Klaus Mittelbachert Vs East India Hotels Ltd.

Court: Delhi High Court

Date of Decision: Jan. 3, 1997

Citation: (1999) ACJ 287 : (1997) 2 AD 23 : AIR 1997 Delhi 201 : (1997) 65 DLT 428 : (1997) 40 DRJ 147

Hon'ble Judges: R.C. Lahoti, J

Bench: Single Bench

Advocate: R.K.P. Shankar Das, P.N. Sewak, D.D. Singh, R.L. Tandon, V.K. Tandon, Lalit Bhasin and K.C. Kalra, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) Klaus Mittelbachert, the plaintiff, a German national born on 2nd September, 1942 was a co-pilot in Lufthansa. Little did he know that his flight from Bangkok to New Delhi in the evening of 11th August, 1972 was his last ever flight

as a co-pilot. He landed at Delhi and was scheduled to continue the flight to Frankfurt on 14th August, 1972. For the intervening time, designated in the air-line terminology as lay- over-period, he checked into and stayed at the Hotel

Oberoi Intercontinental.

(2) Hotel Oberoi Intercontinental, defendant No.3 (hereinafter, the said Hotel) is a five star hotel located at Dr. Zakir Hussein Marg, New Delhi. It is owned by the defendant No.1. The defendant No.4 was its Chairman and it was

allegedly being managed by defendant No.2 at the material time. The Hotel had a swimming pool equipped with a diving board.

(3) In the afternoon of August 13, 1972 the plaintiff visited the swimming pool. At about 6.00 p.m. while diving the plaintiff met with an accident. He had hit his head on the bottom of the swimming pool. He was taken out bleeding from

right ear and appearing to have paralysed in the arms and the legs. He was taken to Holy Family Hospital, situated nearby, where he remained admitted and under treatment until August, 21, 1972 on which date he was flown to Germany

under medical escort.

(4) On 22nd August, 1972 he was admitted for treatment at the Orthopedic Clinic and Polyclinic of the University of Heidelberg. His treatment continued. On 24th March, 1973 he was discharged from the Clinic. Further treatment

continued but the condition of the plaintiff did not improve. The physical suffering of the plaintiff and how he went on deteriorating from bad to worse would be noticed a little later, and not here, to avoid repetition. He was shifted back to

his residence where his treatment continued.

(5) On 11.8.75, the present suit has been filed for recovery of an amount of Rs.50 lacs by way of damages with interest calculated @ 12% from the date of the filing of the suit until payment and costs. Details of the heads under which the

claim is being made would also be noticed little later at an appropriate place.

(6) According to the plaintiff, the accident was caused by what in the circumstances amounted to a trap. The diving board placed at the swimming pool suggested a proper depth of water into which a swimmer could dive. The defendant

hotel owed the plaintiff a duty to take care and ensure his safety. Having failed therein the defendants are guilty of negligence and are, Therefore, liable to compensate the plaintiff for the consequences flowing from the accident.

(7) The defendants have denied their liability. It is submitted that defendants No.2 and 4 have been unnecessarily joined as parties to the suit as none of them can be held liable or personally liable. The defendants admit that defendant

No.1 is the owner of defendant No.3 and is solely responsible for the acts of defendant No.3.

(8) All other material averments in the plaint to the extent to which liability flowing from the accident is sought to be fixed on the defendants have been denied. It is submitted that there was no negligence on the part of the hotel; that it is

the plaintiff who was negligent; and that, in any case, the plaintiff was equally negligent and , under the doctrine of contributory negligence the plaintiff is entitled to no damages at all.

(9) On 4.1.1977, the following issues have been framed by the Court on the pleadings of the parties and in the presence of the counsel for the parties :

(1)WHETHER defendants 2 and 4 were in control of the premises of Hotel Oberoi Inter-continental on 13th August, 1972 ? If not, whether the suit is not bad for misguide of parties ? (2)Whether the plaintiff was a co-pilot of Lufthansa

and what was his age at the time of the accident ? (3)Whether the defendants were guilty of negligence ? If so, to what extent and to what effect? (4)Whether the accident in the swimming pool of Hotel Oberoi Intercontinental on 13th

August, 1972 was on account of any trap laid by the defendants ? (5)Whether there was any failure on the part of the plaintiff to take reasonable care of himself in his own interest and who had the last opportunity of avoiding the

accident? (6)Whether the suffering of the plaintiff was the direct result of his own negligence and inaction ? (7)Whether the disabilities attributed to the plaintiff were the direct result of the accident which took place at the swimming pool of

the Hotel Oberoi Intercontinental on 13.8.1972 ? (8)Whether the plaintiff is guilty of contributory negligence ? If so, to what extent and to what effect ? (9)Whether the plaintiff cannot be indemnified for the injuries suffered by him on 13th

August, 1972 ? (10)To what amount, if any, is the plaintiff entitled ? (11)Whether the plaintiff is entitled to any interest ? If so, at what rate and what amount ? (12)Relief. No other issue was claimed.

(10) A material event occurred during the pendency of the suit. On 27.9.1985 at 21.55 hrs the plaintiff died of acute cardiac arrest. is No.6166/85 was moved for bringing the LRs on record with liberty to prosecute the suit in place of

the deceased alleging survival of the cause of action to the legal representatives. The application was opposed on behalf of the defendants submitting

(11) On 17.2.1986, the Court framed the following three additional issues :

(1)Whether the injury suffered by the deceased plaintiff on 13th August, 1972 caused his death on 27th September, 1985 ? (2) If above issue is held in favor of the defendants, does the right to sue still survive? (3) Relief.

(12) Evidence on the above 3 additional issues was ordered to be led by means of affidavits. The plaintiff has filed the affidavit of Dr Horst Brandt. The defendants have filed the affidavit of Dr. S.B. Gogia. No other evidence has been led

on the above said additional issues. There is no cross-examination conducted or sought for on any of t two affidavits by either party.

(13) The plaintiff has examined 13 witnesses in all. It would be useful to take a brief resume of the nature of the testimony adduced on behalf of the plaintiff. It is as under :- PW-1 Klaus Mittelbachert - The plaintiff PW-2 Mrs.Edda

Mittelbachert - The wife of the plaintiff. PW-3 Horst Seaman - An architect, an expert on swimming pools. PW-4 Hans Joachim Braun - Appeared in witness box, but not examined in view of objection by defendants PW-5 Reiner

Koglbauer - Co-pilot of the plaintiff who had also checked in Oberoi and had reached the Swimming Pool soon after the accident. PW-6 Mrs.Rose Marie Heidrum - Stewardess, who also Gausmann. checked in the Hotel Along with

the plaintiff and is eye witness to the accident PW-7 Dr. Detlef Christian Weiss - Manager Lufthansa. PW-8 Dr.Volkmar Paesleck - who treated the plaintiff in Germany from Aug 22.1972 onwards and also in March, 1981. PW-9

Hoffman Jochen - Head of Personnel Department of Lufthansa who has described the service conditions & emoluments etc. of the plaintiff. PW-10 Jalal Masih - Medical Record in charge Family Hospital. PW-11 Klaus Niemeyer -

Manager Finance Lufthansa who has deposed to certain payments having been made in India in connection with the treatment of the plaintiff. PW-12 Dr.B.B.Mathur - Medical Director Family Hospital, who has proved a few documents.

PW-13 Dr.Arjun D.SehgalNeuro surgeon Holy Family Hospital

(14) On behalf of the defendants, 11 witnesses have been examined as under: DW-1 Amrat Prakash Chadha - Suptd. Health Club of the Hotel. DW-2 J.C.John - Manager Health Club of the Hotel. DW-3 J.S.Randhawa - Lobby

Manager of the Hotel. DW-4 Lalit Sandilya - Loby Attendant of the Hotel. DW-5 L.K.Sharma - Junior Engineer N.D.M.C. DW-6 Dayanand - Security Guard of the Hotel. DW-7 H.S.Dhupia - In whose car plaintiff was shifted to Holy

Family Hospital DW-8 Dr.Daljeet Singh - On panel of doctors of Hotel DW-9 Prabhu Dayal - Fire Officer, Ashok Hotel. DW-10 Prem Kumar Chaudhary - An architect DW-11 Ram Nath Kapoor - Shift in charge of the Hotel.

(15) A good number of documents have also been filed which shall be referred to at their appropriate places. Issue No. 1

(16) There is no evidence adduced to hold the defendants 2 and 4 having been in control of the hotel premises at the time of accident. No liability can be fastened on these defendants. They are unnecessary parties. During the course of

hearing also it was fairly conceded to by the learned counsel for the plaintiff that in the event of the plaintiff being held entitled to a decree, it will be against the defendants 1 and 3 only. The issue is answered accordingly. Issue No.2

(17) There is unchallenged and uncross-examined testimony of the plaintiff and other documents available on record to hold the plaintiff having been a co-pilot of Lufthansa. The plaintiff was born on 2.9.1942. His age on the date of the

accident was 30 years. The issue is answered accordingly. Issues No.3 to 6,8 & 9

(18) All these issues are inter-connected. They emerge out of the contending pleas raised by the plaintiff and the defendants as to whether the negligence was on the part of the defendants or on the part of the plaintiff or whether it was a

case of contributory negligence as suggested by the defendants. 19.According to the plaintiff the accident was by what in the circumstances amounted to a trap. There was implied suggestion by the hotel that there was proper depth of

water into which to dive from the diving board where it was placed. The hotel owed the plaintiff a duty to ensure his safety and having failed therein must be held to have been negligent.

(19) The defendants in their written statements have taken the plea that the plaintiff was in the pool ever since 2.30 p.m. on 13.8.72. He had taken some drinks and was diving in the pool repeatedly till the evening right from the afternoon.

He was performing acrobatics, dangerous in tendency, and many a times he was warned by the hotel staff not to do such dangerous acts from the diving board. Diving at a continuous stretch for about one-and-a-half hour, the plaintiff

was virtually exhausted. There was a notice also at the foot of the diving board reading-- ""dive at your own risk"".

(20) The last act performed by the plaintiff was a naggers dive taking a long sprint and high jump from the diving board without stretching his hands over the head with the result that the plaintiff hit his head on the bottom of the pool. This

was the result of the plaintiff''s own negligence. 20.1.It is also pleaded in the written statement that the plaintiff was suffering from meaning IT is and it was quite possible that he got an attack of epilepsy while diving which prevented him

from diving with accuracy and putting his hands above his head and regulate and guide his course of movement after plunge into the water coupled with his drunken state and physical exhaustion resulted into injuries to the plaintiff for

which the hotel cannot be held liable.

