

TEAM CODE : TL1

**4th Surana & Surana and Ramaiah College of Law National Tort Law
Moot Court Competition**

Before

THE HON'BLE HIGH COURT OF BADLAPUR

(UNDER ARTICLE 226 OF THE CONSTITUTION OF INDUS)

CHETRI & ORS.

...PLAINTIFFS

V

UNION OF INDUS & ANR.

...DEFENDANTS

(MEMORIAL for THE PLAINTIFF)

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TABLE OF ABBREVIATIONS

<u>ABBREVIATIONS</u>	<u>EXPANSIONS</u>
HC	High Court
§	Section
Ss.	Sections
a	Article
u/s.	Under Section
w.e.f.	With effect from
EDA	Epidemic Diseases Act
DMA	Disaster Management Act
QB	Queen's Bench
CoA	Court of Appeal
CFA	Covid Recovery Facility
AIR	All India Reporter
SCC	Supreme Court Cases
UoI	Union of Indus
u/a.	Under Article
WHO	World Health Organisation
SC	Supreme Court
DPSP	Directive Principles of State Policy
NDMA	National Disaster Management Authority
pg	Page number
GCA	General Clauses Act

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THE STATEMENT OF JURISDICTION

THE CAUSE OF ACTION LIES WITHIN THE JURISDICTION OF THE HON'BLE HIGH COURT, WHICH HAS JURISDICTION UNDER ARTICLE 226(1) OF THE CONSTITUTION OF INDUS, 1950. THE COUNSEL FOR THE PLAINTIFF HEREBY SUBMITS THE MEMORANDUM TO THE HON'BLE HIGH COURT OF INDUS FOR THE PROCEEDINGS.

ARTICLE 226 – POWER OF HCs TO ISSUE CERTAIN WRITS NOTWITHSTANDING ANYTHING IN ARTICLE 32 EVERY HC S HALL HAVE POWERS , THROUGHOUT THE TERRITORIES IN RELATION TO WHICH IT EXERCISE JURISDICTION, TO IS SUE TO ANY PERSON OR AUTHORITY, INCLUDING IN APPROPRIATE CASES , ANY GOVERNMENT, WITHIN THOSE TERRITORIES DIRECTIONS , ORDERS OR WRITS , INCLUDING WRITS IN THE NATURE OF HABEAS CORPUS , MANDAMUS , PROHIBITIONS , QUO WARRANTO AND CERTIORARI, OR ANY OF THEM, FOR THE ENFORCEMENT OF ANY OF THE RIGHTS CONFERRED BY PART III AND FOR ANY OTHER PURPOSE

THE STATEMENT OF FACTS

For the sake of brevity and convenience of this Hon'ble Court the facts of the present case are summarised as follows:

Owing to the outbreak of the Covid-19 pandemic and the acute shortage of healthcare facilities, the government set up CRF to take care of those affected by Covid-19. To ensure adequate supply of necessary medical equipment, HealthONE, a company, was engaged by the government. Top researchers and virologists advised that patients recovering from COVID-19 would need oxygen support on priority as studies revealed that lungs are highly vulnerable to the virus and even mildly symptomatic cases could require oxygen support. This led some private hospitals to approach authorities ordering increased amounts of oxygen. HealthONE too approached the government placing additional orders for oxygen cylinders.

Mr. Thupden, a hardworking 50-year-old man, a driver by profession. was very precautionary against Covid-19 as he had a vulnerable state of health owing to type 2 diabetes. Despite all safeguards, he contracted COVID-19 and faced difficulty in breathing with mild symptoms. Due to shortage of hospital beds, he was shifted to CRF at Badlapur. The doctors at the CRF administered Thupden with steroids and closely monitored his health. Unfortunately, there was an acute shortage of oxygen in the CRF, Badlapur in the midnight of July 7th, 2021. The hospital authorities informed the relatives of the patients that the hospital had run out of oxygen supplies and asked them to take care of it themselves. Mr. Chetri, son of Mr. Thupden, left no stone unturned to find an oxygen cylinder. To his dismay, none could be found because none of the oxygen supplies at Badlapur had the oxygen to refill the cylinders for the patients. Mr. Thupden and seven others passed away due to shortage of oxygen in 8th July, 2021. After his father's demise, Mr. Chetri was handed down a long bill of Rs. 20 lakhs by the hospital.

