

Chapter v

Tortious Liability of State and its Remedies in UK

The present law relating to state liability in India is not adequate and it is indispensable to amend the law in this area. Law in the other Countries would shed some light on the proposal. England, after many years of uncertainty over the issue, had passed an Act 'Crown Proceeding Act, 1947, and thereby, subjected the crown to liability to the same extent as a private individual of full age and capacity. Earlier, in England crown was held not to be liable for the act of its employee¹⁶⁰.

In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. But when the person or the property of a person who is not a British subject and who is not residing in British territory is injured by an act "done by any representative of Her majesty's authority, civil or military, and which is either previously sanctioned or subsequently ratified by Her majesty the person injured has no remedy for such an act is an act of state¹⁶¹. An act of state is outside the ordinary law, it is essentially an exercise of sovereign power as a matter of policy or political expediency. Its sanction is not that of law, but that of sovereign power and municipal courts must accept it without question. Ratification by the sovereign power of the act of one of its officers is equivalent to a prior command and may render such act an act of state. It was Roman Law which propounded the theory

¹⁶⁰ Akaant Kumar Mittal, 'Crystallising the concept of Vicarious Liability of State in India, Challenges and Suggestions', AIR 2014 journal 89.

¹⁶¹ Stephen, History of Criminal Law, vol II pp. 61,62.

of irresponsibility of the State, as the sovereign, to be sued in its own Courts. It was based on this principle that in England before 1947, the Crown enjoyed immunity from tortious liability because of the maxim “The King can do no wrong”, which implies that neither any wrong can be imputed to the government nor could it authorize any wrong. Another reason for the doctrine of immunity was that it was regarded as an attribute of sovereignty that a State could not be sued in its Courts without its consent¹⁶².

5.1. Law relating to State Liability in England

English law has always clung to the theory that the king is subject to law and, accordingly can break the law. But in practice rights depend upon remedies, and the theory broke down, because there was no human agency to enforce the law against the king. The courts were the king’s courts and like other feudal lords the king could not be sued in his own court. He could be plaintiff and as plaintiff he had important prerogatives in the law of procedure, but he could not be defendant. No form of writ or executive would issue against him, for there was no way of compelling his submission to it. The maxim that ‘the king can do no wrong’ does not in fact have much to do with this procedural immunity. Its true meaning is that the king has no legal power to do wrong. His legal position, the powers and prerogatives which distinguish him from an ordinary subject, is given to him by the law, and the law gives him no authority to transgress. The crown could not be sued in tort in a representatives capacity, as the employer of its servants. But the king had a personal as well as a political capacity and in his personal capacity he was just as capable of acting illegally as was any one else, and there were special

¹⁶² Abhinav Ashwin, “Government Liability in torts in the 21st century”, AIR 2003 Journal 25.

temptations in his path. But the procedural obstacles were the same in either capacity. English law never succeeded in distinguishing effectively between the king's two capacities. One of the best illustrations of this is that, despite mystical theories that the crown is a corporation and that 'the king never dies', the death of the king caused great trouble even in relatively modern times. Parliament was dissolved, all litigation had to be begun again, and all offices of state (even all commissions in the army) had to be regranted. Until numerous Acts of Parliament had come to the rescue the powers of government appeared wholly personal, and it could truly be said that 'on a demise of the crown we see all the wheels of the state stopping or even running backwards.

Even today, when most of the obstacles to justice have been removed, it has been found necessary to make important modifications of the law of procedure. The Crown Proceeding Act, 1947, subjects the Crown to the same general liability in tort which it would bear, 'if it were a private person of full age and capacity'. The general policy, therefore, is to put the Crown into the shoes of an ordinary defendant. Furthermore, the Act leaves untouched the personal liability of Crown servants, which was the mainstay of the old law, except in certain cases concerning the armed forces.

The principle of the new law is that where a servant of the Crown commits a tort on the course of his employment, the servant and the Crown are jointly and severally liable. This corresponds to the ordinary law of master and servant.