(21) For the purpose of determining the question of negligence I would divide the consideration under two heads : (i)the direct evidence, and (ii) the evidence leading to inference of negligence from failure on the part of the Hotel - as

owner in discharge of its duty to take care. The latter head would also deal with the evidence relating to construction of swimming pool : Whether it was of a defective design from the point of view of architectural and safety standards so

as to amount to a trap?

(22) On behalf of the plaintiff the direct evidence adduced on the point of the incident consists of plaintiff Klaus Mittelbachert PW-1, Mrs. Rose Marie Gosmann PW-6 (earlier name Mrs.Kriemhing), the stewardess who was staying in

the same Hotel.

(23) According to the plaintiff he had gone to the swimming pool at 2.30 pm. He swum twice or thrice, every time taking an hour"s rest in between. At about 6 pm he wanted to have a final swim with a dive from the three meter high

diving board. On the diving board he started by taking two-three steps and made a dive with his head forward and the arms stretched and closed over the head. He sustained injury in the first dive itself. During cross-examination he was

confronted with the bill (Ex D-1) of the hotel and he admitted having ordered for the beer. However, he stated that he did not take the beer as he had intended to take it after the swim and before going for the dinner. Mrs Rose Marie has

corroborated the plaintiff giving almost the same narration of the events, just before the accident. She has denied the plaintiff having had any drinks before the dive. She has also deposed to the changes which had taken place subsequently

at the swimming pool. After the incident she stayed at the hotel 8-9 weeks later and found a big signboard near the stairs of the swimming pool cautioning the people that they could dive at their own risk which notice board was not there

at the time of the accident. The hotel had also put some flowerpots on the diving board so as to obstruct its user and also removed the flexible end thereof.

(24) The defendants have examined a good number of witnesses on the issues. They are Amrit Parkash Chadha DW-1, the superintendent of the health club, J.C.John DW-2, Manager of the health club, J.S.Randhawa DW-3, the lobby

manager, Lalit Shandhilya DW-4 the lobby attendant and Ram Nath Kapoor, DW-11, the shift incharge.

(25) The evidence adduced on behalf of the defendants may be discussed generally. It would suffice. Amrit Parkash DW-1 and J.C.John DW-2 have both stated that the plaintiff was performing very good dives. However, these

witnesses, and the defendants" other witnesses, have gone on to say that the plaintiff had taken heavy drinks and he was performing acrobatics so as to show off. During cross examination the witnesses have explained that the

performance of the plaintiff during dives was erratic meaning thereby the plaintiff was making such dives as were not consistent and were being performed not in such a way as safe dives were expected to be performed.

(26) Whether the plaintiff was drunk ? The plaintiff has denied having taken any drinks. He is supported by Mrs Rose Marie (Public Witness 6) who had also checked in the hotel with the plaintiff and was staying in the hotel and was also

present by the side of the plaintiff at or about the time of the fatal dive. She has also denied the plaintiff having taken any alcoholic drinks.

(27) There are weighty reasons for which the story that the plaintiff had taken any such drinks has to be discarded. 27.1Firstly, if the plaintiff had taken any drinks he must have ordered for them. If that be so he must have been charged

by the hotel for such drinks. The hotel record would show the drinks having been ordered by the plaintiff and having been supplied to and consumed by him. However, only one voucher slip Ex D-1 for one beer bottle has been

produced. The plaintiff has denied even having consumed the beer. Assuming that he either alone or by sharing with others had consumed beer, it cannot be said that he had consumed alcohol in such quantity as would have caused

enough intoxication to impair his alertness or lessen his normal senses so as to have deprived him of capacity to take care of himself. 27.2.Secondly, we have the testimony of Mrs Gausmann PW6, who was stewardess in the same flight

and was also staying in the hotel. She was practically all the time present by the side of the swimming pool when the plaintiff had also reached the swimming pool. When the plaintiff was brought out from the swimming pool he was finding

it difficult to breath and his pulse was stopping. She had given mouth to mouth respiration to the plaintiff. If at all the plaintiff had consumed any alcohol then she is the one who would have certainly got smell of it. The defendants have

cross-examined this witness at length but no where in her cross- examination suggestion was given to the witness of the plaintiff smelling of liquor. The defendants were bound to put up their case to this witness which having not been

done, the probative value of their case is shaken. 27.3Thirdly, Dr Daljeet Singh (DW8) panel doctor of the hotel who had examined the plaintiff at the swimming pool and before the plaintiff was shifted to Holy Family Hospital has also

stated to have checked the pupils of the plaintiff and `they were reacting normally''. 27.4It is Therefore proved that the plaintiff was not drunk.

(28) So is the weight of the testimony on the point of the plaintiff having strained and exhausted himself by too much swimming or diving. The case of the plaintiff is that it was the first dive itself which had resulted in injuries to him. Even

otherwise it cannot be said that a person used to swimming and diving would have been so much exhausted that though he could go to the diving board and take the jump but could not have so postured himself under water as to come

out completing the diving action. The plaintiff''s witnesses including the plaintiff himself have deposed to the plaintiff having stretched his hands above the head while diving into the water.

(29) The learned counsel for the defendants has laid much emphasis on the `tell-tale circumstance'' of the plaintiff''s hands having not sustained any injury, a circumstance - in their submission - irresistibly leading to an inference that the

hands were not above the head else the hands would have certainly sustained an injury before the head could strike the bottom of the pool. 29.1It is difficult to agree with the learned counsel for the defendants. Sheer common sense

answers the submission so forcefully advanced. While the head above the shoulders has very little scope for movement, the hands can move fast and freely in any direction. Even if the hands were above the head, may be the hands gave

way and moved away to sides immediately after coming into contact with the bottom of the pool. The hands could also have slipped away. The hands could have also moved away by way of reflex action. Nobody knows what happened

underwater at the crucial moment. 29.2The fact remains that the absence of injuries on the hands is not necessarily a pointer to the falsity of the plaintiff''s version of his posture and position of the hands at the time of taking the dive.

(30) No material has been brought on record to hold that it is an essential requirement of diving that the hands must be above the head. It all depends on the posture chosen by the diver for diving. One may dive without hands stretched

above the head. Having entered the water the hands may be used for cutting water to move the body in the chosen direction or to come to the surface. Swimming pool may be used by expert swimmer or amateurs or even by learners. It

is not the case of the defendants that there were any restrictions as to the use of the swimming pool and diving board so as to permit its use only by persons categorised by reference to their merit or expertise in the field of swimming and

diving and to exclude others. In short, the swimming pool is expected to be so designed with so much depth of water and such placement of the diving board as to exclude danger even to amateurs and learners. The posture of the

plaintiff

at the time of diving looses all its significance looked at from this angle.

(31) The plea of the defendants that the attack of epilepsy might have been the case for plaintiff''s accident is based on mere surmises having no material in the record available to sustain the same. It is just rejected.

(32) I have already discussed and held that the plaintiff cannot be said to have been drunk-much less so drunk as not to be capable of taking care of himself. For the reasons more than one the weight of the testimony of defendants''

witnesses in this regard has to be discarded. 32.1Firstly, the accident having taken place and it having been found that the plaintiff was not to be blamed for the accident, it was for the defendants to have explained why and in what manner

the accident had taken place or which were the factors contributing to the accident. If such detailed facts as have been deposed to by the employees of the defendants in their statements recorded in the Court were in the knowledge of the

defendants then it was expected that all these material parts of the story should have been set out in the written statement which has not been done. Most of the evidence adduced by the defendants has, Therefore, to be held as beyond

the pleadings and an afterthought. It shall have to be kept in mind that the witnesses examined by the defendants are all the employees of the Hotel and have continued to be so even on the date of their being examined in the Court.

32.2Secondly, the employees of the Hotel holding such important assignments as superintendent or manager of the health club or lobby manager and the security guards who were posted by the side of the swimming pool and whose duty

was to watch those guests who were swimming or diving in the swimming pool were obliged to prevent the plaintiff, nay to exclude him from the swimming pool, once they had noticed that the plaintiff was drunk or exhausted or was

swimming or diving in the swimming pool in a manner in which he was not expected to do. Either their story is false or if true then it is yet another factor pointing to their negligence. 32.3Thirdly, the testimony of all the witnesses is not quite

consistent.

(33) Having discussed the oral evidence in the light of the pleadings and having arrived at the finding that it was not the plaintiff who was in any manner negligent or careless, I would now proceed to deal with the case from another angle.

What is the concept of duty to take care expected of a hotel? What is the standard applicable ? How the issue as to negligence deserves to be dealt with in the context of a hotel, offering swimming pool to its guests as part of its services

available?

(34) Degree of care is not a phrase with static connotation. Its meaning would depend on given fact situation- the person who owes a duty to take care, the person whose care is to be taken and the subject matter by reference to which

degree of care is to be determined. A person, who enters or walks into any premises, if the premises be open to accept entry, and there be nothing warning against his entry, has a right to assume that he is walking into a safe premises.

(35) The person entering into premises may be an intruder or a person invited or a person entering subject to payment or price charged for the entry. In the commercialised world decree of care would also be determined by reference to

the price which is being charged. Few illustrations may assist expounding of the principle. 35.1One who purchases a glass of water from a trolley in the street for 10 or 25 paise is entitled to safe drinking water which should not ordinarily

infect him. But if person purchases a mineral water bottle for Rs. 10/ or 15.00 then he can justifiably demand a higher degree of purity. The manufacturer of water bottle cannot be heard to say so long as he has made it equivalent to the

trolley man''s water he has done his duty and he needs to do nothing more. Such a proposition would be untenable both in law and equity. 35.2A hospital admitting a patient indoors impliedly warrantees its wards free from infection. To

some extent a patient in general ward and a patient in intensive care unit are assured of a minimum and equal degree of care. However, the intensive care unit, more so when it is a pay ward, cannot be heard to say that the degree of care

adopted thereat is the same as is adopted in the general ward. If the patient may be admitted to an intensive care unit of a luxury hospital say for Rs. 3000 or Rs 5000 a day he would be justified in demanding a higher and sophisticated

degree of care, comfort, convenience and recovery. It would not be heard to say that its duty to take care of the patient was over by guaranteeing the same degree of care and a mere sterilization from infection as could be expected in the

general ward of a hospital. 35.3An evening walker desirous of sipping a cup of tea on the roadside dhaba for a rupee or fifty paise would just sit on a charpoy. If the charpoy be not an intentional trap, its collapse bringing down the

customer to earth may provide a source of amusement merely and the customer may be happily bid goodbye by the dhaba owner; the customer smilingly accepting his luck to nave been in the dhaba. To someone desirous of same sipping

of a cup of tea welcomed as a guest in a five star hotel prepared to pay Rs. 50.00 for a cup is entitled to safer chair to seat him and high quality of tea, well served and presented. The leg of the chair giving way and bringing down the

customer on floor of the hotel would certainly invite not a mere smile but a liability in tort on the hotel owner, the latter having failed in discharging his duty to take care and see that the customer was not only comfortable but also safe so

long as he was inside the hotel premises whether seated or moving.