Mr. Chetri had to sell his entire life savings and his autorickshaw to pay up the bills. The Government, on social media stated: "no lives were lost due to shortage of oxygen".

Mr. Chetri and 7 others filed this petition in this Hon'ble Court to seek Justice and compensation for the medical negligence of HealthONE and the State and failure of performing statutory duty by the State.

THE STATEMENT OF ISSUES

- Whether the suit is maintainable.
- Whether HealthONE is negligent due to inadequate supply of oxygen in CRF, Badlapur.
- Whether UoI is vicariously liable for medical negligence of HealthONE.
- Whether the UoI failed to perform its constitutional duty and statutory duty under the Disaster Management Act, 2005 and Epidemic Diseases Act, 1897.

THE SUMMARY OF ARGUMENTS

I. The suit is maintainable

It is humbly submitted before this Hon'ble Court that the Petitioner has right to file Writ under Article 226 of Constitution of India before this Hon'ble High Court. Moreover, the suit is also maintainable under The Fatal Accidents Act, 1855.

II. HealthONE is negligent for inadequate supply of oxygen in CRF, Badlapur

It is submitted that the inadequate supply of oxygen caused the death of Mr. Thupden and 7 others. This disruption was because of the negligence of HealthONE. It is submitted that there is negligence *per se* for application of *res ipsa loquitur*. In arguendo, it is submitted that HealthONE owed a duty of care to the deceased. Moreover, there was a proximate link between the deceased and HealthONE's duty of care. Moreover, the final damage is due to the negligent omission of HealthONE, that is, failure to supply oxygen.

III. UoI is vicariously liable for medical negligence of HealthONE

It is submitted that HealthONE is an employee of the Government of UoI. Its negligent act was committed in the scope of its employment. Hence, the government is vicariously liable for the negligent act of HealthONE. Moreover, medical care is not a sovereign function of the government.

IV. UoI failed to perform its statutory duty under the Disaster Management Act, 2005 & Epidemic Diseases (Amendment) Ordinance, 2020.

It is submitted that Covid-19 is a "disaster" within the meaning of DMA and a "disease" under EDA. The government is responsible to prevent, control and mitigate Covid-19 disaster under these statutes. More so, to those persons like Mr. Thupden who have been affected by Covid-19. The Government of Indus has failed to prevent the second wave of the pandemic by wilful disregard of the statutory duties bestowed on it. Moreover, it failed to keep an adequate supply of oxygen when it was the need of the time for patients affected by the pandemic. Its inability to mitigate the disaster and ensure adequate supply of oxygen, directly led to the demise of Mr. Thupden and 7 others at Badlapur CRF.

THE ARGUMENTS ADVANCED

1. The suit is maintainable

It is humbly submitted before this Hon'ble Court that The Supreme Court in various cases has viewed that the right to life as enshrined in Article 21 of the Constitution of India includes the right to health and medical treatment. The right to life would be meaningless unless medical care is assured to a sick person.¹

Wherever there is infringement of right to life and personal liberty the person aggrieved, or any public, spiritual individual can move the Supreme Court or High courts by appropriate proceedings for the enforcements of rights so infringed by the state action. The courts are empowered to grant compensatory relief if the state fails to preserve the life or liberty of the citizen.²

The courts have the obligation to protect the rights of citizens, since the courts and laws are made for the people. Therefore, they are expected to respond to their aspirations.³ Therefore one can move the High Court by appropriate proceedings for the enforcement of the rights conferred and guaranteed under the constitution and other laws.⁴ The right to health and access to medical treatment has been included in the plethora of rights brought under the ambit of Article 21.⁵ The philosophy of the right to life enshrined in Article 21 enlarges its scope to encompass human personality with invigorated health which is a wealth to a person to earn his livelihood, to sustain the dignity of person and to live with dignity and equality.⁶ Lack of health denudes a person of his livelihood.⁷ Therefore, it is submitted that the suit is maintainable u/a. 226 of the Constitution as it seeks to claim a violation of fundamental right in Part III.

