without the help of a statute. The provisions of MV Act in India permits that compensation paid under No Fault Liability can be deducted from the final amount awarded by the Motor Accident Claim Tribunal. Thus we find above two concepts are based on two different assumptions. The compensation given in Hit & Run cases is an example of strict liability. In case of nuisance also, we find the element of strict liability for it is based on the unreasonableness of the interference without giving any chance to the tortfeasor to justify his action. In strict liability, the defenses available are a few, and in case of absolute liability, the defenses are not available at all. Therefore, as a matter of fact, where the law, doesn't consider the defense of the wrongdoer that he took reasonable care, it is a case of strict liability.

Defamation is another tort, which is finding its way in liability insurance in India. It is a combination of separate torts called libel and slander. A statement, which injures the reputation of a person by exposing him to hatred, ridicule, contempt or fear in such a way that the reputation of the person gets tarnished or he is prejudiced in his trade or profession is said to

be defamatory in nature. The person affected by defamation must lose the respect, esteem or confidence of others. Libel is defamation of lasting nature as opposed to slander, which is of ephemeral nature.

## **CONCLUSION**

It can be said that in India, the law of torts is still in an infant stage in comparison to developed nations, more particularly its western counterparts, whereas it is much ahead of theocratic and banana republics. However, considering the present trend, where the global community is adhering to laws having universal character such as laws relating to IT, RTI, Terrorism, IPR etc, the day is not far away when India will be a front runner in implementing the Law of torts far more effectively and vigorously. Time is just ripe for the general insurers in India to devise liability insurance covers, keeping the future trend of developments in mind.

## **REFERENCES**

1. Pawell, A., London, (1992), *Liability Insurance*, CII.
2. December (1999), *Liability and Engineering Insurance*, Insurance Institute of India.
3. Hill, Peter, London (2005), *Liability Insurance*, CII Study Course.