(36) A person received in a hotel as a guest enjoys an implied assurance from the hotel that the proprietor by himself and through his servants, agents would take proper care of the safety of the customer. Not only the building structure

but the services offered thereat have to be safe and immune from any danger inherent or otherwise. A hotel owner holds himself out as willing and also as capable to accommodate and entertain the guests. The quality and safety of the

services offered increases with the quantum of the price paid for being guest at the hotel. Higher the charges, higher the degree to take care.

(37) To my mind, there is no difference between a five star hotel owner and insurer so far as the safety of the guest is concerned. In the hotel culture the stars assigned to a hotel are suggestive of the professional expertise, achievement

and quality of the services available at the hotel and professed and projected by it to the public at large, holding out invitation to the prospective guests to stay at the hotel-- an assurance as to quality, safety and hazardless ness of the

services offered and available at the hotel. Such a higher degree of care cannot be permitted to be got rid of by merely putting a signboard or caution notice that the guest staying at the hotel does so at his own risk or a guest consuming or

availing any of the services offered by the hotel does so at his own risk. The validity of an invitation to avail and enjoy a service and legal consequences including duty to take care and its degree flowing there from cannot be permitted to

be softened by a general notice - at your own risk- which is hardly a deterrent. One who extends an invitation, tempting the invitee to accept the same cannot be heard to say that the invitee did so at his own risk.

(38) A swimming pool in a hotel is an open invitation to the guests to swim in the pool either subject to payment of extra charges or if it be without any charges then an impliedly announcement that the charges were included in the overall

charges for staying in the hotel. Presence of a diving board at the head of the swimming pool is an invitation for the guests to use it and dive in the swimming pool. In a hotel, the swimming pool filled with water carries an implied warranty

as to safety- that the swimming pool is structurally and from architectural point of view so designed as to be safe, that the water is free from infection, that the depth of the water is safe for swimming. In the absence of a specific warning to

the contrary, the swimming pool is an invitation not only to those who have learnt the art of swimming but also to amateurs who may like to take a plunge into water just for the pleasure of that. Availability of a diving board over the

swimming pool is an invitation to the guests to take dives into the swimming pool with an implied warranty that the height and protrusion of the diving board or the spring board (as the case may be) are safe; and that the depth of water at

the plummet point has been so maintained that any one taking a plunge into the water is not likely to suffer an injury.

(39) The variation in the degree of care making it heavier co-relating the same with the charges fixed and realised in consideration of offering a service assumes significance in law for two purposes, Firstly, it has a bearing on the degree of

care expected, either express or implied. Secondly, it has a bearing on the amount of compensation that would become payable in the event of failure to discharge the expected degree of care. Higher the degree of care, higher the

quantum of compensation, both flowing from rise in charges realised for rendering the services. To illustrate, on breach of duty to take care, the five star hotel would not be heard offering the same quantum of compensation as would have

been offered by a charitable organisation running a dharamshala where a guest was staying on payment of nominal charges.

(40) At the trial, the defendants have taken a firm stand that the pool was designed in conformity with the prevalent architectural standard so as to be safe for user.

(41) I would now proceed to examine whether structural design of the swimming pool at the hotel satisfied the requirements expected of such a swimming pool or whether the structure had a defect so as to amount to a trap-involving an

inherent hazard.

(42) It is not disputed that the relevant dimensions of the swimming pool, as it existed at the relevant time in the hotel, were as hereunder :

(43) A good number of standard books have been brought on record suggesting designs of swimming pools. The relevant extracts from the standard works dealing with the building and structural standards have been placed on file No.7

of the court record. The following chart gives a bird''s eye view of the vital data of the defendant''s pool, the standards as suggested by the defendant hotel and the standards as suggested by the plaintiff which the swimming pool ought to

have satisfied :-

It will be clear from the above table that the depth of the water at the plummet point is ten feet minimum according to some of the authors. Some of the authors expect it to be maintained at twelve feet minimum and suggest a preferred

depth of thirteen feet. The bottom level of swimming pool would start rising soon after the plummet point but the distance at depth to be maintained between the plummet point and the minimum depth point would be 25 feet. Such a

structure would provide comparatively a larger distance for the diver to move horizontally in the depth of water before maneuvering an upwards movement.

(44) The defendant''s swimming pool was structurally so designed as to achieve just the bare minimum of depth at the plummet point (column-C in the table above). This was not enough. Graphic Standard, 5th Edition of 1956 relied on

by the hotel suggests 9'' to 10"" depth for one meter board and 9'' to 12'' depth for three meter diving board being kept at the plummet point. This is at page 640 of the book (page 7:18 of court record). However, at pages 641 and 644

of the book (pages 7.19 and 7.22 of the court record), the same topic has been dealt with in more details. It has been suggested that for a three meter board, the minimum depth should be 12 feet in a 75 feet swimming pool while the

swimming pool of the hotel was 80 feet.

(45) The standards provided in the 1956 edition of the book were discarded and underwent a change as suggested by Architectural Graphical Standard,1970 6th Edition (relevant extracts available at pages 7.26 to 7.36 of the court

record). It is suggested that three meter spring board should make available a dimension of twelve feet from plummet point to pool wall at side and maintain a depth of minimum 12 feet of water at plummet point though 13 feet should be

preferred. At a distance of 20 feet ahead of plummet, the depth of water to be maintained should be 11"-9"" minimum and 12"-9"" preferred.

(46) In the background of the above said facts and circumstances, it was expected of the defendants to have joined the pleadings and adduced evidence pointing out under whose advice the swimming pool was designed and constructed.

It should have been disclosed by the defendants whether the swimming pool was designed for diving too ? And if so, then for what spring board i.e. 1 meter or 3 meters ?

(47) 1PRABHU Dayal Dutta DW9, who has been examined as a swimming pool expert on behalf of the defendants was strongly relied on by the counsel for the defendants during the course of hearing. The following extract from the

cross-examination of this witness is relevant :

Q.Can you point out any swimming pool in India which is open to the hotel guests/public and has a depth of less than 12" for the diving from the three meters spring board ? A. I cannot say for sure about the whole country. I cannot give

any such instance. Q. And anywhere in the world, can you point out ? A. My answer would be the same as regards to such a swimming pool in any other place in the world also.

47.2So is the case with Prem Kumar Chaudhry (DW 10) who has appeared as architect expert on behalf of defendants. He was asked a pertinent question during the cross-examination and he gave an evasive reply:

Q.Can you point out to any swimming pool which is exiting in India or abroad which is meant for diving for a three meter spring board and has an effective depth of less than 12 feet over a reasonable distance on all four sides of the

plummet point ? A. I do not know.

47.3The architect who might have designed the swimming pool and/or under whose supervision the same might have been constructed has not been produced in the witness box. I am mentioning this fact not with a view to finding fault

with the conduct of the case on behalf of the defendants nor with a view to drawing an adverse inference against the defendants for such non examination as it is not clear as to whether that architect is living and available or not. The fact

remains that that piece of evidence is not available on record.

(48) A perusal of all the authorities referred to in para 43 above clearly reveals that the swimming pool was not designed and constructed so as to satisfy the minimum - much less the preferred standard of safety. Even if the case was to

be judged from the point of view of the standards made available and relied on by the defendants, two things are writ large: firstly, the swimming pool satisfied the bare minimum standards of safety and certainly not the standards which

were to be preferred; secondly, the standards relied on by the defendants by reference to 1956 edition of the book were discarded by the source of the same standard in the year 1970 and even in the year 1956 edition a little later from

the page relied on by the defendants, the same source had suggested higher standards. Even if the defendants had chosen to go by the 1956 standards, in the year 1965 when the swimming pool was built, than in the year 1970 with the

standards having been revised and updated, the defendants should have redesigned and renovated their swimming pool. A five star hotel cannot be said to have discharged its duty to care towards its guests by observing bare minimum

standards of safety. It should have gone by preferred standards. The least which could have been done by the defendants in the year 1970 was to have removed the three meters spring board from above the swimming pool leaving it

available only for swimming and not for diving.

(49) It was forcefully submitted by the learned counsel for the defendants that though the swimming pool was constructed in the year 1965 but no accident took place up to 1972. Even the plaintiff had stayed in the hotel on a number of

occasions earlier and must have swim med and dived in the swimming pool but he too never suffered any accident or injury. Merely because an accident with the plaintiff happened in 1972 it cannot by itself be an evidence of negligence.

Soon after the accident the defendants have taken additional precautions and diving at the swimming pool has been discontinued. I make no comment on this submission except quoting from Salmond & Heuston on Law of Torts (12th

Edition, page 242) :

But the general practice itself may not conform to the standard of care required of a reasonably prudent person. In such a case it is not a good defense that the defendant acted in accordance with the general practice. Neglect of duty

does not cease by repetition to be neglect of duty. One does not have to wait for an accident or series of accidents before a system can be condemned as unsafe.

(50) Having arrived at a finding that the design of the swimming pool was defective, the conclusion which necessarily emerges is that the swimming pool of the defendant''s hotel was a trap. It was a `hazardous premises'' in the sense in

which the term is used in the law of torts. The liability of the defendants for adverse consequences flowing from the use of the swimming pool- an hazardous premises - would be absolute. Reiterating the view taken in M.C. Mehta and

another Vs. Union of India and others, their Lordships have held in Indian Council for Enviro-Legal Action and Others Vs. Union of India (UOI) and Others,

Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care

while carrying on his activity.

(51) A five star hotel charging a high or fancy price from its guests owes a high degree of care to its guests as regards quality and safety of its structure and services it offers and makes available. Any latent defect in its structure or service,

which is hazardous to guests, would attract strict liability to compensate for consequences flowing from its breach of duty to take care. The five star price tag hanging on its service pack attracts and casts an obligation to pay exemplary

damages if an occasion may arise for the purpose. A five start hotel can not be heard to say that its structure and services satisfied the standards of safety of the time when it was built or introduced. It has to update itself with the latest and

advanced standard of safety.

