



## BAILEE'S DUTY OF CARE: EVOLUTION AND RELATION WITH TORTS

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### INTRODUCTION

A contract of bailment is a fundamental part of the law of Contracts due to its common occurrence within the law-abiding society. The crux of bailment was explained by Chitty by denoting it as “a separation of the actual possession of goods from some ultimate or reversionary possessory right.”<sup>1</sup> The essence of Bailment is that when the goods are bailed to the bailee for a certain period of time which are to be returned or disposed of in accordance with the bailor's instructions.

With the emergence of more complex contractual relations between parties, it is obvious to know that the liability of bailee in failing to provide “safe haven” to the goods attracts liability. However, the liability of the bailee is restricted to the requirement of care of the goods as per the standards of the prudence of ordinary man and no more, still, some different class of contracts of bailment such as of common carriers place a higher degree of care which needs to be exercised. Nonetheless, the standard of duty of care varies on a fact to fact basis, thus requires analysis of the evolution of Jurisprudence behind these standards notwithstanding the stationary requirement of prudent care.

Bailment is a point where Tort and Contract converges, as their relationship is highlighted

by the determination of bailee's liability through the test of negligence and the concept of vicarious liability. It is also logical to infer that if there is any major change in the test of negligence arising from Tort law, it could be applied while adjudicating disputes relating to bailment in Contract law.

The scope of the project remains flexible with the initial section elucidating upon the evolution of bailee's duty of care in India, where the standard test is applied on varying facts and moving unto some specific types of bailment and their evolution, the section being concluded with the debate of contract to the contrary and burden of proof. Further, the second section talks about bailment's relation with Tort law, where the application of Tort law principles are highlighted and an alternate mechanism set up by Consumer Protection laws is mentioned.

### EVOLUTION OF JURISPRUDENCE

The Standard of care by the Bailee evolved in Indian Jurisprudence under Section 151 of Indian Contract Act, 1872<sup>2</sup> diverged from the English standards where the degree of negligence was considered different for reward bailment and gratuitous bailment, where the latter required the existence of gross negligence on the part of the bailee. However, the Indian law concurred with modern trend and the Supreme Court of India accepted that standard of negligence must be uniform for both kinds of bailments.<sup>3</sup>

The standard of care or diligence required of a bailee under this section is that of an average prudent man in respect of his own goods of the

<sup>1</sup> CHITTY, CHITTY ON CONTRACTS VOLUME II SPECIFIC CONTRACTS, (13<sup>th</sup> ed., 2008).

<sup>2</sup> The Indian Contract Act, 1872, §151.

<sup>3</sup> *Union of India v. Amar Singh*, AIR 1960 SC 233; *Secretary of State v. Ramadhan Das Dwarka Das*, AIR 1934 Cal. 151.



same bulk, value and in similar circumstances, but such measure of care from a bailee would depend upon the facts of each case, e.g. It would depend upon the quality and nature of good.<sup>4</sup>

The Privy Council in one of its earliest cases of bailment in India relaxed the ambit of negligence while delivering the Judgement in *Dwarkanath Chaudhuri v. River Steam Navigation Co. Ltd*<sup>5</sup>. held that “*In a moment of extreme peril and danger, perfect presence of mind, accurate judgment and promptitude cannot be expected. When a man is suddenly put in an extremely difficult position and he gives a wrong order, it should not be attributed to want of nerve and skill as to amount to negligence.*”

‘Care’ taken by the bailee for this purpose would not mean that many others would have acted in the same way, but given the circumstances reasonable measures to take. For instance, in *Gour Chandra Mukherjee v. Andrew Yules Co-op Credit Society*<sup>6</sup> where the director of a co-operative society entrusted with the society’s cash, locked and kept the cash according to the usual informal and conventional arrangement, the fact that he followed the usual practice was no answer to his negligence, because the practice was insecure and risky, and he was legally bound to take all such, precautions as a reasonable man would take.

<sup>4</sup> *Laxmi Narain bhajinath v. Secy of State in India*, AIR 1924 Cal. 92.