¹ MK Sharma, "Right to Health and Medical Care as a Fundamental Right" AIR [2005], 255

² *Rudul Shah v State of Bihar* AIR [1983] SC 1086;

³ *D.K. Basu v State of West Bengal* AIR [1997] SC 610, 625

⁴ Constitution of India, a 226

⁵ AIR [1997] SC 610 Journal Section, 103, 104

⁶ *Consumer Education and Research Centre v Union of India* AIR [1995] SC 922

⁷ *Bharath Kumar K. Palicha v. State of Kerala* AIR [1997] Ker. 291

1.1 The suit is maintainable under the Fatal Accidents Act, 1855.

It is submitted that when the death of a person is caused due to ‘wrongful act, neglect or default’, then the aggrieved party is entitled to maintain an actionable suit and recover damages thereof.⁸ Moreover, a suit for the same purpose can be brought by the representative of the deceased. Here, the death of Mr. Thupden and 7 others was a result of negligence [2] and it is also submitted that the petitioners are representative family members of the deceased and are therefore entitled to bring the present suit.

2. HealthONE is negligent due to inadequate supply of oxygen in CRF, Badlapur.

It is submitted that the reason behind the inadequate supply of oxygen is negligence of HealthONE. It is also submitted that HealthONE is liable under the doctrine of *res ipsa loquitur* (2.1). In arguendo, it is submitted that all the elements of negligence are fulfilled (2.2).

2.1. Doctrine of *res ipsa loquitur* is applicable.

It is submitted that the doctrine of *res ipsa loquitur* is applicable here as from the circumstances, it is clear that there was negligence *per se*. This doctrine is applicable even when there is no specific proof of negligence but it assigns liability nevertheless.⁹ In *Scott v. London and St. Katherine Docks Co*¹⁰, the Court laid down two requirements to establish the maxim. Firstly, the thing causing damage must be under control of the defendant (2.1.1). Secondly, the nature of accident would not have happened ordinarily (2.1.2).

2.1.1. Element causing damage was under the defendant’s control.

It is submitted that HealthONE had control over the oxygen supply. This is true, as the government had engaged it to ensure adequate supply of oxygen to the CRFs.¹¹ Moreover, the death of the deceased was within the CRF.¹²

⁸ The Fatal Accidents Act 1855 § 1A

⁹ Ivy D. Patdu, ‘*Medical Negligence*’ [2017] 61 Ateneo LJ 997

¹⁰ *Scott v London & St Katherine Docks Co* [1865] 3 H&C 596

¹¹ ¶ 12 moot proposition

¹² *ibid*, ¶ 18

2.1.2. Accident would not have happened ordinarily.

It is submitted that the accident in CRF, Badlapur was of such a nature, that under ordinary circumstances, this would not have happened unless there would have been manifest negligence on the part of HealthONE. It is also submitted that nothing much is known about the actual working of HealthONE. What is merely known is that it was responsible for supply of oxygen to the CRFs. Hence, it can be deduced that it is *prima facie* manifest that but for the negligence of HealthONE, this tragedy (which took 8 lives¹³) would not have taken place. Moreover, in *Cruz v. Agas, Jr.*¹⁴, the Court held that if the negligence was “*not immediately apparent to a layman to justify the application of res ipsa loquitur doctrine.*”¹⁵ There was no way in which the plaintiffs could know about the nitigrities of how the negligence came about.

2.2. All elements of negligence are made out in the present case.

The fact that there was a disruption in the oxygen supply in CRF, Badlapur, is not disputed by the defendants. It is submitted that this disruption coupled with the deaths of the patients at CRF, Badlapur, attracts tortious liability under a suit of negligence. In *Winfield*, it is stated, “*Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff*”¹⁶ The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former’s conduct within the scope of the duty(2.2.1); (2) Breach of the said duty which lead to the said deaths that is, sufficient proximate causation (2.2.2); and (3) consequential damage(2.2.3).

