

Chapter 22

Methods of Ascertainment of Personal Damage in India

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Abstract This chapter illustrates the historical, judicial, and juridical framework of personal injury assessment and compensation in India, describing the expert's qualification and competences and detailing the ascertainment methodology and criteria of evaluation utilized for identifying, describing, and estimating any personal injury, its temporary and permanent consequences, and the causal value/link between the event and the injury and between the injury and the impairment/disability.

22.1 Historical, Judicial, and Juridical Overview

22.1.1 History

We all know that the first known laws to compensate for damage were defined under Hammurabi code around 2200 BC which advocated for “an eye for an eye and a tooth for a tooth,” along with monetary punishments. In India, the first legal code was formulated between 3000 and 1000 BC as described under “Manu-smriti” (*“The Dharma Text of Manu”*), which says that the drunk, insane, hungry, thirsty, tired, and those persons with defective sense organs were not permitted to be witnesses in court. Statements of children, old men, diseased persons, and weak minded persons were not to be relied. These were based on various “Dharmashastra” which described punishments for adultery, seduction, incest, and unnatural sexual offences. Around 300 BC, the great Indian Philosopher, teacher, and royal advisor to the Maurya dynasty, Chanakya (also known as Kautilya and Vishnugupta) wrote “Arthashastra” with the purpose of governance, which also described the use of medical knowledge for the purpose of law. In 250 AD—“Charaka Samhitha” contained moral & ethical principles and in

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300 AD, Sushrut was the first person to codify various punishments. Afterwards, during the medieval period in India, the criminal laws were further developed under various Hindu and Muslim rulers. During this period “Quasi-I-Mumalik” was the arbiter of civil and criminal litigations and his function was to find out facts and apply the law. The specified penal code, however, was implemented in 1860 during the British regime. The Civil Procedure Code was afterwards founded in 1908 with an aim to provide a litigant a fair trial in accordance with the accepted principles of natural justice. There have been several amendments over the period of time, but the basic structure remains the same and still follows British laws to a great extent. Of particular importance is Sect. 11 which contains the rule of conclusiveness of the judgment based partly on the maxim of Roman jurisprudence “*interest reipublicae ut sit finis litium*” (it concerns the State that there be an end to law suits) and partly on the maxim “*nemo debet bis vexari pro una et eadem causa*” (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court, but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which the issue has been raised. “*Res judicata pro veritate accipitur*” (a thing adjudged must be taken as truth) is the full maxim which has, over the years, shrunk to mere “*res judicata*”.

The industrial revolution of the 19th century resulted in a shift from agriculture to industry and this led to the introduction of Workmen Compensation Act in 1923 (amended in 2009).

The Workmen’s Compensation Act, 1923 provides for payment of compensation to the workmen and their dependents in the case of injury by industrial accidents including certain occupational diseases arising out of and in the course of employment resulting in death or disablement. This Act applies to certain railway servants and persons employed in hazardous employments at locations such as factories, mines, plantations, mechanically propelled vehicles, construction work, etc., specified in Schedule II of the Act. However, the Act is not applicable to the employees who are covered under the Employees’ State Insurance Act, 1948. The Second National Commission on Labour set up in the year 2002 made certain recommendations relating to the amendment of the Workmen’s Compensation Act, 1923. Ultimately, it was notified in 2009 after consultation with the concerned Ministries/Departments/State Governments and the Union territory Administrations.

Salient points are the following:

- “Workman” was substituted by the term “employee.”
- Increase of the minimum rates of compensation payable to a worker from 80,000 rupees (1300\$) to 120,000 rupees (2000\$) for death and from 90,000 rupees (1500\$) to 140,000 rupees (2300\$) for permanent disability and empowerment of the Central Government to enhance the minimum rates of said compensation from time to time.

- Increase of the funeral expenses from 2500 rupees (40\$) to 5000 rupees (80\$) and to empower the Central Government to enhance the same from time to time.
- Provide reimbursement of actual medical expenditure incurred for treatment of injuries caused during the course of employment.
- Speedy disposal of case within 3 months from the date of reference and to intimate the decision in respect thereof within the said period to the employee.
- Increasing coverage by omission of the restrictive clauses in Schedule II of the Act and inclusion of additional hazardous activities.

In 1948, soon after gaining independence, various trade unions demanded for regularization, which led to introduction of *Employees' State Insurance Act, 1948*.