The Act's specifically makes the Crown liable for;

- (a) Torts committed by its servant or agents,
- (b) Breach of duties which a person owes to his servants or agents at common law by reason of being their employer; and
- (c) Breach of duties attaching at common law to the ownership, occupation, possession, or control of property.

(a) Torts committed by its servant or agents – It is subject to the proviso that the Crown shall not be liable unless the servant or agent would himself have been liable. This proviso gives the Crown a dispensation which a private employer does not enjoy in occasional cases where the servant has some defence but the employer is still liable as such.

(b) Breach of duties which a person owes to his servants or agents at common law by reason of being their employer - The doctrine is that personal defences belonging to the servant do not extend to the employer unless he also is entitled to them personally, and they may not prevent the servant's act from being a tort even though he personally is not liable.

(c) Breach of duties attaching at common law to the ownership, occupation, possession, or control of property – it is subject to the proviso that the Crown to the normal rule of strict liability for dangerous operations (*Rylands v Fletcher*), so that the position is more satisfactory than in the case of other public authorities.

The Crown is also given the benefit of any statutory restriction on the liability of any government department or officer. A number of statutes contain such limitations of liability, for example the Mental Health Act, 1959 which protects those who detain mental patients under the Act unless they act in bad faith or without reasonable care, and the Land Registration Act, 1925, which frees

officials of the land Registry from liability for acts or omissions made in good faith in the exercise of their functions under the Act.

5.2. Immunity of the Crown from liability

In England, the liability of the Crown was determined by the two ancient fundamental rules, which existed in British Constitutional Law. They were substantive law based on "King can do no wrong" *Rex non potest peccare*, and Procedural law "King could not be sued in His own Courts". These two artificial theories of feudalism do not mean the king is above the law but he must be just and lawful.

In the political sphere, if the administration was badly conducted, it was not because of king's fault but it was because of the advice given by the ministers. In the legal concept, his privileged position and powers, is not amenable to the ordinary jurisdiction but law gives him no authority to transgress. Under feudalism it was unthinkable to file a suit against the king. So that the king or Lord could not be sued, in their own courts, as they were at the apex of the feudal pyramid. There was no human agency to enforce law against the king. The king was not liable to be sued civilly or criminally for the supposed wrong doing. This was invoked to negate the right of the subject to sue the king for the redress of wrongs committed by him¹⁶³. The maxim *qui facit per alium facit per se* and respondent superior had no application in case of wrong committed by the crown servants. No form of writ or execution could be laid against him as there was no way of compelling his submission to it. This practice made the crown servant who is sued in respect of a tort that he had committed in the course of employment,

¹⁶³ V.Edwin M. Borchard, "Government Responsibility in Tort", *Y.L.J.*,757(1926)

personally liable for it. In 1234, the king's court proclaimed "Our Lord the king cannot be summoned or receive a command from any one"¹⁶⁴. The king is the fountain of justice and equity and that he could not refuse to give justice when petitioned by his subjects. The king had to redress claims against him, and refer the matter to the courts. Later a standard of procedure in presenting the claims against the king by the petition of Right was introduced.

During the fourteenth and fifteenth century, number of petitions of different claims were brought to get justice from the crown. By the petition of 1256, an attempt was made to seek remedy, against the king's feudal powers, and their demand was to confer power to the royal courts, to deal with anti-feudal powers. The king and his officers could be sued, by waiving the privilege of non-suability, with the commencement of statute of Westminster 1275. The wrong done under a royal commission was made actionable in 1331. Abolition of Star Chamber in 1641 and the enactment of Habeas Corpus Act 1679 was a blow to feudalistic powers of the Crown. After the revolution of 1688, the king's powers gradually eroded, the judges began to enforce contract against the king. By the Petition of Right 1689, the difficulty of proceeding against the king due to sovereign immunity was relaxed. If the petition given to the Secretary of state for Home Department was rejected, there was no remedy against the king. When the fiat is obtained law suit is ensued between the petitioner and the Attorney General. After obtaining the fiat or justice, the plaintiff could seek the help of the regular courts for getting justice. But in the case of tort, there could be no remedy against the king. Thus in the past, the crown was not liable in tort.

¹⁶⁴ Quoted by G.P Verma, State Liability in India, (1993),p.25.