It is submitted that all elements of negligence are made out in the present case, and consequent damages were caused to the plaintiff.

2.2.1. Existence of a legal duty of care between HealthOne and the deceased.

It is submitted that legal duty of care arises between HealthONE and the deceased as the elements of *proximity, reasonable foreseeability, fairness*. In *Caparo*¹⁷, the HoL established the aforementioned three prong test to infer duty of care. In *Haley*¹⁸, the Court established that even if

¹³ *ibid*

¹⁴ *Cruz v. Agas, Jr.* 757 SCRA 549 [2015].

¹⁵ *ibid*

¹⁶ J. A. Jolowicz, Percy Henry Winfield and W.V.H. Rogers *Winfield and Jolowicz on Tort* (12th edn, Sweet & Maxwell 2009)

¹⁷ *Caparo Industries PLC v Dickman* [1990] UKHL 2

¹⁸ *Haley v London Electricity Board* [1965] AC 778

it is a small portion of the population, the defendant must foresee that too. This means that HealthONE should have foreseen all kinds of patients in the CRF, even if he/she is diabetic¹⁹. That oxygen supply was for Covid patients in the CRF, was clearly foreseeable by HealthONE. Generally, proximity and foreseeability limbs go together.²⁰ This case also falls within that category. The foreseeability limb is governed by ‘*justice between the parties*’ and taking consideration of wider systemic issues.²¹ Hence, it is submitted that owing to the miserable economic state of the petitioners²² in general, the court on normative grounds should deduce legal duty of care between the parties.

2.2.2. There is sufficient proximate cause between the disruption of supply of oxygen and the deaths in CRF, Badlapur on 8th July 2021.

In *Klaus Mittelbachert v The East India Hotels Ltd*²³, the plaintiff, a German national, suffered serious personal injuries in a swimming pool while staying in hotel. The plaintiff filed a suit for recovery of damages. The plaintiff died during the pendency of the suit, thirteen years after the injuries were received. The injuries suffered by the plaintiff had made him tetraplegic. The immediate cause of death was cardiac arrest which according to the evidence as accepted by the court, was caused by the tetraplegic condition. The court, therefore, held that the death was caused by the personal injuries suffered in the swimming pool and the cause of action did not abate and could be continued by the legal representatives. It is submitted that in the present case, that *proximate cause* exists between the deaths that occurred and the lack of oxygen. It was the immediate disruption of the oxygen supply, which caused the overnight deaths of 8 persons. Therefore, any argument which disputes the proximity on the grounds of pre-existing medical conditions and/or the severity of Covid-19 symptoms, should not be maintained

2.2.3. Damages are made out as a consequence of the disruption of oxygen.

In *Cartlege v E Jopling & Sons Ltd*²⁴, the court established that it is not the act but its consequences that establish tortious liability. It is submitted that the subsequent result of the omission of supply

¹⁹ ¶ 15 moot proposition

²⁰ John Murphy and Margaret Brazier *Street on Torts* (13th edn, OUP Oxford)

²¹ *ibid*

²² ¶ 18 moot proposition

²³ *Klaus Mittelbachert v The East India Hotels Ltd* AIR [1997] Delhi 201

²⁴ *Cartlege v E Jopling & Sons Ltd* [1963] AC 758

of oxygen by the Respondent, led to the death of eight persons on July 8th, 2021. Thus, from the act of omission, i.e the disrupted supply of oxygen, on part of the Respondent, the criteria for actual damages under a suit of negligence is fulfilled.

3. UoI is vicariously liable for the negligence of HealthONE.

It is submitted that the Union of Indus (hereafter, UoI) is vicariously liable for the medical negligence of HealthONE as the two essential conditions required to make the UoI vicariously liable for the medical negligence on the part of HealthONE are present. Firstly, an employer-employee relationship exists between the Union of Indus and HealthONE, i.e., a contract of service exists between them [3.1]. Secondly, the negligent act was committed in the scope of employment [3.2]. Thirdly, medical care is not a sovereign function of the State [3.3].