<sup>5</sup> *Dwarkanath Chaudhuri v. River Steam Navigation Co. Ltd*, 1917 UKPC 108.

<sup>6</sup> *Gour Chandra Mukherjee v. Andrew Yules Co-op Credit Society* AIR 1977 Cal. 336.

<sup>7</sup> POLLOCK & MULLA, THE INDIAN CONTRACT ACT, 1872 (15<sup>th</sup> ed., 2015).

The duty of care and the ambit of negligent acts of the bailee further evolved in various aspects, both limiting and widening the scope of his duties towards the bailor.

### Extension of bailee’s duty

The bailee’s liability extends to any damage caused by the negligence of his servants acting within the scope of their employment while the use or custody with them or any fraud or wrongful act within the scope of their authority or for the benefit of their master or in the general course of employment.<sup>7</sup> For instance, in *Alias v. EM Paul*<sup>8</sup> where the Appellant gave his truck for repair work to a garage, while carrying out the work one of the workers without proper notice of starting the vehicle hit the truck to one Benny while testing the problem. The Kerala High Court held that the act of the bailee to allow the servant to enter into the truck and operate it was an act of negligence and imprudence. Regardless, of the Indian Contract Act, 1872 liability arising out of master-servant relation is governed by the Tort law and its relation with the Bailment would be discussed more elaborately in the next section of this project.<sup>9</sup>

The expiry of the term of bailment does not automatically terminates the bailee’s responsibility to maintain the goods. The position of UK Supreme Court in *Petrolio Brasileiro SA v. ENE kos*<sup>10</sup> where the contract of bailment was terminated by the bailee due to failure in stipulated payment by the

<sup>8</sup> *Alias v. EM Paul*, AIR 2004 Ker. 214.

<sup>9</sup> Abhik Chakraborty, *Duty of care of bailee: The evolution of doctrine of reasonable care in common law* (Jan. 2014). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2373722](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373722).

<sup>10</sup> *Petrolio Brasileiro SA v. ENE kos*, 2012 UKSC 17.



Charterer, the Ship remained in possession of the bailee for a number of days. The Court held that along with hire and cost for these days the bailee was liable to take reasonable care of the cargo until the arrangements were made.

### Dilution of duty of care

When the damage to the goods bailed is caused due to reasons beyond the control of the bailee, he is generally held to be not liable. In *Shanti Lal v. Tara Chand Madan Gopal*<sup>11</sup> where the plaintiff owned a grain commission shop and he was approached by the defendant to store grains for him, but there was an unexpected flood in Agra due to rise in water level the store submerged and the grains were damaged. The Court held that the occurrence of the flood was unprecedented in the annals of Agra and the Defendant could not have reasonably predicted such an occurrence. Similarly, in *Gopal Singh Hira Singh v. Punjab National bank*<sup>12</sup> where due to partition of India and Pakistan the bank was not able to discharge his liabilities towards the Plaintiff and lost the possession in Pakistan the Court held the bank to be not liable due to loss caused by reasons beyond its control.<sup>13</sup>

### Contract to the Contrary

While Section 151 of the Indian Contract Act, 1872 imposes a General duty on the part of the bailee in the maintenance of the bailed goods. However, the highly debatable question is

whether the bailee could contract himself out of such General duty of care imposed by Section 151 due to diverging opinions by the High Courts and recommendation of Law Commission.

Allowing the contract to the contrary, Punjab & Haryana High Court in *SBI v. Quality Bread Factory*<sup>14</sup> held that the words “*in the absence of special contract*” show that the bailee can Contract himself out of the obligation under Section 151. For this purpose, the Punjab & Haryana High Court relied on the Judgement of Bombay High Court in *Bombay Steam navigation co. Ltd. v. Vasudev Kamat*<sup>15</sup> where the Court liberally interpreting the Act held that “*there is no reason why a man should not be at the liberty to keep some property of his friend on the condition that he would not be held accountable for any loss caused by his own or his servant’s negligence.*” Holding a similar view the Law Commission in its 13<sup>th</sup> report has accepted this view and recommended that this Section be amended to enable the bailee to limit his liability.<sup>16</sup>