(52) Would the doctrine of rest ipsa loquitur come into play ? The phrase means the thing speaks for itself. Under the doctrine of rest ipsa loquitur a plaintiff establishes a prima facie case of negligence where (I) it is not possible for him to

prove precisely what was the relevant act or omission which set in train the events leading to the accident, and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some

act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff''s safety. There must be reasonable evidence of negligence. However,

where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use

proper care, it affords reasonable evidence, in the absence of Explanation by the defendant, that the accident arose from want of care. Three conditions must be satisfied to attract applicability of rest ipsa loquitur :(i) the accident must be

of a kind which does not ordinarily occur in the absence of someone''s negligence; (ii) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (iii) it must not have been due to any voluntary action or

contribution on the part of the plaintiff. (See Ratanlal & Dhirajlal on Law of Torts edited by Justice G.P. Singh, 22nd edition 1992, pp 499-501 and the Law of Negligence by Dr Chakraborti, 1996 edition , pp 191-192).

(53) In The Krishna Bus Service Ltd. Vs. Smt. Mangli and Others, , their Lordships have stated the principle as under :-

Wherein an action for negligence the thing causing fatal injury to the deceased and consequent pecuniary loss to the plaintiff is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary

course of events does not happen if those who have the management use proper care, that affords reasonable evidence, in the absence of the Explanation by the defendants, that the accident arose from want of care.

(54) In Shyam Sunder and Others Vs. The State of Rajasthan, , their Lordships held that the maxim did not embody any rule of substantial law nor a law of evidence; it was simply `the caption to an argument on the evidence''. Their

Lordships further held :-

The maxim rest ipsa loquitur is resorted to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the defendant. The mere fact that the cause of the accident is unknown does not

prevent the plaintiff from recovering the damages, if the proper inference to be drawn from the circumstances which are known is that it was caused by the negligence of the defendant. The fact of the accident may, sometimes, constitute

evidence of negligence and then the maxim rest ipsa loquitur applies.

(55) The principal function of the maxim is to prevent injustice, which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it even when the facts bearing on these

matters are at the outset unknown to him and often within the knowledge of the defendant.

The plaintiff merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the

doctrine of rest ipsa loquitur is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability.

(56) Once a special obligation on the owner to take care of the safety of the structure has been shown to exist then as held in Municipal Corporation of Delhi Vs. Subhagwanti and Others, :-

It is no defense for the owner to prove that he neither knew nor ought to have known of the danger. In other words, the owner is legally responsible irrespective of whether the damage is caused by a patent or a latent defect.

As none knows what had really happened after the plaintiff had plunged into water and before he came out injured, coupled with the fact that the swimming pool was owned controlled and managed by defendants No.1 and 3, in the

absence of an Explanation by them, inference based on rest ipsa loquitur stands drawn that the accident took place from want of care on their part. The facts of the case attract applicability of rest ipsa loquitur.

(57) A few decisions on law of torts dealing with the swimming pool accidents may be noticed with advantage and dealt with. 57.1In the City of Ferguson Vs. Marrow, 210 F R2 S 520, the plaintiff, a student of 21 years age, an

experienced but not an expert swimmer, took a dive into a swimming pool which had been in operation for about a year before. The depth of the water was insufficient. It was held :

Presence of diving board at city swimming pool was invitation for its use, with implied representation by city that such use was not dangerous, and city was charged with knowledge of danger of diving there from into water of insufficient

depth, so as to render city liable in tort for injuries to diver striking his head on bottom of pool, where city gave him no warning of such danger.

Evidence showed that danger of diving from diving board at city swimming pool because of insufficient depth of water was not so obvious to one injured in diving there from as to eliminate city''s failure to warn him of such danger as

proximate cause of injury or render him guilty of contributory negligence barring his recovery of damages from city.

57.2In Darrel L. Cummings vs. Borough of Nazareth, 233 A R S 874, the plaintiff dived from one meter board into a depth of water which was found to be 6''to 8-7/8"'' deep while it should have been 9''10"'' deep. The plaintiff struck the

bottom and sustained injuries leaving him paraplegic. It was held :

Swimmer who had paid admission fee to swim in borough''s pool was business invitee entitled to reasonable care with relation to operation of the pool"".

To successfully charge a plaintiff with assumption of risk, evidence of the danger must be glaringly obvious or patent.

Swimmer who dove into borough''s pool from diving board and struck bottom with result that he became paraplegic was not chargeable with knowledge of inadequate water under the board in view of lack of knowledge of borough''s

park manager and two of its lifeguards as to the inadequate water depth.

Proof that swimmer suing borough for diving injuries which left him a paraplegic had collided with bottom of pool was not required to be direct; testimony supporting inferences which might reasonably be drawn was sufficient.

(58) So far as the defense of contributory negligence is concerned, it needs a short and summary disposal. Contributory negligence is the conduct of a plaintiff consisting of some act or omission which has materially contributed to the

damage caused and is of such a nature that it may properly be described as negligence, only in the sense of careless conduct and not given its usual meaning. Thus, it is an express meaning "" negligence materially contributing to the injury"".

Contributory negligence is not in itself a bar to the plaintiff''s claim but is merely a ground for refusing damages (See Charlesworth & Percy on Negligence, 8th Edn 1990 3. In the case at hand. There is no material or circumstance

available on record permitting an inference being drawn as to the plaintiff having been negligent in any manner whatsoever so as to infer having contributed towards the accident. The plea of contributory negligence raised by the defendants

has to be discarded.[Reference may also be had to Darrel''s case, supra, pr. 55.2]

(59) On the plea of contributory negligence being successfully pleaded by the defendants the court may order reduction of damages by an amount which is just and equitable. If the blame of the plaintiff be only slight it would not be just

and equitable to reduce the damages. The respective blameworthiness of the parties shall have to be weighed and rated. However, where the premises of the defendant suffers from a latent hazard and an invitee for consideration suffers

injuries by making a permitted use of the premises, in my opinion the defense of contributory negligence is totally misconceived. The present one is such a case.

(60) To sum up, my findings on these issues are: the injuries caused to the plaintiff in the accident dated 13.8.1972 are attributable to the negligence of defendants No.1 and 3; the swimming pool was a trap on account of its having a

latent hazard in structure and designing- providing not a safe depth of water at the plummet point; there was no negligence, contributory negligence or inaction on the part of the plaintiff, and the defendant No.1 and 3 are bound to

indemnify the plaintiff for the injuries suffered by him. Issue No.7 And 10

(61) Vide para 14 of the plaint the plaintiff has claimed award of compensation on the following heads :- 14. The plaintiff has suffered and is entitled to claim from the defendants the following damages :

A)On account of loss of salary until the filing of the suit. Dm 1,72,500 B) On account of costs and expenses incurred by the plaintiff until the filing of the suit; i) On account of Doctors'' services hospitalisation and otherwise. ..Rs.25,000 ii)

In Germany : On account of Doctors, services hospitalisation, medicines and nursing requisites, physiotherapy, special diet, nursing help, house built to meet the plaintiff''s special needs, furniture, mechanical aids and equipment therein,

shifting thereto and maintenance thereof and otherwise. Dm 3,500,000 (C) On account of future loss of income Approx. Dm 40,00,000 (D) On account of future loss confession .'''' Dm 3,00,000 (E) On account of future costs and

expenses of medical aid, physio-therapy, special diet, help, maintenance of the house and otherwise attributable to the condition of the plaintiff. '''' Dm 5,00,000 (F) On account of pain and suffering and loss of enjoyment of life.

DM 3,00,000 The a foregoing amounts to Rs.25,000 plus Dm 56,22,500 (equal to Rs.1,91,24,150 at the rate of exchange prevailing at the time of the filing of the suit), that is, total Rs.1,91,49,150. The plaintiff, however, claims an

amount of Rs.50,00,000 only.

(62) Before embarking upon the question of determining the quantum of compensation which would be liable to be awarded to the plaintiff I may briefly review the available principles of law and instruct myself so as to make an

assessment in accordance with the law.

(63) Personal injury may cause non-pecuniary as well as pecuniary loss to the plaintiff. Non-pecuniary loss includes damages on the heads of (i) pain and suffering; (ii) loss of amenities and (iii) loss of expectation of life. Pecuniary loss

may cover damages calculable on the heads of (i) consequential expenses, (ii) cost of care and (iii) loss of earnings. The earlier practice was to make a global award without indicating the sums under different heads but the current

practice as witnessed in 60s is to itemise the award at least broadly. Having done so, at the end a total figure in the round shall have to be arrived at so as to eliminate the deficiency in the process of calculative adjudication caused by

overlapping or otherwise.(See Law of Torts, Rattan Lal and Dhiraj Lal, revised by Justice G.P. Singh, 22nd Edn. page 177).

(64) Pain and suffering consequential to an injury inflicted on the plaintiff would include pain attributable to medical treatment for the injury. The amount of compensation will vary with the intensity of pain and suffering of the plaintiff. Loss

of amenities has a separate head of injuries and covers deprivation of ordinary experience and enjoyment of life. It is customary to award a lump sum as damages covering both the heads. Loss of expectation of life has a separate head of

damages when a normal expectation of life is shortened as a result of injury. However, suffering experienced by the plaintiff from the awareness that his life expectancy has been shortened will fall under the head pain and suffering and not

under the head loss of expectation of life. Quantification of damages for non pecuniary damages such as pain and suffering and loss of amenities presents great difficulties. The Court cannot restore a person to the state of health which he

enjoyed before he suffered a serious injury to his body or brain. The Court can award only reasonable compensation to the plaintiff for his suffering the assessment of which is essentially a guess work. The rules which have developed by

the judicial traditions are (i) amount of compensation awarded must be reasonable and must be assessed with moderation; (ii) regard must be had to awards made in comparable cases; and (iii) the sums awarded must to a considerable

extent be conventional.

(65) In Rehana Rahimbhai Kasambhai Vs. The Transport Manager, Ahmedabad Municipal Transport Service, Ahmedabad and Others, the High Court of Gujarat has held that in cases of personal suffering the general damages can be

given under three heads: (i) personal injury and loss of enjoyment of life; (ii) actual pecuniary loss resulting in any expenses reasonably incurred by the plaintiff; and (iii) the probable future loss of income by reason of incapacity or

diminishing capacity of work.

(66) In Vinod Kumar Shrivastava Vs. Ved Mitra Vohra and Others, , a Division Bench of Madhya Pradesh High Court has held damages for loss of expectation of life are awarded when the expectation of life is shortened as a result of

the injuries and are to be assessed by putting a money value on the prospective balance of happiness in the years that the injured might have otherwise lived. On the other hand, damages for loss of amenities of life, which is a separate

head of damages, are to be awarded when the injured is deprived for the period he lives of ordinary experiences and enjoyment of life.