The basic aim of this act was to provide for certain benefits to Employees in case of Sickness, Maternity, and Employment Injury and to make provisions for related matters. The Act is applicable to the "Factories" employing ten or more persons irrespective of whether power is used in the process of manufacturing or not. Under it, the scheme has been extended to shops, hotels, restaurants, and cinemas, including preview theaters, road motor transport undertakings, and newspaper establishments employing 20 or more persons. The scheme has also been extended to Private Medical Institutions and Educational Institutions employing 20 or more persons. It is a self-financing social security and health insurance scheme for Indian workers. For all employees earning Rs.15000/ (US\$240) or less per month as wages, the employer contributes 4.75 % and the employee contributes 1.75 %, for a total share of 6.5 %. This fund is managed by the ESI Corporation (ESIC) according to rules and regulations stipulated in the ESI Act 1948, which oversees the provision of medical and cash benefits to the employees and their families through its large network of branch offices, dispensaries, and hospitals throughout India. In the ESI scheme, a worker in insurable employment is called an insured person. Insured persons and their families are entitled to different types of benefits, broadly classified in two ways: (1) Medical benefits and (2) Cash benefits. The employees registered under the scheme are entitled to medical treatment for themselves and their dependents, unemployment cash benefit in certain contingencies, and maternity benefit in case of women employees. In case of employment-related disability or death, there is provision for a disability benefit and a family pension, respectively. Funeral Benefits are provided to dependents of Insured Persons/Insured Women to the amount of Rs.15,000/—(US\$250).

22.1.2 Judicial

India lacks a social security system scheme. Hence, in cases of bodily injury claims, in addition to above 2 acts (if one is employed as the case may be), one has to depend either on personal insurance or calling for compensation from third party interventions. This situation is frequently encountered in road traffic accident cases.

Increase in the number of motor vehicles, poor maintenance of roads, and negligence by drivers have led to a substantial increase in road accidents, resulting in death or injuries. India ranks 3rd for the number of fatalities due to road accidents, but data concerning persons becoming permanently disabled from such accidents is lacking. Until 1988, when the victim or their heirs approached the civil courts, they were required to prove negligence by the driver of the offending vehicle in order to make the owner liable to pay compensation. This, at times, was a daunting task for the heirs of the deceased, who did not witness the accident. Even in case of the injured victim, he/she could hardly be expected to recall the exact manner in which the accident had occurred. Denial of compensation on the ground that negligence of the driver of the vehicle was not established was highly unfair to the victim, particularly in a democratic country like India. The compensation was provided under Section 140 of the Motor Vehicle Act, which was limited to 50,000 Rs in cases of death and 25,000 Rs in cases of permanent disability.

Becoming aware of this huge lacunae, parliament passed the Motor Vehicles (Amendment) Act, 1994 (54 of 1994) inserting Section 163-A in the Motor Vehicles Act, 1988 with effect from November 14, 1994. The section provides for compensation on a structured-formula basis as indicated in a tabular form in the Second Schedule forming part of the Act. In a claim for compensation under this provision, the claimant is not required to plead or establish that death or permanent disablement was due to "any wrongful act or neglect or default of the owner of the vehicle." In other words, the claimant is entitled to compensation in accordance with the Second Schedule on the principle of no-fault liability. For instance, in the case of death of a person aged 25 years whose annual income was 12,000 Rs, the compensation payable to the heirs as per the Second Schedule would come to approximately 136,000 Rs. Section 163-A is a provision intended to provide for immediate relief to the victims of motor accidents. Surprisingly, however, lawyers and litigants have not come forward to take maximum benefit of this statutory amendment, with the result that the victims have to wait many years for the final adjudication of the claim petition.

The Court's observations were in response to the introduction of Section 92-A in the Motor Vehicles Act, 1939 (Section 140 of the 1988 Act), providing for a lump sum compensation of 15,000 Rs in case of death and 7500 Rs in case of permanent disability, on the principle of no fault. The Supreme Court found the amendments a welcome step and observed thus:

"Where a pedestrian without negligence on his part is injured or killed by a motorist whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if the principle of social justice should have any meaning at all. In order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents there has been a continuous effort throughout the world to make the liability for damages arising out of motor vehicles accidents as a liability without fault."

The issue of evaluation of disability invariably came into question and in September, 1981, an "Expert Group Meeting on Disability Evaluation" comprising of about 50 experts in different fields of the medical sciences was held in New Delhi

with the objective to develop simple norms for the evaluation of permanent physical impairment in Indian patients. Guidelines developed at the meeting were given due trial at various centres in the country. It was then followed by the “National Seminar on Disability Evaluation & Dissemination” held in December, 1981. A manual was afterwards developed as an outcome of these seminars to evaluate permanent physical impairment, which was primarily based upon “Disability—Determination and Evaluation” by Dr. Henry H. Kessler, West Orange, New Jersey, USA. The basic aim was that it would facilitate medical practitioners in evaluating the degrees of permanent physical impairment. It would further uniformly standardize the evaluation system in the country. It would facilitate handicapped persons in the rural areas to obtain the benefits existing under various provisions. While developing the criteria of evaluation of physical impairment, due consideration was given to terms like “impairment,” “functional limitation,” “disability,” and “normal.”

In 1995, The Persons with Disabilities (Equal Opportunities, protection Of Rights and Full Participation) Act (henceforth PWD Act) came into force. It provided 3% reservations for disabled people in poverty alleviation programs, government posts, and in state educational facilities, as well as other rights and entitlements. The specific objectives of the Act include Prevention and Early Detection of Disabilities, Education, Employment, Affirmative Action, Non-Discrimination, Research and Manpower Development, as well as some kind of Social Security. This act was further amended in 2009 with the placement of exhaustive guidelines regarding calculation of disability and the clarification of certain terminologies, such as “person with disability” meaning a person suffering from not less than 40% of any disability as certified by a medical authority and “medical authority” meaning any hospital or institution specified for the purposes of this Act through notification by the appropriate Government. In pursuance of this, State Governments/UT administrations are required to notify the medical authorities to issue a disability certificate. The maximum period of validity of a temporary disability certificate will be 5 years.