3.1 HealthONE falls under the category of ‘employee’, i.e., a contract of service exists between HealthONE and the state.

In *Cassidy v Ministry of Health*²⁵, Lord Denning applied the integration test to infer vicarious liability of the Hospital authorities by answering whether a doctor working within the NHS is an employee of the Health Authority. Here, Lord Denning reiterates, “*The reason why the employers are liable in such cases is not because they can control the way in which the work is done – they often have not sufficient knowledge to do so – but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct, the power of dismissal.*”²⁶ In *Stevenson, Jordan & Harrison Ltd v MacDonald and Evans*, the Court of Appeal again led by Lord Denning clarified that under a contract of service, the work carried out by an employee forms an integral part of the business, unlike a contract for services wherein the work carried out by an independent contractor is merely ancillary to the business and is not a sine qua non of the business.²⁷ The Covid Recovery Facility (hereafter, CRF) was created to provide medical services to those suffering from COVID-19, and the UoI delegated the task of ensuring an adequate supply of essential medical requirements like medicines, equipment, sanitisers, oxygen, etc.²⁸ to HealthONE, thereby making it an integral functioning wing of the CRF. The very purpose of creating the CRF cannot be fulfilled without the supply of medical requirements by HealthONE. It is therefore submitted that HealthONE falls under the category of ‘employee’.

²⁵ *Cassidy v Ministry of Health* [1951] 2 KB 343.

²⁶ *Id*

²⁷ *Stevenson, Jordan Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101.

²⁸ ¶12 Moot Proposition

However, merely for the sake of argument (*in arguendo*), even if it is considered an ‘independent contractor’, the UoI will be vicariously liable, as was reiterated in *Santa Garg v Director National Heart Institute*²⁹ that irrespective of the men employed under a contract of service or contract for service, the performance of duty (here, supply of oxygen amongst other medical requirements) that the authority (here, UoI) owes, cannot be delegated with absolute immunity from liability arising from default on the part of employees or independent contractors or their improper performance. Moreover, supply of oxygen to the public is a critical activity which affects the public, especially during the pandemic. Hence, this is a non-delegable duty of the government to positively and affirmatively protect the public.³⁰ So, despite delegation, the duty to supply adequate oxygen remains with the government.

3.2 The negligent act of not maintaining adequate oxygen supply by HealthONE comes under the scope of employment.

It is submitted that the negligent act of not maintaining an adequate oxygen supply by HealthONE comes within the scope of employment, which is conspicuous from the duties that HealthONE was delegated to carry out, one of which was to maintain an adequate supply of oxygen. In *Central Insurance Co Ltd v Northern Ireland Road Transport Board*, the negligent act of lighting a cigarette with a lit match in a petrol station and throwing it on the floor by a petrol lorry driver, thereby leading to an explosion and fire, was held to be within the course and scope of employment as this act was done when he was carrying out his authorised duty of delivering petrol at the gas station. In the present case scenario, maintaining an adequate supply of oxygen at all times amongst other medical requirements falls clearly within the scope of what HealthONE was employed to do.³¹ An unauthorised method of doing an authorised act does not render the act beyond the scope of employment.³² The test of determining the scope of employment was also explained comprehensively in *Ruddiman & Co v Smith* wherein it was held that unless the circumstances and time period in which the default happened are ‘unreasonably disconnected’ from the authorised period of work, the default falls within the scope of employment.³³ In the present case scenario, it was evident from the studies carried out by the researchers and virologists that even mildly symptomatic cases could require oxygen support. They also explicitly advised prioritising the

²⁹ *Santa Garg v Director National Heart Institute* Civil Appeal No. 4024 Of 2003

³⁰ *Woodland v Essex County Council* [2014] AC 537 at [6]-[7]

³¹ *Central Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509.

³² *London County Council v Cattermoles (Garages) Ltd* [1953] 1 WLR 997.