(67) Several observations on impact of curtailment of expectation of life made by the House of Lords in Rose vs Ford 1937(3) All E R 359 are illuminating. Lord Atkin observed (at page 362) :

Aman is injured in the prime of life. Evidence is given that he is not likely to live more than two or three years. The tribunal estimating damages will take this fact into account, not only in estimating actual money loss, for he may not be in a

position to earn, or be capable of earning anything, but also as an item of personal damage. It does not seem to me necessary to say that a man has a personal right, of the nature of property , in his life, so that, when it is diminished he

loose something, I do not say that this is not so, but I am satisfied that the injured person is damnified by having cut short the period during which he had a normal expectation of enjoying life and that the loss damnum, is capable of being

estimated in terms of money, and that the calculation should be made

Lord Russell of Killowen observed at pp.365- 366: I am of opinion that, if a person''s expectation of life is curtailed, he is necessarily deprived of something of value, and that, if that loss to him is occasioned by the negligence of another,

that other is liable to him in damages for the loss.

Lord Wright Observed at pp. 371, 372 :

Aman has a legal right in his own life, I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts not only in regard to pain, suffering, and disability, but also in regard to the continuance of life

for its normal expectancy. A man has a legal right that his life should not be shortened by tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be

given.

(68) In Benham vs Gambling 1941 (1) All ER7 Viscount Simon, L.C. has observed :

The thing to be valued is not prospect of length of days but the prospect of a predominantly happy life. The age of the individual may in some cases be a relevant factor.

(69) It was further observed that while assessing the quantum of compensation it is not merely the length of life, but a predominantly happy life which shall have to be valued by the court. Though all human life is continuously an enjoyable

thing, an account shall have to be taken of all the ups and downs of life, its pains and sorrows, its joys and pleasures.

(70) .WHILE assessing the quantum of damages, the court shall have to keep in view not only what has already happened but also what is sure to happen with foreseeable certainty. The court shall have to recollect the past, be alive

to

the present and also peep into the future. In an action for damages arising out of personal injury this is a necessity felt by the rule that the law permits only one action for one cause of action. Charlesworth and Percy on Negligence, 8th

Edn, states (vide para 4.43 at page 307) :

Inane action for negligence damages must be assessed once and for all at the trial of such issue. Even if it is found later that the damage suffered was much greater than was originally supposed, no further action can be brought. Again, ""it

is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all

(71) On broad division of damages Charlesworth and Percy say (at para 4.74,4.75,at pages 323 and 324 ibid):

Damages are divided into general and special damages. General damages are those, which the law presumes to flow from the negligence alleged by the plaintiff. Although these damages must be averred to have been suffered and,

subsequently, need to be proved, it is not necessary to plead them in any detail in the statement of claim. Particulars of general damages will not be ordered. It has been held that damages for the loss of enjoyment, resulting from a holiday

that had been spoiled, form part of the claim of general damages in a negligence action .

(72) Special damage, in this context, means some specific item of loss, which the plaintiff alleges to be the result of the defendant''s negligence in the case, although it is not presumed by law to have flowed from it, as a matter of course.

(73) The learned authors further say while dealing with tort of personal injury :

Often the courts do not find it necessary to make any distinction between the injury itself, particularly if it is of a serious nature or extent, and the consequences, which flow from its infliction. This is because the ordinary victim of injury is

usually far less concerned about his physical injury, after the first few months or so, than about the dislocation of his normal every day life. Clearly in all cases where the body''s integrity has been violated, resulting in impairment, which may

be either temporary, in that a full recovery is achieved, or permanent, such as the loss of an ear lobe, the injury by itself will merely attract an award of damages. In an appropriate case, such damages could be substantial."" (para 4:100,

pp.336-337)

Where a plaintiff either knows that his expectation of life has been shortened or realises the severity of his injuries and the extent, to which they have reduced him permanently to a lower level of activity, he must be compensated for the

mental anguish, suffered there from on a basis comparable with that concerned with pain, that has resulted from physical causes. Likewise, in appropriate cases, damages will be awarded in respect of anxiety neurosis suffered, where it

has been caused by the accident itself, although the physical injuries sustained may well have been insignificant."" (para 4:103, page 338)

In assessing damages for physical injuries, it is an irrelevant consideration that a victim may be unable to enjoy personally any award of damages and may be ignorant of the loss he has , except that such ignorance will be an element in the

assessment of damages for pain and suffering."" (para 4:108, page 342)

Loss of expectation of life. Injury to health, which has resulted in a shortening of the injured person''s expectation of life, i.e. the loss of the prospect of an enjoyable, vigorous and happy old age, used to be a matter that had to be taken

into account. This was because a man had a legal right to his own life."" (para 4.109, page 342)

(74) According to Clerk & Lind sell on Torts (17th Edn 1995, para 27:22 at page 1456):

The plaintiff is entitled to compensation for the pain and suffering, both actual and prospective, which is attributable to his injury and its consequences. Injury includes disease and physical or mental illness. Mental anguish must be

compensated for as well as actual physical pain. So, for example, there must be compensation for a severely incapacitated person''s realisation of the condition to which he has been reduced or for the embarrassment of disfigurement.

(75) According to Charlesworth and Percy (ibid, para 4:117 to 4:121, pp. 346-348), the injured party is entitled to damages for his loss both actual and prospective. The actual financial loss may consist of loss of earning, medical,

nursing expenses, additional cost of buying invalid diet, damage to cloth, employment of extra household or other assistance and any other loss which is the direct consequence of the injury, including the cost of convalescence after an

injury necessitating a change of air in some place away from the injured party''s home. Future pecuniary loss as estimated form of financial loss which is likely to be supplied by the injured party, after the date of trial, and necessarily, will

include such matters as his prospective loss of earning, any loss of his future earning capacity, any extra expenses, including the cost of special accommodation, where the plaintiff has suffered catastrophic injuries.

(76) The learned authors further say :

Amongst the loss of the amenities of life, there are to be considered: the injured person''s inability to engage in indoor or outdoor games; his dependence, to a greater or less extent, on the help of others in his daily life; the inability to cope

by looking after, caring for and rendering the accustomed services to a dependent; his sexual impotence; the loss of happiness and satisfaction in bringing her pregnancy to a successful conclusion; the premature onset of her menopause;

any prejudice to the prospects of marriage; and his inability to lead the life he wants to lead and was able to lead, before his injuries. In this connection, the age of the injured person must be taken into account, since an elderly person or a

very young child will not suffer the same loss in this respect as a young adult "". (para 4:107, pp.340-341)

Wages lost can be recovered, even though they have been paid by the employer if the plaintiff is under a moral obligation to repay them, in the event of his recovering such loss from the defendant."" (para 4:122,p.349)

(77) It is easy to say that the plaintiff is entitled to compensate himself for the loss flowing from the direct consequences resulting from the tort but it is difficult to define the same. According to Charlesworth & Percy (para 4:16,page

295,ibid) a direct consequence means that there is no independent cause intervening between negligence and the damage.

(78) As to `lost earning capacity'' Winfield & Jolowicz on Tort, (13th Edn 1989) state at page 621 :

Loss of earning capacity. In cases of continuing disability the plaintiff may be able to remain in his employment but with the risk that, if he loses that employment at some time in the future, he may then, as a result of his injury, be at a

disadvantage in getting another job or an equally well- paid job. This ""loss of earning capacity"" has always been a compassable head of damage but has come into more prominence in recent years, probably as a result of the growth of the

practice of ""itemizing"" awards. Assessment of damages under this head may be highly speculative and clearly no mathematical approach is possible; but the court would be satisfied that there is a substantial or ""real"" risk that the plaintiff

will be subject to the disadvantage before the end of his working life. If so satisfied, the judge must then do his best to value the ""chance"", taking into account all the facts of the case.

(79) Winfield deals with the concept of loss of expectation of life by naming it as theory of lost years. Damages for loss of earning are to be assessed on the plaintiff"s expectation of life before the accident making a deduction in respect of

money which the plaintiff would have spent on his own support during the lost years.

(80) In Davies vs. The Mayor Alderman and Burgesses of the Borough of Tenby, 1974(2) Llr 469, Lloyd"s Lw Reports plaintiff having sustained the injuries on account of slip from the end of the diving board because its mountings were

loose was held entitled to recovery of damages on the following heads : ""a) Loss of earnings until trial b) Loss of earnings from trial onwards c) Loss of expectation of life d) Pain and suffering and loss of amenities e) Contingency of the

wife breaking down and having to employ assistance.

(81) In R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, , their Lordships have held: (vide para 9) :

Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has

actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary

damages may include expenses incurred by the claimant:(i) medical attendance;(ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non- pecuniary damages are concerned , they may include (i) damages for

mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may

not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and

mental stress in life.

(82) Concept of exemplary damages by reference to paying capacity of wrongdoer has been recognised in M.C. Mehta and another Vs. Union of India and others, as under :

The measure of compensation in these kinds of cases must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the

greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

(83) Having so surveyed and resumed the principles I now revert back to the facts of the case at hand. First I would examine the nature and extent of the injuries suffered by the plaintiff in the accident.

(84) DR.ARJUN D.Sehgal PW-13, the neuro surgeon attached with Holy Family Hospital where the plaintiff was taken immediately after the accident had X-rayed the plaintiff. He found the plaintiff having suffered cervical cord injury

requiring immediate immobilisation, traction and emergency treatment. The X-ray showed cervical fracture and compression. The documents produced by the witness further go to show that on the skull being X-rayed long vertical

fracture of right parietal and temporal bone was found. The X- ray of L.S.spine showed 4 small cracks at S3. Cervical spine had suffered fracture at C-4, C-5 and C- 6. There was a compressed fracture of the arch of the 5th cervical

vertebrae. High transverse - section paralysis (Tetraplegic) at the level of 5th, 6th segment of the cervical vertebrae of the spinal cord was imminent. Surgery was performed on the spinal cord to remove the pressure on the 3rd to 6th

cervical vertebrae, process known as Laminectomy. However, no improvement in the condition of the plaintiff could be noticed.