22.1.3 Juridical

Liability. Tort law defines the conditions under which a person is entitled to damage compensation if his or her claim is not based on contractual obligation, i.e., either covered under the Workmen Compensation Act or the Employee State Insurance Act. Damage results from the loss or impairment of property, health, life, or limb, from the infringement of rights or from pure financial or nonfinancial losses. Economically speaking, every reduction of the individual’s utility level caused by a tortious act can be regarded as damage. Tort law rules aim at drawing a just and fair line between those noxious events that should lead to damage compensation and others for which the damage should lie where it falls. In India, it has developed from a large body of formerly unrelated doctrines, such as

conversions, trespass, nuisance, defamation, negligence, deceit, and rules from case laws.

Tort Suit A tort suit enables the victim of some injury to make their problem someone else's problem. Unlike a criminal case, which is initiated and managed by the state, a tort suit is prosecuted by the victim or his legal heirs. Moreover, a successful tort suit results not in a sentence of punishment but in a judgment of liability. Such a judgment normally requires the defendant to compensate the plaintiff financially. In principle, an award of compensatory damages shifts all of the plaintiff's legally cognizable costs to the defendant. On rare occasions, a plaintiff may also be awarded punitive damages, defined as damages in excess of compensatory relief. In other cases, a plaintiff may obtain an injunction: a court order preventing the defendant from injuring him/her or from violating one of his/her property rights. The law does not recognize just any injury as the basis of a claim in tort.

Types of Duties Tort distinguishes between two general classes of duties.

- Duties not to injure.
- Duties not to injure negligently, recklessly, or intentionally.

When one is engaged in an activity the law regards as extremely hazardous (e.g., blasting with dynamite), it is the duty of the first type but when one is engaged in an activity of ordinary riskiness (e.g., driving), it is covered under the second type, i.e., a duty not to injure negligently, recklessly, or intentionally, and is governed by fault liability.

Scope of Tort Liability This depends to a great extent on two factors, the availability of private insurance against hazards and the capacity of the civil system to obtain and process information. If private insurance is easily obtainable for both victims and tortfeasor, secondary costs are independent from the loss.

In India, there is no concept of social security and therefore insurance markets are grossly underdeveloped. It leads to a tendency to shift the costs of accidents to these large insurance companies by way of third party.

22.2 Identification and Description of Medicolegal Expert's Qualifications in Ascertainment of Personal Injuries and Damage

22.2.1 The Immediate Treatment

In case of any injury suffered, the first treatment point is usually the emergency department of a hospital, whether government or private. In India, a doctor owes two types of duty in such situations. One of them is a primary medical duty, i.e., pertaining to treatment and other medicolegal duty, i.e., pertaining to law. The

medicolegal report (MLR) is prepared after the initial first-aid treatment or stabilizing the patient. Preparation of MLR is part and parcel of the duty of the doctor who has attended the victim first. In cases of injuries, the doctor reports the injuries on a specified document in duplicate, the original of which is taken by the law enforcement/police investigative agencies. This information about the occurrence of a medicolegal case has to be either reported to the nearest police station as per jurisdiction of the hospital or, if the victim is accompanied by the police, of the jurisdiction where the alleged accident took place. In the case of the former, it will be the duty of the nearest police station to coordinate further with the jurisdiction in which the alleged accident took place.

22.2.2 Investigation by the Police/Law Enforcement Agencies and Insurance Companies

Every case of unnatural/unknown circumstances/accident has to be investigated by police and submitted to the Motor Accident Claim Tribunal (MACT)/Civil Court for information. This information itself is treated as a preliminary application for fixation of the claim, in addition to criminal action later. The victim can request for the copy of all medical treatment papers including all the reports and costs of the treatment. The MLR and original X-ray, however, are the property of the police and are handed over to them. The police act on behalf of the victim in most of the cases. However, the victim is empowered to lodge a separate suit directly by name if the whereabouts of the perpetrator are known. The cost of treatment incurred by a victim is usually verified by insurance agencies that directly approach the relevant hospital. If the patient is being treated in a public hospital the cost of treatment, being heavily subsidized, is exempted from it. There is no need to undergo a further medical examination by any other agency. The concept of medical advisors in the insurance company is nonexistent. Usually, it is surveyor who simply verifies the facts from hospital records. Afterwards, it may be contested in a court of law whether a causal connection existed between the accident and the claimed damage and if there was any gross negligence on part of treating doctor.

There is no such entity as insurance medicine in India, since the whole system runs in a totally different manner. Depending upon the earning capacity and quantum of damage, as well as due consideration of the dependent family members, the court decides an amount to be paid by the opposing party through his insurance company.