³³ *Ruddiman & Co v Smith* [1889] 60 LT 708

oxygen supply³⁴, so not maintaining adequate oxygen supply in such unprecedented times is reflective of negligence on the part of HealthONE concerning the duty assigned, thereby bringing this act within the scope of employment. Therefore, it is submitted that the negligent act of not maintaining adequate oxygen supply by HealthONE comes within the scope of employment.

3.3 Medical care is not a sovereign function of the State.

In the *State of Rajasthan v Mst. Vidhyawati and Anr*³⁵, Hon'ble Supreme Court observed that the State is vicariously liable for the tortious acts of its servants or agents which are not committed in the exercise of its sovereign functions. The Supreme Court in *Achutrao Haribhau Khodwa v State of Maharashtra And Ors*³⁶ while overruling the judgment of the High Court makes it clear that the high court has erred in arriving at conclusion that maintaining and running a hospital was an exercise of the state's sovereign function.³⁷ Disapproving this line of thought, the Supreme Court pointed out that running a hospital is a welfare activity undertaken by the government, but is not an exclusive function or activity of the government so as to be classified as one which could be regarded as being sovereign power of the state.³⁸ The principle of law which emerges is that the Union of India and States are liable for damages occasioned by the negligence of employees serving/employed in the services of the Government Hospital (It is submitted CRF is a Government Hospital as it was set up by the government of UoI to counter the shortage of beds in hospitals during the pandemic and to provide for other essential medical requirements³⁹) as if law would render an ordinary employer liable. Like a private employer, the state is liable to pay compensation for negligence of its medical practitioners who have committed the wrong in the course of their employment as a public servant. Hence, for the negligence of HealthONE, the government should be accountable as during an emergency like Covid-19, scrutiny of the government is more important. It cannot shark away from the plight of hapless citizens. The government cannot be allowed to take shelter behind the shield of sovereign or regal functions⁴⁰ especially after delegating its medical care function to a private company like HealthONE.

³⁴ ¶14 Moot Proposition

³⁵ *The State of Rajasthan v Mst. Vidhyawati And Anr* AIR [1962] SC 933

³⁶ *Achutrao Haribhau Khodwa v State of Maharashtra And Ors* [1996] SCC (2)

³⁷ *See Kasturilal* AIR [1965] SC 1039

³⁸ *Achutrao Haribhau Khodwa v State of Maharashtra And Ors* [1996] SCC (2)

³⁹ ¶12 Moot Proposition

⁴⁰ *Indian Medical Association v V.P. Shantha & Ors.* [1995] 6 SCC 651

Thus, in *Marbury v Madison*, it was held, “the very essence of civil liability certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury”.⁴¹

4. UoI failed to perform its statutory duty under the Disaster Management Act, 2005 & Epidemic Diseases (Amendment) Ordinance, 2020 (hereinafter EDA).

4.1. Covid-19 falls within the ambit of the DMA and the EDA

Due to the outbreak of the pandemic, the Central Government brought to force the DMA which was promulgated in 2005 to manage and control any disaster. § 2(d) of the DMA defines “disaster” as “a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area”⁴². It is also submitted that Covid-19 is also a “disaster of severe magnitude” u/s. 13⁴³ of the DMA. It is therefore submitted that through its promulgation during the pandemic, the government accepts that Covid-19 falls within the definition of a “disaster” under the DMA. It is submitted that even the XVth Finance Commission’s Report which is prepared after Covid-19 Pandemic suggests that the Central Government has always considered Covid-19 as a “Disaster” as mentioned in § 2(d) of the DMA 2005.⁴⁴

Similarly, it is beyond argument that Covid-19 is a “dangerous epidemic disease” within the meaning of the EDA. This is also evident from the Central Government’s promulgation.

4.2. Mr.Thupden and the 7 other diseased persons in the Badlapur CRF are beneficiaries under the aforementioned statutes.