In the nineteenth century, the ordinary vicarious liability began to apply so that the personal liability of the official was recognized and this became the great bulwark of the rule of law. The damages were awarded and they were paid out of public funds. The laws, relating to the liability of the ministers were not adequate, and it was also necessary to prevent immunity of the officials so a draft bill with regard to the governmental liability was prepared by the Crown Proceedings Committee in 1927. In practice, the action against the officers concerned was defended by the Treasury Solicitor but the difficulty arose when the actual wrongdoer was not identified. Then the government department began to nominate a defendant, putting up nominated defendants was criticized by the House of Lords, as whipping boys¹⁶⁵. But this practice was condemned by the House of Lords. Firstly there was no clear evidence as to which crown servant was liable and secondly the suit could be filed only against the representative suit and not against the real defendant. In *Adams v. Naylor* the court expressed its difficulty in exercising jurisdiction and in deciding the case against the defendant who is in truth not the real defendant. This case was decided on the ground that the claim failed by reason of the provisions of personal injuries (Emergency Provisions) Act 1939. The action failed because of statutory immunity of the Crown but the House of Lords pointed out that it would have also failed in common law. In the course of judgment, the court observed that the legislation on the subject or liability of the crown for the torts of its servants was overdue¹⁶⁶.

¹⁶⁵ *Adams v Naylor*(1946)2 All ER 241: Action for damages was brought against the army officer in charge of that area, for the death of a boy when he came into contact with wire fence of the mine field owned by the ministry. House of Lords criticized the practice of instituting suit in the name of nominated defendant and dismissed as the negligence could not be attributed to the officers as he was no way responsible for laying the mines and causing death and injury to the boys. Mine field was in the occupation of the crown and not in the occupation of the nominated crown servant.

¹⁶⁶ (1946)2 All ER 241,245.

In certain kinds of torts the employer will be liable and not the servant example, for not providing adequate safety measures in the factory. In *Royster v Cavey*¹⁶⁷, the court expressed its inability to pronounce judgment against the defendant who in truth is not the real defendant. Such a practice of rendering non-guilty as guilty was also repugnant to the Rule of Law. The House of Lords refused and protested against the fiction of taking action against the nominated defendant who could be sued on the understanding that the crown would stand behind him indemnify him against damages.

In the above two cases, there was sufficient cause of action to sue for compensation. But immunity of the sovereign debarred the plaintiff from representing the crown as defendant. In both these cases the court expressed its difficulty of deciding the case due to lack of jurisdiction. Till 1946, a citizen's redress against the crown for tortious conduct committed by its servants was at best indirect. Even if various reforms were introduced before the Act of 1947, all attempts were refused by the powerful government department. Due to the change in the socio-economic conditions (from Laissez faire to welfare system, the crown became the largest employer of men and the largest occupier of the property) and modern civilization, the government felt intolerable with the old feudal doctrine and felt the need to change the crown immunity rule. The decision in *Adams v Naylor* in 1946 and the subsequent discussion, compelled it to introduce reform in the immunity principle as late as 1947 which resulted in the enactment of the Crown Proceeding Act 1947 which came into force on January 1, 1948.

¹⁶⁷ (1947)K.B.204(1946)2 All ER 642. In this case when an employee claimed compensation for breach of statutory duty against the occupier of the factory under Factories Act, suit being not lie against the state he took action against the nominated defendant supplied according to the agreement.

5.3. The Crown Proceedings Act 1947

The statutory duties can give rise to liability in tort, the Act therefore subjects the crown to the same liabilities as a private person in any case where the crown is bound by a statutory duty which is binding upon other persons¹⁶⁸. The Act makes no change in the general rule that statutes do not bind the crown unless an intention to do so is expressed or implied¹⁶⁹, so the crown will normally be liable only where the statute in question says so. But many important statutes do expressly bind the crown, such as the Road Traffic Act, 1960, the Factories Act 1961, and the Occupiers Liability Act 1957. The crown becomes liable in the same way as any other occupier of premises for not taking reasonable care for the safety of visitors invited or permitted to be there. A visitor to a government office or workshop who was injured by a negligently maintained roof or staircase would be able to sue the crown for the tort. So far as the occupation of land is concerns, the crown shares both the common law and statutory liabilities of its subjects.