22.2.3 Judicial Procedure in MACT/Civil Courts

Because of the huge number of cases, a special type of court, i.e., the Motor Accident Claim Tribunal (MACT), has been opened in bigger cities since 1988 after the introduction of the new Motor Vehicle Act, which has now gone to district levels of several states. It has all of the powers of a civil court and was basically established in order for a settlement to be reached at the first instance by mutual agreement.

The presiding judge under whose jurisdiction the case has filed then consults all of the records of the police investigation and examines all of the eyewitnesses and expert witnesses concerned with the case, whereupon the role of the doctor comes into play. Primarily, the first doctor who prepared the MLR gives his opinion about the injuries and then all of the doctors who were primary or expert treatment givers are also called upon in relation to the type of intervention done/operations performed.

Where a claims tribunal has been constituted for any areas, no civil court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the claims tribunal in respect of the claim for compensation shall be granted by the civil court.

The MACT is a civil court, for all intents and purposes of adjudication of claims for compensation in motor accident cases. From the scheme of the Motor vehicles Act and the Rules framed thereunder, it is clear that a Claims tribunal is constituted for a specific area, which is specified in the notification for the adjudication of such claim. The institution of the proceedings is by an application for compensation. The tribunal disposes such an application by giving the parties an opportunity of being heard and holding an inquiry into the claim and it then has to make an award determining the amount of compensation to be paid and the amount which is to be paid by the insurer. The tribunal has been given all the powers of a civil judge for the purpose of taking evidence on oath and enforcing the attendance of witnesses and of compelling the discovery and production of documents, the reception of evidence on affidavits, as well as requisitioning any public record or document or copy of such a record or document from any court or office. The right to appeal to the High Court is also provided.

The victim can file a claim in any of the following MACT.

- The Tribunal within the local limits of whose jurisdiction the accident has occurred.
- The Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business.
- Within the local limits of whose jurisdiction the defendant resides.

22.2.3.1 Who Can File a Claim

In case of damage to property, the application for compensation has to be made by the owner of the property damaged. It is implied that in case of the death of the owner of the property, the legal representatives of the deceased can competently claim compensation.

- People who have been injured in accidents on the road can themselves file for compensation or route the claims through their advocates.
- But accident victims, who are below 18 years of age, cannot file for compensation themselves; they have to go through their advocates.
- Legal heirs of people who have died in accidents can also claim compensation; alternatively, they can route their claims through their advocates.

22.2.3.2 Who Can Report to MACT in Case of Accident

- The victim himself or, through an advocate, in the case of personal injury.
- An advocate in the case of an applicant below the age of 18 years.
- Legal heirs themselves or their advocate, in the case of death.
- The owner of the vehicle in the event of property damage.

22.2.3.3 Essential Documents Required to File Claim

The following documents are required for a compensation claim.

- Copy of the First Information Report registered with police in connection with said accident, if any.
- Panchnama copy (this is a list of damages that is drafted by the police in the presence of witnesses).
- Copy of the MLR/Post Mortem Report/Death Report, as the case may be.
- The documents of the identity of the claimants and of the deceased in a death case.
- Original bills of expenses incurred in relation to the treatment along with the treatment record.
- Documents of the educational qualifications of the deceased, if any.
- Disability Certificate, if already obtained, in an injury case.
- The proof of income of the deceased/injured.
- Documents about the age of the victim.
- The cover note of the third party insurance policy, if any.
- An affidavit detailing the relationship of the claimants with the deceased.
- Road Transport Office Certificate (showing the name and address of owner and insurance particulars of vehicle/s involved in the mishap).
- Passport-Size Photograph.
- Court-Fee Stamp.

22.2.3.4 The Court Fees for Filing an Application for Compensation

A court-fee stamp needs be affixed of 0.25 % of the claim if the amount is between 10,001 Rs and 50,000 Rs; 0.5 % of the claim if the amount is between 50,001 Rs and 100,000 Rs; and 1 % if the amount is more than 100,000 Rs with a maximum amount of 15,000 Rs.

22.2.3.5 Pecuniary Jurisdiction

The pecuniary jurisdiction of the MACT has a double implication, i.e., compensation in case of death or bodily injury and in respect of damage caused to any property. Section 165 of the Act empowers the tribunal to award compensation not only for death and bodily injury but also for damage to property. As regards the former, there are three different provisions in the Motor Vehicles Act, 1988, namely:

- Compensation in certain cases on the principle of no fault, as provided in Section 140 of the Act.
- Compensation on structured formula basis, under section 163-A of the Act
- Compensation which appears to the MACT to be just, under section 168 of the Act.