(85) I may extract and reproduce these passages from the testimony of Dr Arjun D. Sehgal, (Public Witness 13) to formulate an opinion on the severity of the injuries and their outcome. To quote :-

I examined the patient while he was being X- rayed on the same day and made diagnosis of cervical cord injury and advised him immediate immobilization, traction and emergency treatment which is necessary for the Cervical (cervical)

Cord injury. X-Rays wet films seen right there showed cervical fracture dislocation."" (at p.4:081)

On evening of 15.8.72, on consultation with Dr. S. Tandon and Dr. Pant,neuro physician, advised "" An early operation with 10% to 15% hope of good recovery discussing details with the wife in the presence of the plaintiff certain

questions were asked by the patient quick honest replies were given. Then plaintiff and wife agreed for this operation risk explained over all poor prognosis predicted transportation to Germany also discussed.

plaintiff had a fracture of the skull bone indicating that he had hit the head on the ground while making a jump head down causing fracture dislocation of cervical spine. My personal experience of last many years here in India and seven

years in U.S.A. and reading the medical literature and medical journals from all over the world show that injuries are of poor out come even after surgical decompression"". (at p.4.086 of court''s record) On 22.8.72, the plaintiff

accompanied by a doctor and a nurse was transferred by air from Delhi to Germany.

(86) DR.PEASLACK, PW-8 was Medical Director of the spinal cord injury centre of the Orthopedic University Clinic at Heidelberg. The plaintiff was admitted in this Hospital after being flown from India and remained there for 7

months. He was released from the Hospital sitting in wheel chair partially paralysed in his arms, totally paralysed in his hands and trunk and legs and unable to control the functions of the bladder and the vowels. inspire of having been

discharged as in-door patient he continued to remain in the care of the Hospital as out patient. In February, 1977 the plaintiff was re-admitted in hospital for four weeks because of bed-sores on his buttocks. In March, 1981 he was

readmitted for four weeks because of urinary therapy and in July, 1981 again because of bed-sores and severe infection of urinary tract.

(87) According to Dr.Paesleck, the plaintiff suffered from repeated Pulmonary Embolism in 1973. For some years he was under anti- coagulant drugs. In January, 1975 he had a severe Haematoria. Until 15.10.81 - the date of

examination of this witness, the plaintiff had not been cured of urinary infection. The witness deposes that it was not possible to cure it in the case of plaintiff. The plaintiff was Tetra pelagic meaning thereby he was paralysed in his trunk;

50% of the muscular activities of his respiratory functions remained paralysed. He was breathing only with his diaphragm while his respiratory functions remained paralysed. He had also lost the function of Thermo Regulation and required

room temperature being maintained equilibrated at 21 to 24 degree centigrade for his existence.

(88) The plaintiff needed regular control by specialised hospitals, continued medical attendance and supervision, regular physic-therapy and permanent drugs to fight the urinary tract infection. Dr.Paeslack stated on 15.10.81 that inspire

of all this being done the condition of the plaintiff did not improve.

(89) DR.PAESLACK has further stated that the plaintiff required special diet - proteins and vitamins enriched. His life expectancy was reduced because of the accident. In the opinion of Dr.Paeslack all the problems of the plaintiff as

were noticeable in the year 1981 were related to the disabilities suffered by the plaintiff on account of injuries resulting from accident. The witness has ruled out the suggestion of any signs related to former meaning IT is of the plaintiff

having been found during the time when the plaintiff remained under his care.

(90) Dr Paeslack has very clearly opined that the plaintiff"s physical disability was directly related to the accident. He has further opined that as per his experience of such cases the spinal cord injury caused by fracture of vertebrae

columns was immediately permanent.

(91) As to the impact of injury on life expectancy of the plaintiff, Dr. Paesleck has stated :-

MRMittelbachert"s life expectancy has reduced because of this accident. I can answer the question as to how much the life expectancy has reduced only by giving some statistics. The statistics I can give are also uncertain. I have to

explain this further. Twenty years ago, a Tetra predict had a life expectancy less than two years. This situation could be changed by introduction of better methods of treatment. Now, a Tetra predict can survive for much longer time if he

has regular, specialised treatment. In our experience, life expectancy for a Tetra predict like Mr Mittelbachert will be reduced for about 25 to 30 per cent compared with a normal man. You have to calculate it from the time of beginning

of tetraplaeigio. When Mr Mittelbachert became tetraplaegic, he was about 31 years of age. In my knowledge and I am not a specialist in life expectancy statistics,. Mr Mittelbachert would have had a life expectancy of about 40 years

from 1972. To explain further when Mr Mittelbachert became tetraplaegic, he was thirty. As a normal man, he had at this time a life expectancy of 40 years. So the life expectancy of Mr Mittelbachert is reduced by 25% that means, by

10 years and his life expectancy will, from 1972, would be 30 years.

(92) The plaintiff himself has narrated his own suffering. He has stated that during the first seven months of stay at the Hospital in Heidelberg he was suffering from Tetra pelagic i.e. paralysis completely from below the arm pits and in

motorist and sensory way. His arm could move only in a limited way. His fingers were immobile. He had no control over his vowels and bladder. His such situation had continued up to 5.10.81, the date of recording of his statement.

(93) The plaintiff has further stated that in the autumn of 1972 he had embolism of the lungs. In the spring of 1974 he suffered thrombosis in the right half of the pelvic. In 1977 he developed skin defect in buttocks and thereafter frequent

infections of the bladder. In July-August, 1971 he was operated in the bladder. He again suffered skin defects of the buttock - condition called decubitus. The bladder infections became permanent. His vision was adversely effected.

(94) The plaintiff is fully corroborated on all the points of his ailments and suffering by the testimony of his wife Mrs.Edda Mittelbachert (Public Witness -2).

(95) It is clear from the unimpeachable evidence adduced on behalf of the plaintiff that ever since the date of the accident till the time of his death the plaintiff remained completely crippled and a total wreck. One can imagine with near

certainty how much physical pain and suffering and constant mental agony the plaintiff must have suffered until his death.

(96) According to the plaintiff apart from other education which he had taken, he was a commercial pilot having passed theory and practical examinations in 1967 and 1968. In January, 1969 in his first attempt he passed type rating grade

of Boeing 737. He was a member of the pilots association. He was a co-pilot in Lufthansa. The next rank promotion was of a Captain of 727 or 737. Then he could have been Captain on intercontinental flights. To calculate the monetary

loss suffered by the plaintiff the best available material is provided by Hoffmann Goshen (Public Witness -9) who was head of the Personnel Deptt. of Lufthansa and dealing with the recruitments and promotions. He has produced

documents in support of his testimony. According to him the plaintiff joined Lufthansa on 19.10.68 as a co-pilot with starting salary of 1529-DM. In August, 1972, the plaintiff was drawing a salary of 3975 DM. plaintiff was entitled to

two increases half-yearly. On 31.12.1973, the plaintiff was discharged from service on ground of physical disability. The plaintiff was not given any salary between 14.11.72 and 27.7.73 for the period between 27.11.73 to 31.12.73

plaintiff was not given his full salary. Only 60% of the normal salary was paid to him. 96-1.According to this witnesses PW-9, after attaining the age of 65 years plaintiff would have got normal pension. Lufthansa pays transitional or

interim pension between the ages of 55 and 65.If the plaintiff had continued in service until the age of 55 he would have been paid a total sum of 38,59,553.00 Dm for the period January, 1974 to September, 1977. (vide calculation sheet

Ex.PW-9/2). The calculation takes account of usual increments and promotions etc. 96.2.If the plaintiff would have served up to age of 55 years he would have received 9,19,220.00 Dm by way of interim or transitional pension.

(97) There is no specific evidence available as to the salary for the period 28.7.73 to 26.11.73. For the period 27.11.73 to 31.12.73 the evidence is available to show that the plaintiff was paid 60% of the salary. The emoluments

comprised of 60% basic pay and 40% flight allowance. On 31.12.1973, the plaintiff was discharged from service on account of his physical disability to serve. From the manner in which the evidence has been adduced, it can be assumed

that the plaintiff was not paid any salary for the period 28.7.73 to 26.11.73. Thus, the loss of salary is calculated at Dm 1,28,206 according to the following table :

Particulars dm 1. For salary @ Dm 3975 Pm from 14.11.72 to 26.11.73 49,422 Loss of flight allowance @40% from 27.11.73 to 31.12.73 1,802 Salary from 1.1.74 to 11.8.75 (the date of filing the suit) 76,982 Total dm 1,28,206

(98) However Hoffman Jochen has filed and proved a statement (Ex PW9/2) according to which in the event of the plaintiff serving up to the age of 55 years and having been allowed routine and normal promotion and increments, the

plaintiff has suffered a loss of Dm 38,59,553 on account of salary. The same witness has filed and proved another statement Ex PW9/4 according to which the plaintiff has suffered a loss of interim pension to the tune of Dm 9,19,920.

(99) The above said figures do not take into account the uncertainties of life, and the expenses which the plaintiff would have been required to incur on himself.

(100) On the other hand, if the plaintiff had continued in the service of Lufthansa he would have been flying until the age of 55. He could have also been given an extension up to the age of 60 years. The plaintiff could have normally

become co-pilot Boeing 747, then Captain of 727 or 737 and also Captain of long range aircraft such as 707 or DC-10 etc.

(101) The Court would not calculate the entire amount of salary and pension which the plaintiff would have earned if he would not have been disabled from earning either by death or incapacity and award the same by way of

compensation. The compensation has to be a just compensation. On General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, the Supreme Court has held the best method to be

adopted for calculating just compensation is the multiplier method. According to their Lordships :

Statutory determination of a just compensation would unshackle the exercise from any rigid formula. It must be borne in mind that the multiplier method is the accepted method of ensuring a just compensation which will make for

uniformity and certainty of the awards.

The multiplier represents the number of years"s purchase on which the loss of dependency is capitalised. Then allowance to scale down the multiplier would have to be made taking into account the uncertainties of the future. The

allowances for immediate lump sum payment the period over which the dependency is to last being shorter and the capital feed also to be spent away over the period of dependency is to last etc.

It is not unusual to deduct one-third of the gross income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependents.

The determination of the quantum must answer what contemporary society would deem to be a fair sum such as would allow the wrongdoer to hold up his head among his neighbors and say with their approval that he has done the fair

thing. The amount awarded must not be niggardly since the law values life and limb in a free society in generous scales. All this means that the sum awarded must be fair and reasonable by accepted legal standards.

The multiplier method is logically sound and legally well established. There are some cases which have proceeded to determine the compensation on the basis of aggregating the entire future earnings for over the period the life expectancy

was lost, deducted a percentage there from towards uncertainties of future life and award the resulting sum as compensation. This is clearly unscientific"

(102) The principle of assessment of compensation as laid down in Susamma Thomas"s case (supra) has been re-affirmed by the Supreme Court in Smt. Sarla Dixit and another Vs. Balwant Yadav and others, .