The Act does not allow the crown to shelter behind the fact that powers may be given (either by common law or statute) to a minister or other servant of the crown directly, and not to the crown itself. In such cases the crown is made liable as if the minister or servant were acting on the crown's

¹⁶⁸ Section 2(2). In *Ministry of Housing and Local Government v Sharp* (1970) 2 Q. B .233 at 268. Lord Denning M.R. says that the Crown is not liable for mistakes in the Land Registry by virtue of section 23(3) (f) of the Crown Proceedings Act, 1947. That provision however applies only to part II of the Act (jurisdiction and procedure) and does not exclude crown liability under Section 2(3). But Land Registry officials acting in good faith are not liable.

¹⁶⁹ Section 40(2) (f).

own instructions¹⁷⁰. These primary rules for imposing liability in tort may be said, in general, to achieve their object well. The crown occasionally claims that public policy should entitle it to exemption in respect of its government functions. But this claim is rejected by the courts.

The liability of public authorities to pay monetary damages or compensation runs at once into difficulties of classification. In the first place, there is the problem of the Crown. Crown liability for torts such as trespass and negligence has a very different history from the liability of local authorities and other governmental bodies. But since the Crown Proceedings Act, 1947 the Crown has in principle been put on the same footing as public authorities generally. The need for a change in the law relating to tortious liability of the Crown was strongly felt as early as in 1921, when the Lord Chancellor Birkenhead appointed a committee of lawyers and others to consider the position of the Crown as litigant and to propose such amendments as might seem feasible. The committee in 1927 presented a Draft Bill, proposing the abolition of the petition of right and making the Crown suable in tort freely. However, the report was pigeon holed. Donoughmore Committee again recommended a case for legislation in this regard but the Administration of justice (miscellaneous provisions) Act, 1933 did not make Crown liable in tort. A large number of accidents involving state transportation during the Second world War, and the fear of nationalization of many industries by the government so as to lead an increase in the

¹⁷⁰ *Dorset Yacht Co. Ltd. v Home Office* (1970) A.C. 1044.

governmental immunities, together with the outcome of two cases viz, Adams v. Naylor and Royster v. Cavey, led Lord Chancellor, viscount Jowitt to introduce in the House of Lords a government sponsored Crown proceedings Bill, mostly based on 1927 Draft Bill, on 13th Feb 1947. The Bill became an Act on 31st July 1947 and came into operation on 1st Jan 1948.

The Crown Proceeding Act, 1947, as the title suggested, changes the procedure relating to civil proceeding by and against the Crown and also fundamentally modifies the rights and liabilities of the Crown vis-à-vis the subject. Its preamble reads that it is an “Act to amend the law relating to civil liberties and rights of the Crown and to civil proceedings by and against the Crown, to amend the law relating to civil liberties of persons other than the Crown in certain cases involving the affairs or property of the Crown”.

Section 1 of the Crown Proceedings Act, gives the plaintiff a right to sue the Crown without any fiat in cases where, if the Act had not been passed, he could: i) bring a petition of right, or ii) take any proceedings under special statutory provision, repealed by the Act. It does not create a new cause of action and the various limitations on the scope of the former petition of right continue to apply this right to action. However, by virtue of Section 13 of the Act, proceedings by way of petition of right stands abolished. Though on the face of it, it appears that Section 1 of the Act gives a general right to sue the Crown in all type of cases, the facts is that there is not as yet an unfettered right to sue the Crown. On a closer study of the wording of the section, the illusion is dispelled for it is seen that the “right of

direct action is only given where the claim might have been enforced before the Act by the old procedure of the petition of right or by other specially statutory provisions.