Compensation can be awarded either in cases of death or in cases of the permanent disablement of any person, and in either case, the different amounts have been fixed, respectively, for death and permanent disablement. The relevant provisions are subsections (1) and (2) of section 140. The injured or the legal representatives of the deceased can file a claim application in a prescribed format making the driver, owner, and insurer a party. The driver is not a necessary party in some states, e.g., in the state of Rajasthan the MACT Rules provide that only the owner and insurer are required to be parties. No limitation has been prescribed for the filing of the claim application. Initially, when the law came into force the limitation was 6 months, which was later increased to 1 year and ultimately, in the garb of welfare legislation, the provision of limitation was deleted. A claim launched by dependents of the deceased but not by his/her legal representatives would be defective unless the legal representatives of the deceased have been joined either as claimants or even as respondents.

The problem arose when an individual is not working, especially married females who constitute about 20 % of the cases. In India the Courts have recognized that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by a wife with true love and affection to the children and her husband, in addition to managing the household affairs, cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the

employer's work during particular hours. She takes care of all the requirements of husband and children, including the cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, and keeping the house clean, but she can never be a substitute for a wife/mother who renders selfless service to her husband and children. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family, i.e., husband and children.

However, for the purpose of the award of compensation to the dependents, some pecuniary estimate has to be made of the services of the housewife/mother. In that context, the term "services" is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife.

They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The gratuitous services rendered by wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. It is virtually impossible to measure in terms of money the loss of personal care and attention suffered by the husband and children on the demise of the housewife. In its wisdom, the legislature in 1994 fixed the notional income of a nonearning person at Rs.15,000/- per annum and in case of a spouse, 1/3rd income of the earning/surviving spouse for the purpose of computing the compensation. Though Section 163A does not, in terms, apply to the cases in which claim for compensation is filed under Section 166 of the Act, in the absence of any other definite criteria for determination of compensation payable to the dependents of a nonearning housewife/mother, it would be reasonable to rely upon.

The disability however has to be calculated as per provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participation) Act. Since 1999, the guidelines for evaluation of following disabilities and procedure for certification were notified.

- Visual impairment.
- Locomotor/orthopaedic disability.
- Speech and hearing disability.
- Mental retardation.
- Multiple disabilities.

As per the PWD Act, effective from 2009, authorities providing disability certificates were a medical board duly constituted by the central and state governments. The state government may constitute a medical board consisting of at least three members, out of which one shall be a specialist in the particular field. The evaluation of the disability percentage should be done as per the guidelines issued in the notification. The concept of extra-judicial assessment is not applicable in India. Only government authorized institutes and doctors working in the setup are empowered to issue disability certificates after following the guidelines. Usually, the medical superintendent of the hospital acts as chairman of the medical board,

being the administrative head of the hospital. Every hospital has a medical board for this purpose. As clarified in the act, one doctor from concerned specialty, e.g., orthopedics, ophthalmology, ENT (ear, nose and throat), surgery, neurosurgery, and psychiatry, is essential. Invariably, forensic medicine practitioner is also either a member of the board or chairman of the board, but practice varies from place to place. The Chairman is free to co-opt any specialist depending upon the type of disability to be evaluated. The board usually meets periodically on prefixed dates or days depending upon the case load. On representation by the applicant, the medical board may review its decision having regard to all the facts and circumstances of the case and pass such an order in the matter it considers fit.

There is no discretion in choosing the expert or appointing the expert. The doctor who has primarily treated and the hospital from where the disability certificate is issued is the only authority who are afterwards called to testify. Recently, however, with a view to extending further help to the victim the government hospitals under whose jurisdiction the victim resides have also been authorized to issue the disability certificate. The disability is calculated in relation to the percentage loss of function of that particular limb and not in relation to the whole body. Medical experts are called to give the evidence and technical advice based on their findings after taking oath. The defense lawyer is free to ask any question to discredit the evidence and argue his case with all witnesses, including the doctor.

The judge, after carefully listening to both parties, decides the value of all evidence, but has the discretion to use it as per his wisdom, mainly in relation to the percentage loss in relation to whole body. An appeal can be made by either of the parties if unsatisfied with the judgment to higher courts, i.e., the High Court of the state and, ultimately, to the Supreme Court situated in New Delhi, the capital of country.

These courts, if they feel consider there has been a gross discrepancy, may refer the whole case to the highest government medical college of the state or the Supreme court to the most prominent medical and research institute of country. In either case, a medical board comprising of various specialties will be constituted to reexamine the victim and give their opinion. This medical board consults all the previous reports, if it is deemed necessary. The compensation for damages is complete and integral, including moral, esthetic damage and incapacitation, and also the loss of a chance on a better outcome is covered.

22.2.3.6 Qualifications of the Medicolegal Experts

As per the Indian legal system, at present a registered medical practitioner is legally competent to handle any medicolegal case. The basic undergraduate medical degree is labeled as MBBS (Bachelor of Medicine and Bachelor of Surgery). In India, currently almost 80–85 % of the total medicolegal workload is handled by these MBBS doctors, including the accident cases. The subject of forensic medicine is a compulsory subject and presently being taught during the second professional of the MBBS. The total duration of MBBS is 4½ years of which the 2nd professional is of

1½ years in duration, starting after completion of the first year to completion of 2½ years. This is one of the main reasons for overall poor medicolegal functioning. The situation in bigger cities is, however, totally different, where both government and private medical colleges are situated. In most of these cities, the medicolegal work is handled by forensic medicine experts.