However, holding a contrary view Gujrat High Court in *Mahendra Kumar v. CBI*<sup>17</sup> where the bank was having the custody of bales of cotton, but they lost the bales subsequently and despite the existence of ‘contract to the contrary’ the Court held the banker liable. Similarly, the Kerala High Court concurring with Gujrat High Court, in *United India Insurance v. Pooppally Coir*

<sup>11</sup> *Shanti Lal v. Tara Chand Madan Gopal*, AIR 1933 All. 158.

<sup>12</sup> *Gopal Singh Hira Singh v. Punjab National bank*, AIR 1976 Del. 115.

<sup>13</sup> AVTAR SINGH, LAW OF CONTRACT ACT AND SPECIFIC RELIEF ACT 682 (12<sup>th</sup> ed., 2017).

<sup>14</sup> *SBI v. Quality Bread Factory*, AIR 1983 P&H. 244.

<sup>15</sup> *Bombay Steam navigation co. Ltd. v. Vasudev Kamat*, AIR 1928 Bom. 5.

<sup>16</sup> Law Commission of India, *Contract Act, 1872*, Report No.13 (1958), available at

<http://lawcommissionofindia.nic.in/reports/report13.pdf> (Last visited on June 1, 2020).

<sup>17</sup> *Mahendra Kumar v. CBI*, AIR 1984 Guj. 53.



*Mills*<sup>18</sup> held that the bailee could not claim total exemption from the standard of care which is required to be maintained by the bailee by taking recourse to Statutory principles. Therefore, it is of paramount importance that the Supreme Court might establish the law or an amendment be made by the Parliament to establish the bounds of duty of care of the bailee.

In *Taj Mahal Hotel's* case, a two-Judge Supreme Court bench held that hotels are free to print exemption clause for any damage caused due to contributory negligence, acts of third party or force majeure events. However, this exemption would always be subject to bailee discharging its initial burden of duty of care which it requires to take under Section 151.<sup>19</sup> The position of the Supreme Court in the aforesaid case has cleared any vagueness present in Jurisprudence of Section 151.

### Old Wine in New Bottle: Common Carrier's duty

Initially, The carriers of goods were held liable for any damage to the goods generally, barring a few exceptions of Act of God and Act by enemies of the King such that the bailor just had to prove the non-application of these exceptions and relief for any injury whatsoever to the goods was liable to be compensated.<sup>20</sup> Hence, in a sense, the duty of care owed by the common carriers was of widest amplitude. However, the Privy Council decided to keep the Common carriers outside the purview of Indian Contract Act, 1872.

Therefore, a look at The Carriers Act, 1865 is pertinent to elucidate upon the duty of care of the bailee (common carriers).

Even arrangement with a special contract under Section 6 of the Carriers Act, 1865<sup>21</sup> which enabled the common carrier to limit his liability by a special contract in its essence did not reduce the care required by the bailee with respect to goods, as such a contract was not capable of absolving him of liability due to criminal acts or negligence of himself or his servants<sup>22</sup> unless the advent of Act of God or enemies of the King.

Also, the burden of proof for disapproval of negligence was placed on the common carrier for any short-delivery, non-delivery or damage to the goods as per Section 9 of the Carriers Act, 1865.<sup>23</sup> And to discharge the burden of proof greater duty of care is required. For instance, In *Mooljee Sicka & Co v Sardar Narharsing*<sup>24</sup>, where the appellant contracted with the respondent for the delivery of one hundred and twenty bags of Tendu leaves to Gondia, subsequently, it was found that the respondent's truck was 58 miles away from Gondia and caught fire from the coal boiler of the truck. The Hon'ble Court held that occurrence of fire under such circumstances indicated negligence and the respondent's failure to discharge its burden by disproving negligence makes him liable for the damage accrued.