In respect of any breach of those duties which a person owes to his servant or agents at common law by reason of their being employer, i.e. breach of common law duties owed by an employer to his employees, viz, to supply proper plant, to provide a safe system or working and to select fit and competent fellow servants. In respect of any breach of duties attaching at common law to the ownership, occupation, possession or control of property. This may include liability for nuisance the rule in *Rylands v. Fletcher* liability for dangerous chattels, etc. In all these cases the Crown has been made subject to all those liabilities in tort to which a private person of full age and capacity would be subject. However, the Crown shall not be liable unless, "the act or omission would apart from the provisions of this Act given rise to a cause of action in tort against that servant or agent or his estate. Though it cannot be said that section 2(1) of the Act provides a general right of action against the Crown in tort, certainly, it is widely worded for it is difficult to think of a commission of a tort by the Crown other than by its servants or agents, as the Act does not apply to proceedings by or against the Crown in its private capacity

This Act supported in making the crown liable, like that of private person of full age and capacity when the crown servant committed a tort in the course of employment. So that the ordinary legal process instituted

against the crown, through ordinary courts and the remedies, such as an action for damages, injunctions and declarations become available. If the authority acted without power, there was no justification for it and it constitute torts or contract or any other wrongful acts and is actionable like a private person. The purpose of this Act was to put the crown in the shoes of an ordinary defendant. The crown would be liable as if the minister or servants were acting on the instructions from the crown¹⁷¹.

The defence of 'Act of State' was available to the crown servant and this could be used by the crown also. This could be applied only in limited circumstances like in the course of relation with another state or with the subjects of another state, and the claim arising out of treaty rights¹⁷². The liability of the Crown with the respect to the failure to comply with the imposed statutory duty was dealt with in Section 2 (2) of the Act¹⁷³. According to this provision the crown could be held liable for breach of statutory duty.

By means of Section 2(3) of the Crown Proceedings Act, the crown would be liable under common law, for breach of duty or breach of

¹⁷¹ Section 2 of the Crown Proceeding Act 1947, provides that: "(1) Subject to the provisions of this act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:- (a) to torts committed by its servants and agents; (b) to any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceeding shall lie against the Crown by virtue of paragraph (a) of this sub section in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act given rise to a cause of action in tort against that servant or agent or his estate.

¹⁷² Garner, Administrative law, p 283.

¹⁷³ Section 2 of the Crown Proceeding Act 1947 which provides that 'when the Crown is bound by a statutory duty which is binding upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of failure to comply with the duty, be subject to all those liabilities in tort to which it would be so subject if it were a private person of full age and capacity'.

statutory duty. So common law action for damages would lie against the crown if a wrong was committed by its agencies¹⁷⁴. So that crown would be liable like that of an ordinary person, if any wrong was committed by its servants while exercising statutory duty. In order to raise claim against the crown for the wrong of its servants or officials, certain conditions were required. The crown would be liable only if the particular officer was appointed by the crown and paid out of treasury. This section had the effect of excluding the crown from liability, in cases of action taken by the servants of some statutory corporation. For example according to section 48 of the Police Act 1964, the chief constable was rendered liable to be sued and the injured victim was paid out of local funds. The purpose of giving such restriction was to exclude the crown from liability for the action taken by the officers or servants of the statutory corporation even if the particular corporation acted as an agent of the crown. In England, if a tort was committed by a police constable, the chief constable was responsible. The section 2(6) of the Crown Proceeding Act made it clear about the liability of the crown¹⁷⁵. The crown was exempted from liability while discharging or purporting to discharge any responsibilities of judicial nature vested in him

¹⁷⁴ Section 2(3) of the Crown Proceeding Act 1947 provides that 'where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute and that officer commits a torts while performing or purporting to perform those functions, the liabilities of the crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

¹⁷⁵ Section 2 (6) of the Crown Proceeding Act 1947, 'No proceeding shall lie against the Crown by virtue of this section in respect of any neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed as an officer of the Crown and was at the material time paid in respect of his duties as an officer of Crown wholly out of the consolidated Fund of the United Kingdom provided by Parliament, the Road Fund or any other Fund certified by the Treasury for the purpose of this sub-section or was at the material time holding an office in respect of which the treasury certify that the holders thereof would normally be so paid'.

or any responsibilities which he has in connection with the execution of judicial processes. Section 9 and 10 of the Act also exempted the crown from liability in connection with postal and armed Forces.