Forensic Medicine Experts These medical practitioners are mostly attached to a medical college, whether government or private, with a department of Forensic Medicine & Toxicology. They all have a specialty in Forensic medicine and a good knowledge of the legislation in relation to the investigation of crime. Forensic medicine is recognized since 1956 when it was bifurcated from pathology. The postgraduate degree in forensic medicine is of 3-years duration which encompasses traumatology, pathology, legal knowledge, toxicology, ethics, and applied legal aspects of various other branches like anthropology, dentistry, and psychiatry. There is no separate existence of specialty of insurance medicine and that is covered under forensic medicine itself.

The Medicolegal Experts in Civil Cases and the Medical Advisors of Insurance Companies The concept of private medicolegal consultancy is in infancy. Few forensic medicine experts act as advisor to the lawyers and extend their help to them and thus their roles are limited. There are three important medicolegal societies in India.

- Indian Academy of Forensic Medicine.
- Indian Association of Medicolegal Experts.
- National Action Committee for Progress of Forensic Medicine and Toxicology.

As clarified earlier, disability has to be calculated by a designated and authorized medical board and not by any private, single doctor or medicolegal expert.

22.3 Ascertainment Methodology

The assessment of damages to compensate the dependants is beset with difficulties, because from the nature of things it has to take into account many imponderables, e.g., the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have obtained better employment or income or might have lost his employment or income altogether.

The determination of the temporary and permanent disability is decided by medical board. Physical disability is not the same as economic disability, although physical disability can have its influence on the professional, personal, domestic,

and social life of the victim. Other than physical disabilities, the rest is decided by the Court after hearing the parties.

The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his/her dependants and to deduct there from such part of his/her income as the deceased was accustomed to spend upon him/herself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spending for the benefit of dependants. Then that should be capitalized by multiplying it by a figure representing the proper number of the year's purchases.

The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should be consumed over the period for which the dependency is expected to last. The multiplier method is logically sound and legally well established (Table 22.1).

However, a claim for compensation under section 163A and section 166 of the Act can go together, both being independent provisions and awarding of compensation under section 163-A, unlike that under section 140, does not detract or defeat the provisions of section 166. Total reliance cannot be placed on this schedule, since it does not provide any computation chart for the persons having more than Rs.40,000/- annual income. A claim petition can also be filed under Section 166 of Motor Vehicle Act pleading negligence where the claim shall be assessed by the Judge not on the basis of structural formula but on the basis of evidence.

Table 22.1 Multiplier table in claim cases under Section 166

Age of the victim (years)	Multiplier
15-18	20
18-22	18
23-27	17
28-32	16
33-37	15
38-42	14
43-47	13
48-52	12
53-57	11
58-62	10
63-67	9
68-72	8
73-77	7

22.4 Evaluation Criteria

Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery, which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment-related activities as a result of the accident. The permanent disabilities that may arise from motor accident injuries are of a much wider range when compared to the physical disabilities, which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act", for short). However, if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

In India, only death or grievous hurt (few sub-clauses) in issues of compensation are recognized.

Section 142 of MVA defines Permanent Disablement if such a person has suffered by reason of the accident, any injury or injuries involving:

- Permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint
- Destruction or permanent impairing of the powers of any member or joint
- Permanent disfiguration of the head or face

The percentage of permanent disability is expressed with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45 % of the left lower limb, it is not the same as 45 % permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb obviously cannot be assumed to be the extent of disability of the whole body. If there is a 50 % permanent disability of the right hand and a 70 % permanent disability of right leg, it does not mean that the extent of permanent disability with reference to the whole body is 120 % (that is 70 % plus 50 %). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100 %.

Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. Therefore, it remains a gray area and in most of the cases the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability, will be different from the percentage of permanent disability.

Temporary disability is not compensated. The date of consolidation is not defined and the victim has to be reassessed after a period of 1 or 2 years depending upon the disability of the part to claim for it. Otherwise, also given the duration of lengthy legal procedures, that time has often already passed. All the costs incurred have to be compensated. However, there are a number of cases which deviate from the proposed costs and depend upon the discretion of the judge. It is the lawyer of the party who files the case while filing the claim.

These findings will lead to the determination of the disability rate and the negative implications on his private, domestic, and professional/economic life. Each of these implications can lead to a disability. Other more specific consequences in the private, domestic, or economic field such as pain, esthetic, sexual, as well as social and cultural damage have not been specified. It is usually based on case laws. The economic disability takes into account the net loss of income during the period of disability.

22.4.1 Type of Disabilities

For sake of convenience and better understanding, the five types of disabilities as described under PWD Act have been categorized and discussed individually for the purpose of assessment methodology and evaluation criteria, i.e., mental retardation, visual impairment, speech and hearing disability, locomotor/orthopaedic disability, and multiple disabilities.

22.4.1.1 Mental Retardation

Mental retardation is a condition of arrested or incomplete development of the mind, which is especially characterized by impairment of skills manifested during the development period which contributed to the overall level of intelligence, i.e., cognitive, language, motor, and social abilities.