(103) The plaintiff suffered accident at the age of 30 years and died at the age of 43 years consequent thereto. In the case of Susamma Thomas the deceased was 39 years. Their Lordships adopted a multiplier of 12 and applying the

same principle I am of the opinion that it would be just to calculate the monetary loss on account of loss of expectation of life by calculating the annual income of the plaintiff at 3975 p.m.X 12= Dm 47700 (p.a.) (-) one-third for expenses

on self = Dm 31800 and then applying a multiplier of 12 so as to arrive at a figure of Dm 3,81,600. As this figure, in my opinion, ideally represents the number of years purchase in which the loss of dependency is capitalised in

accordance with the principle laid down in Susamma Thomas"s case (supra), the plaintiff need not be awarded any separate amount on account of future loss of income and future loss of pension.

(104) So far as the compensation for pain and suffering is concerned, the nature of injuries, physical and mental condition in which the plaintiff must have remained after the date and time of the accident till the time of his death, have all

been noticed by me while discussing the evidence in paragraph No.79 to 94 above. Looking at his grossly precarious and pitiable condition- both physical and mental- in which the plaintiff was placed and the period of about 12 years for

which he must have remained under severe pain, suffering and agony- physical and mental- an amount of Rs.18,00,000.00 in my opinion would be a reasonable sum to be awarded on this head.

(105) However, the plaintiff has claimed a total amount of Dm 3,00,000 by way of general or non- pecuniary damages. This figure which is already on the lower side deserves to be accepted as the total amount to be awarded as general

or non-pecuniary damages for pain and suffering, for loss of enjoyment of life and for loss of life expectancy.

(106) The plaintiff has proved only three items of expenditure incurred in India on account of doctors services and hospitalisation. A sum of Rs.3,337.00 was paid to Holy Family Hospital which has been proved by Jalal Masih PW10,

Medical Record in charge of the said hospital. According to Klaus Niemeyer PW11 an amount of Rs. 10500/ was paid to Dr Arjun D. Sehgal against his bill. A sum of Rs. 2010.00 was sent to Dr Sharma against his bill. Thus an amount

of Rs. 15847.00 is proved to have been incurred on the plaintiff"s treatment in India.

(107) The plaintiff had suffered the accident on 13.8.72 and he died on 27.9.1985, i.e. after a period of more than 13 years. An amount of 2400 Dm per year is claimed to have been spent on special diet of the plaintiff. Though this claim

is also not specially supported by vouchers yet in view of the physical condition of the plaintiff and the prolonged and intensive care, which the plaintiff was undergoing the amount cannot be said to be unreasonable and is accepted. At the

rate of Dm 2400 per year, he might have incurred Dm 31200 on account of special diet during the period in which he remained alive.

(108) MRS.EDDA Mittelbachert has also deposed to having incurred expenditure on special fittings and furnitures in the house (vide documents Ex.PW-2/75 to 78), because of the plaintiff''s condition. She had to incur expenses on

commuting between the house and the hospital, on special diet of the plaintiff and on the nurse required for the day and night attendance. The nurse had to be paid Dm 100 to Dm 150 per day. To be able to look after her husband,

domestic help had also to be engaged.

(109) In Germany, an amount of 2,67,246.05 Dm is proved to have been incurred on account of doctor''s services, hospitalisation, medicine, nursing, requisite physiotherapy, special diet, nursing, health and housing facilities including

special furniture, mechanical and especial equipments on account of physic at incapacity in which the plaintiff was placed on account of the accident. Without entering into a lengthy discussion of the entire evidence, it would suffice to place

in a tabulated form the documents and the amounts referable thereto :

(i) Medical d housing expenses. Exhibit Amount (DM)Court file page. PW2/2A 5,550.00 5:083 PW2/3B 242.12 5:087 PW2/4B 111.00 5:095 PW2/5B 118.00 5:100 PW2/6B 2956.59 5:104 PW2/6A 1560.00 5:105 PW2/7B 36000.00 5:115 PW2/8B 13000.00 5:119 PW2/10B 1350.00 5:123 PW2/11B 7000.00 5:131 PW2/12 16,775.00 5:135 PW2/13B 2000.00 5:137 PW2/14B 3600.00 5:141 PW2/15B 5000.00 5:145 PW2/16B 9000.00 5:149 PW2/17B 2860.41 5:153 PW2/18B 1579.55 5:157 PW2/19A 3088.58 5:161 PW2/20B 1200.00 5:163 PW2/21B 7000.00 5:167 PW2/22A 5000.00 5:171 PW2/23B 3500.00 5:173 PW2/24B 939.17 5:181 PW2/25B 1515.71 5:184 PW2/26B 2726.40 5:189 PW2/27B 888.00 5:192 PW2/28B 111.88 5:196 PW2/29B 3500.00 5:204 PW2/30B 1500.00 5:209 PW2/31B 216.06 5:213 PW2/32B 415.83 5:225 PW2/33B 621.70 5:229 PW2/34B 3850.00 5:233 PW2/35B 2700.00 5:238 PW2/36B 2000.00 5:242 PW2/37B 2000.00 5:246 PW2/38B 327.56 5:254 PW2/39B 10000.00 5:258 PW2/40B 1800.00 5:262 PW2/41B 2626.86 5:267 PW2/42B 3100.00 5:271 PW2/43B 209.35 5:286 PW2/44B 1000.00 5:290 PW2/45B 20087.40 5:294 PW2/46B 18000.00 5:304 PW2/47B 1047.67 5:308 PW2/48B 1950.00 5:313 PW2/49B 226.44 5:322 PW2/50A 3755.85 5:324 PW2/51B 3919.88 5:324 PW2/52B 1109.75 5:329 PW2/53B 444.00 5:334 PW2/54B 664.42 5:338 PW2/55N 254.80 5:340 PW2/56B 295.78 5:342 PW2/57B 2146.10 5:346 PW2/58B 117.10 5:354 PW2/59B 1150.00 5:360 PW2/60B 754.80 5:364 PW2/61B 1000.00 5:366 PW2/62B 3085.41 5:371 PW2/63B 9912.00 5:373 PW2/64B 1443.00 5:376 PW2/65B 45.30 5:377 PW2/66B 80.00 5:386 PW2/67B Not located PW2/68B 173.12 5:390 PW2/69B 172.00 5:405 PW2/70B 1070.00 5:408 PW2/71B 1048.00 5:415 PW2/72B 1948.00 5:421 PW2/73B 1566.00 5:425 _____ Total Dm 252606.59 (ii) Cost of special plank for making plaintiff stand up PW2/74A 1269.37 5:178 (iii) Cost of special fittings and furniture in house. PW2/75B 184.40 5:200 PW2/75A 284.04 5:201 PW2/76B 11181.75 5:275-278 PW2/77B 656.20 5:280 PW2/78A 848.48 5:284 _____ Total 13054.87 iv) Cost for shifting house. PW2/79B 792.54 5:250 PW2/80B 626.00 5:251 PW2/81B 166.50 5:252 _____ Total 1585.04 Total of (i),(ii),(iii) and (iv) above = 2,68,515.87

(110) Mrs Edda Mittelbachert Public Witness 2 states to have incurred 12000 Dm for going from home to hospital and back. There is no documentary evidence in support. However, in view of the fact that the plaintiff had to be kept

indoors in the hospital, the wife must have been required to attend to the husband and hence required to shuttle between the home and the hospital. The amount claimed is reasonable and is accepted.

(111) The plaintiff has received an amount of Dm 2,80,000 under personal accident and sickness insurance. This amount deserves to be deducted from the amount of special damages claimed by the plaintiff.

(112) To sum up, the plaintiff is entitled to the following amount of damages on the following heads :

Head of damages Claimed Allowed Special (or pecuniary) damages Loss of salary until Dm 1,72,500.00 Dm 1,28,206.00 the filing of the suit (judgment pr.97) Future Loss of Income Dm 40,00,000.00 Nil Future Loss of Pension Dm

3,00,000.00 Nil Actual expenses incurred on plaintiff''s treatment- In India (judgment pr.104) Rs. 25,000.00 Rs. 15,847.00 In Germany Dm 3,50,000.00 Dm 5,00,000.00 Expenses on special diet (judgment pr.107) Dm 31,200.00

Other expenses actually incurred (judgment pr.109) Dm 2,68,515.87 Expenses incurred by wife on commuting for attending to the plaintiff (judgment pr.110) Dm 12,000.00 Total, Rs. 15,847.00 Dm 4,39,921.87 Less- Amount

received from insurance (judgment Dm 2,80,000.00 pr.111) Net Total Dm 1,59,921.87 General (or non-pecuniary) damages Pain and suffering and loss of enjoyment of life. Dm 3,00,000.00 -For pain and suffering } (judgment pr 104

& 105} Rs. 18,00,000.00 } Dm 3,00,000.00 -for loss of expectation} of life (judgment pr 103 & 105)} Dm 3,81,600.00 Total Dm 3,00,000.00 Grand Total Rs. 15,847.00 Dm 4,59,921.87

(113) The Dm deserves to be converted into rupees at the current rate of exchange which is DM= Rs. 22.45 (the rate as on 2.1.97 as confirmed by the RBI). Calculated at this rate Dm 4,59,921.87 stand converted to

Rs.1,02,71,365.98. The plaintiff has thus proved his entitlement to damages quantified at Rs.1,03,25,245.98. The decree shall however, remain confined to Rs.50,00,000.00 as prayed for by the plaintiff. Issue NO.11 In a suit for

recovery of unliquidated damages interest from date of suit can be allowed but not for a period prior to that [Vinod Kumar Shrivastava Vs. Ved Mitra Vohra and Others,]. No provision other than S. 34 of the CPC has been brought to

my notice under which interest may be claimed or allowed by or to the plaintiff.

(114) The judgment shows the events relatable to period subsequent to the institution of suit also having been taken into consideration while assessing the quantum of compensation. Some of the items taken into consideration for

determining pecuniary damages are referable to a period subsequent to the institution of suit and up to the date of plaintiff"s death. I, Therefore, deem it proper to allow interest on the decretal amount not from the date of institution of suit

but from the date of the death of the plaintiff (i.e. 27.9.85) and that too @ 6% p.a. Additional issues Nos.1,2,3 (dated 17.2.1986)

(115) The question arises, whether the suit would abate on the principle of actio personalis moritur cum persona or the cause of action would survive to the legal representatives so as to enable them to prosecute the suit and claim a

decree therein.