5.4. Who is a Crown servants?

The question who is a servant of the crown, it must be remembered that the crown is liable to the same extent as a private person for torts committed by its servants or agents, and that 'agent' includes an independent contractor¹⁷⁶. The general principle in tort is that the employer is liable for the misdeeds of his servant or agent done in the course of the employer's business but not for the misdeeds of independent contractors, who bear their own responsibility. Where the employer can control what the employee does and how he does it, the relationship is likely to be that of master and servant, so that they are liable jointly. The same is true when an agent is employed. But an agent has to be distinguished from an independent contractor, for whose tortious acts the employer is not liable at all. For example, a person who takes his car for repair to an apparently competent garage is not liable if, because of careless work by the garage, a wheel comes off and injures some one¹⁷⁷. Yet there are some special cases where there is liability even for independent contractors, for example where the work is particularly dangerous. Thus a householder had to share the liability when she called in workmen to thaw out frozen pipes and by using

¹⁷⁶ Section 38(2).

¹⁷⁷ Compare *Phillips v Britannia Hygienic Laundry* (1923) 2 K.B. 823.

blowlamps they set fire both to her house and her neighbour's¹⁷⁸. If this had happened on crown land, the crown would have been equally liable under the Act because of its general liability for the torts of its agents.

The crown shall not be liable for the torts of any officer of the crown unless that officer has been directly or indirectly appointed by the crown and was at the material time paid wholly out of money provided by Parliament or out of certain funds, or would normally be so paid. But the principle importance of this provision is that it prevents the crown becoming answerable for the police, in some of their functions the police act as officers of the crown. Since the police, both in London and in the provinces are partly paid out of local rates, and in the provinces are appointed by local authorities, they are all excluded by the Act.

The crown has one general immunity in tort which is a matter of constitutional propriety. Judges and magistrates are appointed by the crown or by ministers. They are paid out of public funds and so may be said to be servants of the crown in a broad sense. But the relationship between the crown and the judges is entirely unlike the relationship of employer and employee on which liability in tort is based. The master can terminate his servant's employment, but the superior judges are protected by legislation. Their independence is sacrosanct, and if they are independence no one else can be vicariously answerable for any wrong that they may do.

¹⁷⁸ *Balfour v Barty king* (1957) 1 Q.B. 496.

It is virtually impossible for judges of the Supreme Court to commit torts in their official capacity, since they are clothed with absolute privilege, and this privilege has now been extended to lower judges, such as magistrates, if acting bonafide within their jurisdiction. But the Act comprehensively protects the crown in the case of any one discharging or purporting to discharge judicial functions. If there is no personal liability, the crown cannot be liable in the capacity of employer.

Public authorities, including ministers of the crown enjoy no dispensation from the ordinary law of tort and contract, except in so far as statute gives it to them. Unless acting within their powers, they are liable like any other person for trespass, nuisance, negligence and so forth. This is an important aspect of the rule of law. Similarly they are subject to the ordinary law of master and servant, by which the employer is liable for torts committed by the employee in the course of his employment, the employee also being personally liable. In *Cooper v Wandsworth Board of Works*¹⁷⁹, the board was held liable in damages in an ordinary action of trespass, as has been seen, it was acting outside its powers because it caused its workmen to demolish a building without first giving the owner a fair hearing, therefore it had no defence to an action for damages for trespass. The famous cases which centred round John Wilkes in the eighteenth century, and which denied the power of ministers to issue general warrants of arrest and search, took the form of actions for damages against the particular servants

¹⁷⁹ (1863) 14 C.B. (N.S) 180.

who did the deeds, who were sued in trespass just as if they were private individuals. The Governor of Jamaica, who had ordered the seizure of a ship chartered to the plaintiff and could show no legal justification, was held personally liable in damages for trespass. Before 1948 the crown itself was not legally liable for its servants misdeeds, but the crown would be the natural defendant to day. The plaintiff may sue the master or the servant or both, since both are jointly liable, but in most cases he will naturally choose to sue the master. He must be able to show some recognized legal wrong. Thus there is no remedy for tapping of telephones, which is not a tort. There are some situations where an officer of central or local government has an independent statutory liability by virtue of his office, because the statute imposes duties upon him as a designated officer rather than on the public authority which appoints him. In that case the employee only will be liable.