Categories of Mental Retardation are the following.

- Mild Mental Retardation. The range of 50–69 (standardized IQ test) is indicative of mild retardation. Understanding and use of language tend to be delayed to a varying degree and executive speech problems that interfere with the development of independence may persist into adult life.

- Moderate Mental Retardation. The range of 35–49 is indicative of moderate mental retardation. The level of development of language is variable. Some of those affected can take part in simple conversations while others have only enough language to communicate their basic needs.
- Severe Mental Retardation. The IQ is usually in the range of 20–34. In this category, most of the people suffer from a marked degree of motor impairment or other associated deficits indicating the presence of clinically significant damage to or mal-development of the central nervous system.
- Profound Mental Retardation. The IQ in this category is estimated to be under 20. The ability to understand or comply with requests or instructions are severally limited. Most of such individuals are immobile or severally restricted in mobility incontinent and capable at most of only very rudimentary forms of nonverbal communication. They possess little or no ability to care for their own basic needs and require constant help and supervision.

The Process of Certifications consists of two main stages.

- A disability certificate shall be issued by a Medical Board consisting of three members duly constituted by the Central/State Government. At least one shall be a Specialist in the area of mental retardation, namely Psychiatrist, Pediatrician, and clinical Psychologist.
- The examination process will consist of three components, namely clinical assessment, assessment of adaptive behavior, and intellectual functioning.

22.4.1.2 Visual Disability

Blindness refers to a condition where a person suffers from any of the following condition, i.e.,

- Total absence of sight.
- Visual acuity not exceeding 6/60 or 20/200 (Snellen) in the better eye with best correcting lenses.
- Limitation of field of vision subtending an angle of 20 degree or worse.

Low Visions referred to a person with impairment of vision of less than 6/18–6/60 with best correction in the better eye or impairment of field in any one of the following categories:

- Reduction of fields less than 50 degrees.
- Hemianopia with macular involvement.
- Altitudinal defect involving lower fields.

The Process of Certification consists of a disability certificate which shall be issued by a Medical Board duly constituted by the Central/State Government having at least three members. Out of which, at least one member shall be a specialist in ophthalmology.

22.4.1.3 Speech and Hearing Disability

Hearing Disability involves a person with hearing impairment having difficulty in hearing sounds. The type for impairment ranges from various degrees of mild hearing loss to total deafness.

The following have to be considered.

- Pure tone average of hearing in 500, 2000, and 4000 HZ by conduction (AC and DC) should be taken as basis for consideration as per the test recommendations.
- When there is only an island of hearing present in one or two frequencies in better ear, it should be considered as total loss of hearing.
- Wherever there is no response at any of the four frequencies (500, 1000, 2000, and 4000 HZ), it should be considered as equivalent to 100 dbles for the purpose of classification of disability and in arriving at the average.

The Process of Certification includes a disability certificate which shall be issued by a Medical Board duly constituted by the Central and the State Government; out of which at least one member shall be a specialist in the field of ear, nose, and throat.

22.4.1.4 Locomotor Disability

The following definitions are considered.

- Impairment. Impairment is any loss or abnormality of psychological, physiological, or anatomical structure or function in a human being.
- Functional Limitations. Impairment may cause functional limitations which are partial or total inability to perform those nativities necessary for motor, sensory, or mental function within the range or manner of which a human being is normally capable.
- Disability. A disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.
- Locomotor Disability. Locomotor disability is defined as a person's inability to execute distinctive activities associated with moving both himself and objects, from place to place, and such inability resulting from affection of musculoskeletal and/or nervous system.

22.4.1.5 Multiple Disabilities

Multiple disabilities means a combination of two or more disabilities as defined.

In order to evaluate the multiple disability, the same guidelines shall be used as have been developed by the respective subcommittees of various single disability,

i.e., Mental retardation, Locomotor Disability, Visual Disability, and Speech & Hearing disability.

However, in order to arrive at the total percentage of multiple disability, the combining formula $\frac{a + b(90 - a)}{90}$ as given in the Guidelines shall be used, where “a” will be the higher score and “b” will be the lower score. However, the maximum total percentage of multiple disabilities shall not exceed 100 %. For example, if the percentage of hearing disability is 30 % and visual disability is 20 %, then by applying the combining formula given above, the total percentage of multiple disability will be calculated as follows : $30 + \frac{20(90 - 30)}{90} = 43$

The Procedure for Certification of Multiple Disabilities will remain the same as has been developed by the respective subcommittees on various single disabilities. The final disability certificate for multiple disability will be issued by Disability Board which has given higher score of disability by combining the score of different disabilities using the combining format, i.e., $\frac{a + b(90 - a)}{90}$.

In case where two scores of disability are equal, the final certificate of multiple disabilities will be issued by any one of them as decided by local authority.

The Process of Certification consists of a disability certificate which shall be issued by a Medical Board of three members duly constituted by the Central and the State Government, out of which, at least, one member shall be a specialist from either the field of Physical Medicine and Rehabilitation or Orthopedics.