The Carriage by Road Act, 2007 was enacted to replace the old Carriage Act, 1865, but the

<sup>18</sup> *United India Insurance v. Pooppally Coir Mills*, (1994) 2 Ker. LT 473.

<sup>19</sup> *Taj Mahal Hotel's case*, at ¶ 39.

<sup>20</sup> *Irrawaddy Flotilla Co v Bugwandas*, 18 IA 121 at 125 : (1891) ILR 18 Cal 620 at 625.

<sup>21</sup> The Carriers Act, 1865, §6.

<sup>22</sup> *Nath Bros Exim Intl. Ltd v Best Roadways Ltd*, (2000) 4 SCC 553

<sup>23</sup> The Carriers Act, 1865, §9.

<sup>24</sup> *Mooljee Sicka & Co v Sardar Narharsingh*, AIR 1959 MP 351.



provisions regarding the liability of common carrier (Section 12, Section 17) in their essence remained the same as earlier.

### Liability of Railway as a bailee

The Railways Act, 1989 remains the governing authority in cases of dispute regarding bailment of goods to the Railways and for the purpose of the act the Railways may be considered as a bailee (carrier) under Sections 151, 152 of the Indian Contract Act, 1872.<sup>25</sup>

The scope of reasonable care which is required to be taken by Railway administration is elucidated upon by the Supreme Court in *Governor General in Council v. Musaddi Lal*<sup>26</sup> holding that “*The quantum of care which the railway administration is required to take is that care which it would take having regard to the bulk, quality and value of its own similar goods.*”

The liability of consignee for the breach of duty under the Railways Act is defined by Section 93<sup>27</sup> where the railway administration shall be responsible for the loss, destruction, damage or deterioration in transit or non-delivery of any consignment, arising from any cause except the following, namely:-

- (a) Act of God
- (b) Act of War
- (c) Act of public enemies
- (d) Arrest, restrain or seizure under legal process
- (e) Order or restrictions by Government or Government authorities
- (f) Act or omission or negligence of the

consignor and his servants or consignee and his servants

- (g) Natural deterioration or wastage or loss due to inherent defect or quality of the goods
- (h) Latent defects
- (i) Fire, explosion or any unforeseen risk.

Provided that the railway administration shall not be relieved of such liability under these heads until it proves that it has used reasonable foresight and care in the carriage of goods.

Subsequently, the duty of the railway administration is enunciated by a series of cases under the Delhi High Court. In, *Indian oil corp. Ltd. V. UOI*.<sup>28</sup> where a wagon containing 22,040 litres of furnace oil was discovered to be empty with its top and bottom seals open and valve rod missing, it was established that the oil was duly loaded and there had been tampering subsequently. The Delhi High Court held that during the tampering of the wagon and its contents the wagon was in the custody of the railways and it was not necessary for the Appellant consignor to prove such leakage which was clearly attributable to the failure in preventing any sort of tampering with the goods. Therefore, the Railways was held negligent in handling of the goods. Previously, the High Court in *UOI v. Hindustan Petroleum Corp. Ltd.*<sup>29</sup> had held that the act of not checking the sealing of the wagon amounted to negligence on the part of railway employees.

In *Rajinder Singh brothers v. UOI*<sup>30</sup>, where the consignor found that the fruits bailed by

<sup>25</sup> The Indian Contract Act, 1872, §151, §152.

<sup>26</sup> *Governor General in Council v. Musaddi Lal*, AIR 1961 SC 725.

<sup>27</sup> The Railways Act, 1989, §93.

<sup>28</sup> *Indian oil corp. ltd. v. UOI*, (2006) 89 DRJ 49

<sup>29</sup> *UOI v. Hindustan Petroleum Corp. Ltd.*, 2004 SCC OnLine Del 960.

<sup>30</sup> *Rajinder Singh brothers v. UOI*, ILR (2002) 2 DEL 30.



him to the Railways for transportation were unfit for consumption due to acid on the floor of the wagon. The Court held that duty of care in case of the natural process of deterioration may be diluted, however, such a plea was not entered in the matter at hand. Also, where the Station Master failed to perform its duty of countersigning indemnity receipts the railway administration was held liable for the negligence of the employee.