Covid-19 has been declared a pandemic. The word “pandemic” is used to define a far-reaching spread of contagious disease throughout a country or even across continents.⁴⁵The Dictionary of

⁴¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 [1803]

⁴² The Disaster Management Act, 2005, § 2(d)

⁴³ *ibid*, § 13

⁴⁴ XVth Finance Commission Report, pg: 225

⁴⁵ M. Honigsbaum [2009]. *Historical keyword Pandemic*, The Lancet [373]

Epidemiology puts it as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people.”⁴⁶ Thus, a pandemic like Covid-19 obviously affects every person in the whole of Indus. So, the DMA and the EDA, promulgated to counter such a disaster or dangerous disease obviously seeks to include within its ambit all the people of Indus and more so, those affected by the pandemic. That the later population has been contemplated by the DMA is evident from reading Ss. 24 & 34 which mentions : “For the purpose of assisting, protecting or providing relief to the community, in response to any threatening disaster situation or disaster”⁴⁷ and “For the purpose of, assisting and protecting the community affected by disaster or providing relief to such community...”⁴⁸ Hence, the legislation clearly seeks to protect not just the people of the whole country but also those affected by the disaster *here* the Covid-19 pandemic. The EDA seeks to “provide for the better prevention of the spread of dangerous epidemic disease” which means that it contemplates to contain the spread of ‘dangerous epidemic’ in the country and therefore, brings in the people of the whole country under its ambit.⁴⁹

4.3. The UoI owed a duty to the deceased under the Constitution in general and under the aforementioned statutes in particular.

As Lord Wright put it, “*If there is a breach of a statutory duty, it may be presumed that there is negligence. In the case of a common law duty, the duty itself has to be established before its violation is proved giving rise to a claim for damages.*”⁵⁰ Hence, the following arguments are humbly presented before the Hon’ble Court in this regard to present that UoI is mandated by the Constitution to ensure proper healthcare (3.3.1). The Union is mandated by the DMA to contain the pandemic effectively (3.3.2). The EDA obligates the Central Government of Indus to manage the pandemic expeditiously (3.3.3).⁵¹

⁴⁶ S.S. Harris [2000] *A Dictionary of Epidemiology* (4th ed)

⁴⁷ The Disaster Management Act, 2005, § 34

⁴⁸ The Disaster Management Act, 2005, § 24

⁴⁹ GP Singh: *Principles of Statutory Interpretation (also including General Clauses Act, 1897 with Notes)* (14th ed, LexisNexis) and M P Jain & S N Jain: *Principles of Administrative Law*, (9th ed, LexisNexis)

⁵⁰ [1949] AC 155

⁵¹ DD Basu: *Commentary on the Constitution of India* (9th ed, LexisNexis)

4.3.1. UoI is bound to provide adequate healthcare u/a 21 read with DPSPs.

The right to healthcare has been guaranteed to all people irrespective of race, religion and political belief, economic or social condition by the WHO.⁵² The Hon'ble SC and Hon'ble HCs of various states have reiterated that "giving priority to the health of its citizen, which not only makes one's life meaningful, improves one's efficiency, but in turn gives optimum output."⁵³ Right to Health has been an integral part of the fundamental right to life u/a. 21 of the Constitution. In *Maneka Gandhi v. Union of India*, the Hon'ble SC gave a new dimension to Art.21 and held that the right to live is not merely confined to physical existence but it includes within its ambit the right to live with human dignity.⁵⁴ The Hon'ble SC in *CESC Ltd. v. Subhash Chandra Bose*⁵⁵, relied on international instruments and concluded that the right to health is a fundamental right. The Hon'ble SC in *State Of Punjab & Ors vs Mohinder Singh Chawla* stated, "It is now settled law that right to health is an integral to right to life. Government has constitutional obligation to provide the health facilities."⁵⁶ Moreover, the government is further obligated specifically under, though non-justiciable, Ss 38, 42, 43 and 47 of the Constitution⁵⁷ to ensure effective realisation of the rights. "Hence the right of a citizen to live under Article 21 casts obligation on the State. This obligation is further reinforced under Article 47(*and aforementioned DPSPs*); it is for the State to secure health to its citizen as its primary duty."⁵⁸ Therefore, the UoI was under a mandatory duty to ensure that even Mr.Thupden and 7 others, citizens of Indus got adequate healthcare.