22.4.2 Methods of Compensation

The assessment of compensation, however, can be made effectively, but cannot be said to be without flaws. In every such assessment, certain assumptions are to be made and there is a possibility of discrepancies from Judge to Judge in applying the various principles enunciated by the Courts from time to time. The Supreme Court, while dealing with a related matter, evolved a formula. Yearly Income and yearly expenditure of the deceased gives the sum expended on legal representatives. If this amount is capitalized subject to certain deductions, pecuniary loss to the family can be assessed. While improving the above formula, the Supreme Court has stated that there is no exact uniform rule for measuring the value of human life, and the measure of damages cannot be arrived at by a mathematical calculation, but the amount recoverable depends upon the life expectancy of the legal beneficiaries. The Supreme Court of India, with the development of accident claims, has decided to take into consideration the annual income of deceased. This ranges to double the income, depending upon the nature of the job, age, future prospects, etc. The Supreme Court has held that after determining and doubling annual income, 1/3 should be deducted towards the expenses to be incurred of the deceased, and the remaining amount should be multiplied by a multiplier depending on the age of the deceased and the beneficiary. The maximum multiplier approved by the Supreme Court in this case was 16. Later, the Supreme Court’s 3 Judges approved the Davis formula along with determination of dependency on a unit basis in which the adults

were not considered as 2 units and the minors were considered as 1 unit. In this case, the court did not allow double of the amount except that a premium may be given in consideration of future prospects. But, in a recent Supreme Court judgment, in order to make compensation just and to take consideration of overall factors, the multiplier was reduced from 16 to 12 in the case of a deceased individual of 38 years. In similar circumstances, in another case the Supreme Court stated that the determination of the multiplier depends upon (1) age of deceased, (2) age of claimants, (3) marital status, (4) education and employment of the claimants, and (5) loss of pecuniary benefits. The Supreme Court also held that criteria of awarding compensation includes some guess work, some hypothetical considerations, and some amount of sympathy linked with the nature of the disability caused. But, all such elements are required to be viewed with the objective standard.

In view of the above case law, one can say that the assessment of compensation is to be guided by way of applying precedents on the facts and circumstances of a particular case. It should not be misunderstood that an injured or legal representative of the deceased should be given an exorbitant claim, but the law restricts them to be “just compensation” so as to save the injured or legal representatives of the deceased from possible pecuniary and non-pecuniary losses, guided by the above judgments.

The effect of the permanent disability on the earning capacity of the injured is to be assessed, and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). It is to be paid in as a lump sum only.

The following must therefore be taken into consideration:

- Whether the disability is permanent or temporary
- If the disability is permanent, whether it is permanent total disability or permanent partial disability
- If the disability percentage is expressed with reference to any specific limb, then the effect of such a disability of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person

If the Tribunal concludes that there is no permanent disability, then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability, then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

However, the situation varies from case to case and is usually decided on basis of case laws.

The following example is given for illustration.

In Ajay Kumar’s case MAC.APP.378/2013, the court clearly held that the assessment of compensation under the heading of future earnings would depend upon the effect and impact of such permanent disability on the earning capacity. This can be assessed only on appreciation of the evidence. The appellant was an

accountant and thus was doing a desk job and his disability in relation to the lower limbs had not left him totally incapable of performing his job. In the facts and circumstances, the learned tribunal assessed the percentage of whole body disability of the appellant as 40 %.

The total loss of future earning on account of disability = $215,250 \times 17$ (multiplier) $\times 40/100$ (permanent disability) = 1,463,700/- Rs.

- Loss of earning capacity due to injuries 1,463,700/- Rs.
- Compensation towards pain and sufferings. 100,000/- Rs.
- Loss of amenities and enjoyment 150,000/- Rs.
- Compensation towards disfiguration 100,000/- Rs.
- Loss of earning of petitioner for 5 months at 8200/- Rs per month, 41,000/- Rs.
- Expenses towards medical bills 311,619/- Rs.
- Compensation towards conveyance and special diet (without bills) 10,000/- Rs.
- Compensation towards prosthetic leg 70,000/- Rs. 224,631/- Rs.
- The appellant shall be entitled for the interest of 7.5 % per MAC.APP.378/2013.

22.4.2.1 Death: Costs of the Funeral

In the event that a victim dies as a consequence of the tort, the costs of the funeral will be taken into account. When the duration of survival probability of the one who bears the cost is lower than that of the victim, this one probably never have had to bear them and can accordingly claim full reimbursement (e.g., a parent for her child). If the victim's life expectancy is lower than that of the one entitled to it, the latter would have had to bear in the future and his compensation consists in the advance payment of these costs. The compensation is then formed by the difference between the current expenditure and the constant value of this sum payable to the presumed date of death in the assumption that the accident would not have happened.

22.4.2.2 Death: Damage of the Relatives

This suffering of the relatives cannot be concretely expressed and must be done with a lump sum.

Below are listed some general bibliographic sources useful to deepen the issue. They are not reported within the text as they are no cited references.

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