The railway's duty of care does not extend to negligent acts of third parties, when Indian Railways wagon is passing through Pakistan Railways and loss is caused due to acts of Pakistan Railway Administration<sup>31</sup>, or when the goods under the possession of Railways were destroyed by the populace which could not have been avoided by the Railways through standard care<sup>32</sup>

However, Under Section 97 of the Railways Act, the Railway Administration could be absolved of liability when the consignment was carried at owner's risk rate for whatever cause, except when such loss is caused by negligence or misconduct of Railway's servants.

*UOI v. Sugauli sugar works Pvt ltd*<sup>33</sup> The liability of the railway was that of a bailee the consignments were booked at owner's risk. The onus of proving that the railway employees took the necessary amount of care and that they were not guilty of negligence rested on the Railway Authorities. The High Court held that it was not a case of an unavoidable accident and that the Barge sank

because of gross negligence of railway employees and the railways did not take the amount of care which it was required to take as a bailee, the negligence was established by the fact that the Railway servants should have known about the defects as they used to ply the steamer. Therefore, the Railway is also not amenable to the test of negligence under Section 151.

### Bank's duty of care: a higher standard of care

It was established that the exemption clause would not completely extinguish Bank's duty of care in *Central bank of India v. Grains and Gunny Agencies*<sup>34</sup> "Any other cause whatsoever". The Hon'ble Court held that such a clause would protect the bank for any loss caused due to fire, rain, flood, theft, earthquake or lightning because under such circumstances no amount of care would seem reasonable, but not for the negligence of its servants as the Bank could not escape its liability if it has failed to show that it took as much care as a man of ordinary prudence under similar circumstances would take according to Section 151.

Therefore, despite the No liability clause in the pledge agreement, the bank was held liable for the negligence of its servants in exercising the reasonable standard of care that a man of ordinary prudence would take.

Moreover, *Central bank of India v. Abdul Mujeeb Khan*<sup>35</sup> the Court explained the general duty of care of the Bank where there

<sup>31</sup> *Cooch Behar Commercial co. v. UOI*, AIR 1960 Cal 455.

<sup>32</sup> *UOI v. Chekka Ranganayakulu*, (1966) AP 431.

<sup>33</sup> *UOI v. Sugauli sugar works Pvt ltd*, (1976) 3 SCC 32.

<sup>34</sup> *Central bank of India v. Grains and Gunny Agencies*, AIR 1989 MP 28. [Hereinafter "Gunny agencies case"].

<sup>35</sup> *Central bank of India v. Abdul Mujeeb Khan*, 1996 MP LJ 1110.



was a contract of Truck hypothecation by the borrower from the bank, he failed to repay the amount borrowed, truck was put under Bank's possession while suit for recovery was pending. Truck was kept in open area leading to total destruction to the truck, hypothecation being extended form of pledge, thereby attracting Section 151 and 152 of the Indian Contract Act, 1872 the Court held that the bank failed to take reasonable measures that an ordinary prudent man would have taken, thus its negligence lead to loss, thereby liable to indemnify the borrower.

The Apex Court in *UCO Bank v. Hem Chandra Sarkar*<sup>36</sup> attributed an higher degree of duty of care on the bank by holding that loss of goods by the Bank would itself attract absolute liability without the element of negligence present. Further, holding that "If the property is not delivered to the true owner, the banker cannot avoid its liability in conversion." For this purpose the Court referred to Halsbury's Laws of England<sup>37</sup>

*"where the bank delivers the goods to the wrong person, whereby they are lost to the owner, the liability of the bank is absolute, though there is no element of negligence, as where the delivery is obtained by means of an artfully forged order. In law the banker could contract of this liability, but he would be unlikely to do so in practice."*

Therefore, in the case it was held that a paid bailee must use the greatest possible care and is expected to employ all necessary

<sup>36</sup> *UCO Bank v. Hem Chandra Sarkar*, AIR 1990 SC 1329.