There are varieties of actionable negligence, an account of which belongs to the law of tort. But the courts have extended the principle of liability to certain acts of public authorities which are of a peculiarly governmental character and which require notice. In 1970 the House of Lords held the crown (the Home Office) liable for damage done by escaping Borstal boys. These were boys with criminal records who had been taken out on a training exercise in charge of Borstal officers who had instructions to keep them in custody but, who neglected to do so, they escaped and damaged a yacht, the owner of which was the successful plaintiff. Despite the novel nature of the claim, and the contention that there was no liability

for the acts of persons other than servants or agents, it was held that the custody of these dangerous boys imposed a duty to take reasonable care that they could not injure the public. This was an application of the doctrine of the law of tort that a duty of care arises from a relationship of proximity where the damage done is the natural and probable result of the breach of duty. The required degree of proximity may exist, on the facts of such a case, only in the vicinity of the place of detention, so that liability may be limited to damage done locally in the course of the escape. In this decision the House of Lords has taken a noteworthy step towards spreading over the whole community the price that has to be paid for experimental penal policies, rather than requiring it to be borne by the individual victim. In the same way a local authority was held liable for negligent custody of a boy.

5.5. Remedies available in English Legal System

The English legal system gives effective remedies in private law, in cases of infraction of primary rights. This private law concepts is flexible enough to cope with public law situation and can be used to regulate public law relation by changing the Royal immunities to the Royal responsibilities. The English legal system has had some notable success historically. It has given remedies particularly effective in case of infraction of primary rights especially those relating to torts, flexible enough to cope with the public law situation¹⁸⁰. The Crown Proceeding Act gives a certainty regarding the area where the crown can enjoy privilege and exception. In the same way it was

¹⁸⁰ C.J Hamson, Government Liability in Tort in the English and French Legal System, 12 JILI 1970 at 31.

clearly explained the conditions when the crown becomes liable for the wrong of his servants or officials. Now the English system is successful in safeguarding the primary rights and in giving the injured subject, an extremely prompt and efficacious remedy by directing its process against the immediately responsible individual. Payment of compensation maintains to restore the equilibrium where the injured cannot go to the original position and thus protects the rights of people in general¹⁸¹.

The primary function of the judiciary is to determine the dispute either between subjects or between subjects and states. In England the chief constitutional function is to ensure that the administration conforms to law where the supremacy of Parliament is absolute. The Parliament can override the decision of the court if need be with retrospective effect¹⁸². More recent trend in England is that courts are capable of evolving new principles to meet the changing situation of the modern welfare state and to see whether the administrative agency has acted ultra vires or not. So judicial review is to see, whether the administrative agencies acted according to law. They must not act beyond the power conferred on them. So the function of the court is to see that these authorities whether performing judicial, ministerial, and discretionary do not act in excess of their power. If the act of the Crown is outside the exemption, the ordinary courts possess jurisdiction to decide and the action will lie against the state. In England, no court is competent to

¹⁸¹ P.Ishwara Bhat, *Administrative Liability of Government and Public Servants*, Eastern Law House, New Delhi (1983) P. 122.

¹⁸² Manju Saxena and Harish Chandra, *Law and Changing Society, Enforcement of Basic Human right in the changing society*, Deep and Deep Publications, New Delhi (1999) P. 104.

enquire into the misconduct however gross of an official public duty such as that incumbent upon a borstal officer, for the purpose of giving a remedy in damages to a member of the public, however directly injured. So the aggrieved has to approach the ordinary courts for getting justice.

In India, in addition to the defence of 'Act of State' there are other instances where the state enjoys privilege by distinguishing its functions as sovereign and non-sovereign though there is no rationality behind it. There is no demarcating line and guidelines for treating the public function as sovereign and non-sovereign and it is determined according to the discretion of the courts. In India, the principle of Respondeat Superior is not applied in case of statutory functions by the state.