(116) Section 306 of the Indian Succession Act, 1925 is relevant. It reads as under :

306.Demands and rights of action of, or against deceased survive to and against executor or administrator.-- All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favor of or against a

person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and

except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

(117) In M. Veerappa Vs. Evelyn Sequeira and Others, , their Lordships have held :

The words ""personal injuries"" do not mean injuries to the body alone but all injuries to a person other than those which cause death and the relevant words must be read ejusdem generis with the words ""defamation and assault"" and not

with the word ""assault"" alone.

(118) 1IT is clear that the applicability of S. 306 of the Indian Succession Act would be attracted to the facts of the case at hand, as it is a claim arising on account of personal injuries sustained by the plaintiff. However, their Lordships

have further held that it will have to be seen still if the foundation for the claim is based on tort or on contract. To quote:

If the entire suit claim is founded on torts the suit would undoubtedly abate. If the action is founded partly on torts and partly on contract then such part of the claim as relates to torts would stand abated and the other part would survive.

If the suit claim is founded entirely on contract then the suit has to proceed to trial in its entirety and be adjudicated upon.

(119) The learned counsel for the plaintiff has submitted that the plaintiff"s claim is founded on both the basis: on tort and also on contract.

(120) Tindal C.J. in Brown Vs. Boorman (1842) 3 Qb 511 has stated that the contract creates a duty and a neglect to perform that duty, or the non-feasance is a ground of action upon a tort. According to Collins M.R. the distinction

between tort and contract is not a logical one and it is sometimes difficult to see whether a particular thing is wrong or a breach of a contract. Nevertheless as the law has drawn a distinction tort may be defined in terms of a breach of duty

other than a contractual duty {Sachs Vs. Henderson (1902) 1 Kb 612.

(121) It is an admitted case of the parties that the plaintiff had checked into the hotel and was staying there as a guest. plaintiff"s stay was not gratis. The swimming pool equipped with a diving board was a facility offered to the guests of

the hotel. It is not the case of either party that any extra charges were payable for using the swimming pool. The charges were by implication included in charges for staying in the hotel. Once a guest enters the hotel premises and the hotel

agrees to accommodate him, the hotel impliedly enters into a contract with the guest for his safe stay in the hotel. Such implied terms are rarely - virtually never - expressed explicitly. Where the main purpose of the contract is to use the

accommodation in the hotel for stay as also to make use of the services made available by the hotel for use by the guests staying therein and those services contribute to attracting guests in the hotel, there is an implied warranty extended

by hotel to the guests that the accommodation or the services could also be availed and made use of safely, the required care and skill having been exercised by the owner/management so as to ensure safety of the person and property of

the guests while staying in the accommodation and making use of services offered. It is common knowledge that five star hotels charge not only the price but fancy price for providing luxurious stay and various services which make the

stay not only comfortable but enjoyable, pleasant and entertaining. Higher the price charges, higher the level of guarantee of utility and safety. This will be the liability under the contract. The action seeking enforcement of liability under

contract would not abate by the death of the injured plaintiff, and cause of action would survive to the legal heirs.

(122) Alternatively, it was submitted by the learned counsel for the plaintiff that the very existence of swimming pool filled with water and a diving board installed thereon in a hotel and owned and managed by the hotel implies an

obligation on the part of the hotel to keep it free from any latent or patent defect which may be injurious to any one swimming or diving in the swimming pool. If any one suffers an injury on account of owner"s failure to fully discharge the

duty to take care of the guests, the owner incurs liability under the torts. Such an injury resulting in death would survive as cause of action to the legal heirs.

(123) It was submitted by the learned counsel for the defendants that if the plaintiff is choosing to enforce a liability arising out of a contract, then the suit has to be dismissed at its threshold as the Hotel"s contract was with Lufthansa and

not with the plaintiff. The plaintiff being a third party to the contract is not entitled to sue, submitted the learned counsel. This contention has to be rejected obviously.

(124) The doctrine of privity of contract is subject to many exceptions, one of them being that a beneficiary can sue on a contract for enforcement of the benefit intended to confer on him by the contract. 124.1In Bhujendra Nath vs.

Sushamoyee Basu, Air 1936 Cal 66, the Division Bench has held :

A stranger to a contract which is to his benefit is entitled to enforce the agreement to his benefit.

124.2In Pandurang vs. Vishwanath, Air 1939 Nag 20, it is held :

The person beneficially entitled under the agreement can sue even though not a party to the agreement itself.

124.3In Greene v. Chelsea Borough Council 1954 (2) All E R 318, the husband had taken premises on license from the defendant. The ceiling fell and injured the wife, who brought a suit for damages which was objected to by the

defendant on the ground that she could not sue as the defendant owed no duty of care to the plaintiff since she was not a party to their agreement with her husband. The contention was overruled and it was held that the defendants were

liable towards the plaintiff for breach of duty.

(125) The contract for stay in the Hotel was between Lufthansa and the Hotel entitling the crew of Lufthansa to stay as guest in the Hotel. The beneficiaries are those who would stay and hence the contract was for their benefit.

Consequent to the breach of the contract those who stay in the Hotel would be entitled to sue. Any other view of the law would create an anomaly. Those who are staying in the Hotel would not be entitled to sue because they were not

parties to the contract. Lufthansa would not be entitled to sue as it has not suffered any injury. A view of the law creating such an anomalous situation cannot be sustained.

(126) In tort of negligence liability arises from duty to take care. This is independent of any contractual obligation. One who owns a structure, owes a duty to take care to see that it is safe for a likely user; the exact details of the duty

being determinable by the nature of structure and its likely use.

(127) If it be a case of tortuous liability, it shall have to be found within the meaning of Section 306 of the Indian Succession Act that it is the injury which has caused the death so as to save the cause of action surviving to the legal

representatives.

(128) In Words & Phrases, Permanent Edn Vol 21 at page 448, `injury causing death'' has been defined as under :

If an employee but for an injury would not have died at the time at which and in the way in which he did die the accident though it merely hastened a deep- seated disorder is regarded as resulting in an ""injury causing death"" within the

Workmens Compensation Act

''Death resulting from injury'' has been defined in Vol Xi page 46-47 (CAPP) ibid as follows :-

Death resulting from an injury... covers cases in which an injury aggravates or accelerates an existing condition so that death ensues earlier than it would in the ordinary course, even though the existing condition would have ultimately

resulted fatally

(129) In Pigney vs. Pointers Transport Services Ltd 1952 (2) All ER 807, relying on Re: Polemis & Furnace 1921 (3) Kb 560 Lord Pilcher has said:"" if death is directly traceable to the injury in the accident for which the defendants are

responsible, the chain of causation is not broken."" In plain words, if an injury hastens or accelerates the death, directly and not remotely, then in law the injury is one causing or resulting in death.

(130) The plaintiff himself has given a detailed narration of the plight which he had to undergo ever since the date he met with the accident in the swimming pool till the date of recording of his statement. He is corroborated squarely by the

testimony of his wife. I have already dealt with the gravity of the injuries suffered by the plaintiff in the accident. The earliest version is provided by Dr Arjun D. Sehgal PW13. In what condition the plaintiff was when he reached Germany

is to be found in the testimony of Dr Paeslack PW8. From their testimony as also of the plaintiff it is very clearly established that the plaintiff''s death has resulted from the injuries caused in accident. From 13.8.1972 to 27.9.1985 it has

been one cause and causation.

(131) Then we have the affidavit dated 3.3.1986 sworn in by Dr Horst Brandt, family physician of the plaintiff, who had treated him continuously since the year 1974 until his death. He has narrated in brief the history of the physical and

nervous condition of the plaintiff. He had also carried out an inspection of the dead body of the plaintiff. He has summed up his conclusions vide para 5 of the affidavit in the following words:

Taking into consideration Mr Mittelbacherts overall condition as well as history, I am of the opinion that the cause of cardiac arrest was pulmonary embolism which was connected with the recurring thrombosis of the veins I have above

referred to and it was caused by his tatraplegic condition. I, Therefore, say that Mr Mittelbachert''s death was caused by the accident above referred to .

(133) As against this, the defendants have filed the affidavit of Dr S.B. Gogia. So far as his professional competence is concerned, there can hardly be any doubt. However, the question of paramount consideration is as to the weight to

be assigned to his testimony. Dr S.B. Gogia did not have any occasion to see or meet the plaintiff in his life time or see his body even after his death. What the defendants have done is to provide this witness with copies of statements of

the plaintiff, his wife, Dr Paeslack and Dr. Arjun D. Sehgal recorded in the suit. He was also supplied a copy of the affidavit of Dr. Horst Brandt. His opinion was sought for on the question: whether the injury suffered by the plaintiff on

13.8.72 caused his death on 27.9.1985. Dr S.B. Gogia having read the above said documents, has opined :-

I differ with the opinion and statement of Dr Horst Brandt as stated by him in para 5 of his said affidavit. In my opinion, the injury suffered by Mr Claus Mittelbachert (plaintiff) did not cause his death on 27.9.95

(134) I have grave doubts if the expression of an opinion by Dr. S.B.Gogia on the testimony of the five witnesses above said can at all constitute admissible evidence. Even if it is expression of an expert opinion within the meaning of

Section 45 of the Evidence Act and hence urged to be relevant piece of evidence then the opinion of Dr Horst Brandt is entitled to a greater weight than the opinion of Dr S.B. Gogia inasmuch as the former is an opinion given by an

expert who had an occasion to personally perceive the facts forming basis of the opinion and is also supported by direct testimony of other witnesses including the plaintiff. The opinion of Dr.S.B.Gogia is merely an opinion expressed on

another opinion.

(135) For the foregoing reasons it is held that the injuries sustained by the plaintiff on 13.8.1972 have caused his death on 27.9.1985. The cause of action survives to the legal heirs u/s 306 of the Succession Act.

(136) Looked at from either angle whether it is a suit based on torts or on contract, I am of the opinion that the suit does not abate and cause of action survives to the legal heirs so as to entitle them to prosecute the suit and also to a

decree if the averments made in the plaint are proved. Additional issues No. 1,2 and 3 (framed on 17.2.86) are answered accordingly.

(137) Accordingly I.A. No. 6166/85 is also allowed and the widow and daughter of the deceased plaintiff are brought on record as plaintiffs.

(138) The suit is decreed for recovery of Rs. 50 lacs against the defendants 1 and 3. The suit is dismissed against defendant No.2 and 4 who shall bear their own costs. Defendants No.1 and 3 shall bear their own costs and also pay the

costs incurred by the plaintiff/s. The decretal amount shall carry interest @ 6% per annum calculated from 27.9.1985 till realisation. Let a decree be drawn accordingly.