<sup>37</sup> HALSBURY'S LAWS OF ENGLAND [3] ¶93,94 (4<sup>th</sup> ed., 2006).

<sup>38</sup> *Secretary of State v. Ramadhan Das Dwarka Das*, AIR 1934 Cal. 151.

precautions with respect to the bailed goods. If the property is not delivered to the true owner, then banker cannot avoid liability under conversion. Burden of Proof: requirement of proving the minimal

The position in India law regarding the burden of proof for disproving negligence is on the bailee and this position has been made clear by the Courts over and over.<sup>38</sup> The rationale behind such burden was explained by M.P. High Court in *Gunny Agencies case* while holding that loss to the goods bailed to the bailee is *prima facie* evidence of negligence and the bailee being in possession of goods would only know how the loss was caused and would be in a better position to prove the due care and absolve himself of liability.

Also, the manner of discharge of burden of proof was laid down by in the case of *Railway Co. Ltd. v. Eastern Assam Co. Ltd.* Where J. Rankin's observation "when a defendant is called upon to prove that he was not negligent he is not really called upon to prove negative, but to prove that he took reasonable care."<sup>39</sup>

However, in special circumstances the onus on the bailee is reduced. As discussed in the case of *River Steam Navigation Co. v. Choutmull*<sup>40</sup> where fire arose from an unknown cause while they were in possession of railway company. It was held that due to nature of fire being an unknown cause the burden of proof on the bailee would be limited to putting forward the evidence which supports the bailee's duty of care and from that

<sup>39</sup> *Railway Co. Ltd. v. Eastern Assam Co. Ltd.*, AIR 1921 Cal. 315, (per Rankin J.).

<sup>40</sup> *River Steam Navigation Co. v. Choutmull*, 1898 SCC OnLine PC 19.



evidence the bailor would have to draw inference and establish breach in fulfilment of duty of care.

In *Taj Mahal Hotel's case*, *Prima facie* liability rule was applied which has same effect as the burden of proof with the bailee where the Hotel was required to show reasonable care on its part in securing parked cars, but it failed to do so thereby burden did not shift to the Respondent.

Therefore, the duty of care of the bailee under normal circumstances is slightly higher because the burden of disproving his negligence is present on the bailee, however, such a burden could be reduced by the bailee due to exemption clause where the bailee would have to prove the facts attracting the clause.

### **RELATION WITH TORTS**

As to liability in what we should now call tort, has its essence on the premise that the bailee who was guilty of negligent misfeasance in breach of his undertaking was liable to an action in tort based on his undertaking.

A clear line to demarcate between both Contractual bailment and tortious bailment does not exist such that it was already established that bailee's rights were consistently based on his possession of the goods, thus an action based on torts seemed futile because the element of gratuitous bailment was already incorporated by CJ. Holt.

The problem arose when the courts allowed a

cause of action founded on tort to masquerade as an action founded on contract. The parties were allowed to waive the tort and sue in contract. For instance, in *Walker v. Watson*,<sup>41</sup> the owner a car lent it to two inebriated girls, insisting that only the less inebriated of them should drive. The car was found several hours later embedded in a wall and the owner sued the appointed driver for the resultant damage. Foreseeing a possible defence of contributory negligence or *volenti non fit injuria*, he formulated his action in contract alleging a breach of the terms of the bailment. Thereby, accepting a claim under contract and ignoring the tortious misfeasance.<sup>42</sup>

However, while considering other aspects and details of evolving Jurisprudence of contract of bailment other aspects of tort law are also involved which are discussed hereunder.

### **Vicarious liability**

Under a contract of bailment, the bailee is responsible for the negligence of its servants during the course of employment, thus the concept of master-servant relationship plays an important role in establishing the duty of care of the bailee and resultant negligence.

The relation between tort and bailment due to resulting vicarious liability on the bailee was expounded upon by UK Queen's Bench in *Morris v. C.W. Martin & Sons Ltd.*<sup>43</sup>

The liability of the bailee towards the bailor comprises of a non-delegable duty. The liability for the acts of the servant arose from

<sup>41</sup> *Walker v. Watson*, 6 [1974] 2 N.Z.L.R. 175.

<sup>42</sup> *The Extent of a Gratuitous Bailee's Liability in Contract*, 23 Columbia Law Review 574 (1923). doi:10.2307/1111351.

<sup>43</sup> *Morris v. C.W. Martin & Sons Ltd.*, [1966] 1 QB 716



two approaches the contractual duty approach explained by Lord Denning, where the bailee owes a non-delegable duty to the bailor and the servant is required to have actual control over the goods bailed for establishing liability, and the traditional approach in tort where the course of employment and its satisfaction establishes the liability on the master.<sup>44</sup> Thus, the latter approach seems to be wider than the contractual one, due to the wider scope of liability it could impose<sup>45</sup>. However, the courts in India and England have interpreted the liability of the Bailee due to negligent acts of the servants on the lines of vicarious liability, thereby establishing a relation between them.

Furthermore, the Jurisprudence of duty of care of the bailee evolved with respect to vicarious liability in a number of cases by expanding the scope of the duty of the master (bailee). For instance, in *Hastmal v. Raffi Uddin*<sup>46</sup> the Court held the master liable due to negligence of his servant on account of the use or custody of the bailed goods. Also, the acts of fraud or other wrongful acts of the servant within the apparent scope of their authority either in the interest of the principle or the master or in the course of employment.<sup>47</sup> Similarly, the M.P. High Court<sup>48</sup> stated that even if the master employs dishonest servants or failed to supervise the action of his servants which lead to damage the master can be held liable for their negligence.

The relation between tort and bailment the tort law's exception to vicarious liability prevails,

this was evident in the case of *State of Gujrat v. Memon Mahomed haji Hasam*<sup>49</sup> where the The state was considered a bailee without any existence of any enforceable Contract holding that a contract of bailment could arise towards a specific property without there being consent or enforceable contract. Also, the Court opined that if the State or its servants had disabled themselves to return the goods they could not claim protection under the statute.

#### Relation as to Negligence

Under the Tort Law, the tort of negligence has three elements.-

1. Existence of duty of care
2. Breach of duty of care
3. Causation or damages.

As stated by The Karnataka High Court in *M. Sidalingappa v. T. Nataraj*<sup>50</sup> that the effect of Section 151 is that of imposing a duty of care by law on the bailee, and breach of such duty results in causation. Such construction of duty of care shows the evolution of negligence with respect to bailee's duty of care.

Furthermore, The Hon'ble Supreme Court in *Taj Mahal Hotel's case* where a car was bailed to the Hotel's parking service after payment of some fees, but due to negligence of the Hotel Staff, the car was stolen from its premises. The *prima facie* liability of the Hotel appeared to be two-fold, but the Court refused to apply strict liability rule in case of innkeepers bailment by keeping in mind today's context

<sup>44</sup> Jane Swanton, *Master's Liability for the Wilful Tortious Conduct of His Servant*, 16 U.W. Austl. L. Rev. 1 (1985).

<sup>45</sup> *Id.*

<sup>46</sup> *Hastmal v. Raffi Uddin*, AIR 1953 BHO. 5.

<sup>47</sup> POLLOCK & MULLA, THE INDIAN CONTRACT ACT, 1872 (15th ed., 2015).

<sup>48</sup> *Bilaspur Central Co-operative Bank Ltd. v. State of M.P.*, AIR 1959 MP 77.

<sup>49</sup> *State of Gujrat v. Memon Mahomed haji Hasam*, AIR 1967 SC 1885.

<sup>50</sup> *M. Sidalingappa v. T. Nataraj*, AIR 1970 Kant. 154.



of economies with well-established hotel industries and a tendency across jurisdictions to move from such “*relics of past.*”<sup>51</sup> However, the Court constructed the Hotel’s duty of care on the lines of a previous celebrated Judgement of Delhi High Court<sup>52</sup> where the Court held that “*High prices charged by such hotels imply a relatively higher degree of care that a reasonable person would normally expect greater quality and service made available by such hotels.*” Therefore, the Hotel was held liable due to want of requisite care.

Thus, in the establishment of a bailee’s negligence the test of negligence is borrowed from the law of torts for a Justiciable and viable result in attributing liability of parties under the Contract law.

### Operation of Consumer Protection laws

The Consumer Protection Act, 1986 has set up Consumer Dispute Redressal Commissions from district to national level, these commissions are competent to hear matters related to consumer disputes and their Jurisdiction extends to the liability of bailee and bailor, on the condition that the transaction is not for commercial use. The Consumer Protection Act itself is very consumer-centric act, so the *modus operandi* of proving deficiency in service itself attaches a greater degree of duty of care on the bailee. Subsequently, cases are discussed where the Consumer forums had constructed liability in an arrangement of bailment.

In *Bombay Brazzerie v. Mulchand Agarwal*<sup>53</sup> On account of the negligence of the servants of a hotel complainant’s car was stolen, where the National Consumer Dispute Forum acknowledged relation of bailment between both the parties and it was opined that the Hotel was negligent in his duties. Therefore, the claim was upheld by the Forum on grounds that there was a deficiency in service on the part of the Hotel. However, the forum refused to grant decree to the Complainant as he had already received compensation from the insurance company. But, the insurance company on the facts of the case was entitled to such compensation, which may be claimed through a separate suit.

Further, the Consumer Protection Act can also adjudicate upon the disputes related to Common Carriers under the Carriers Act, 1865 and Carriage by Road Act, 2007. The Consumer Protection Act supplements other Acts namely the Carriers Act and is not in derogation of the these Act, so when a special condition for execution of a contract is laid down in Section 10 of the Carriers Act, 1865 the Consumer Protection Act could not vitiate its compliance.<sup>54</sup> Additionally, the Common carrier would be liable in deficiency in service within the meaning of ‘Service’ under Section 2 (1) (o) of Consumer Protection Act, 1986 if the carrier has lost the goods in transit.<sup>55</sup> Also, with the enactment of Consumer Protection Act, 2019, there is no crucial change in the mechanism of attributing liability.

<sup>51</sup> *Taj Mahal Hotel’s case*, at ¶16.2.

<sup>52</sup> *Klaus Mittelbachert v. East India Hotels Ltd.*, AIR 1997 Delhi 201.

<sup>53</sup> *Bombay Brazzerie v. Mulchand Agarwal*, I (2003) CPJ 4 (NC).

<sup>54</sup> *Arvind Mills Ltd.v. M/S. Associated Roadways*, AIR 2004 SC 5147.

<sup>55</sup> *Transport Corp. of India Ltd.,v. M/s. Veljan Hydrair Ltd.*, (2000) (4) SCC 91.

**CONCLUSION**

“The test of a reasonable man is what it takes to attribute liability.” The rule is simple and followed across Jurisdictions in various facets of law. In India, under the contract of bailment duty is based on reasonableness, and this has been reiterated by the Courts since time immemorial. Further, in terms of limiting the liability the position of Courts have remained conflicting, however, recent trends show that the liability may not be curtailed due to an exemption clause because the test of Section 151 is of paramount importance. Recognition of special duty with reference to special cases such as of the Railway and banks have been attributed by the Court, but no explicit position is reiterated such that Railway is required to take care of the goods as if their own, and banks have a higher duty in the maintenance of goods in its possession.

While analysing the relation of torts and contract of bailment we stumble upon the question that why is there a need for such two-fold remedies which could have conflicting results. Further, the concept of vicarious liability evolved under tort law finds its place in a contract of bailment where not only the signatory to the contract but also its employees actions could constitute want of care under the Contract. Lastly, with the operation of Consumer protection laws could have a similar effect of attributing liability as the Indian Contract Act, 1872 when there is deficiency in service. Therefore, a bailment is a mixed phenomenon with conflicting details and expanding scope.

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