⁵² Constitution of the World Health Organization

⁵³ *State of Punjab v Ram Lubhaya Bagga* Civil Appeal No. 1111-1115 Of [1998]

⁵⁴ Human Rights in Healthcare – Indian Perspective [2011] 2 MLJ 80

⁵⁵ AIR [1992] SC 573, [585]

⁵⁶ *State Of Punjab v Mohinder Singh Chawla Etc* Civil Appeal No. 16979 Of 1996

⁵⁷ Constitution of India, Part IV

⁵⁸ *State of Punjab v. Ram Lubhaya Bagga* [1998] 1 SCR

4.3.2. DMA imposes a duty on the Union of Indus to manage disasters effectively for its citizens.

It is submitted that the DMA in its preamble claims to be, “An Act to provide for the effective management of disasters and for matters connected therewith or incidental thereto.”⁵⁹ Hence, the government of UoI is duty bound to all its citizens under the DMA, not only to draw up, monitor and implement disaster management plans, but also prevent and mitigate the effects of a disaster.⁶⁰ “Mitigation” is defined under § 2(i) in this regard.

4.3.2.a. The petitioners’ case falls under the category of ‘persons affected by disaster’ of the DMA

It is submitted that Mr.Thupden and 7 others who perished in the CRF, Badlapur on the 7th of July, 2021 were victims of Covid-19 disaster coupled with oxygen supply shortage.⁶¹ The NDMA working with other Central ministries also owes a duty to award a minimum standard of relief to ‘persons affected by disaster’⁶² u/s. 12 of the DMA. It is therefore submitted that Mr.Thupden and 7 others are part of the ‘persons affected by disaster’ under the said Act. They also belong to the ‘community affected by disaster’⁶³ u/s. 24 and u/s. 34 which the governments at all levels, headed by the Centre, aims to protect.

4.3.2.b. The moment there is a disaster, there is a duty cast upon the NDMA and other ministries to mitigate its effects

It is submitted that NDMA and other Central ministries are obligated to take prudent measures for mitigation of disaster and preparedness against future disasters.⁶⁴ The NDMA is obligated to lay down the “policies, plans and guidelines for disaster management for ensuring timely and effective response to disaster.”⁶⁵ Moreover, duty for mitigation of effects of disaster is bestowed on the

⁵⁹ Disaster Management Act, 2005, preamble

⁶⁰ *Swaraj Abhiyan – (I) v. Union of India* AIR [2016] SC 2929

⁶¹ *X (minors) v. Bedfordshire County Council* [1995] 3 All ER 353

⁶² Disaster Management Act § 12

⁶³ Disaster Management Act § 24; § 34

⁶⁴ Disaster Management Act § 36

⁶⁵ Disaster Management Act § 6

NDMA.⁶⁶ It is acknowledged that the NDMA cannot take charge of functions of all ministries of the UoI. It is therefore the duty of various Ministries under the Central Government to take various relief measures within their respective spheres for remedying the effects of the disaster.⁶⁷ As the nature of Covid-19 disaster is such that cooperation of every ministry is necessary⁶⁸ and hence, a duty is cast on each of them and the UoI government as a whole. It is submitted that though no amount of money will be enough to mitigate the loss of a family member but still the government as its social responsibility shall frame a national scheme for providing compensation to the families of those people who have died due to Covid-19 pandemic so that they all can live a dignified life and fulfil their basic necessities.

4.3.3. EDA makes the UoI duty bound to manage disasters.

It is submitted that the Central Government of Indus is bestowed with extraordinary measures to counter an epidemic disease. It also seeks to prescribe regulations with regard to the same. The recent 2020 amendment seeks to expand the powers of the Central government to prevent spread of such diseases.

4.4. The UoI is liable for breach of duty under the DMA and EDA

It is submitted that the UoI is liable for breach of duty bestowed by the DMA. Its liability is valid as DMA has a scheme for actions for breach of statutory duty (4.4.1). It failed to ensure adequate supply of oxygen (4.4.2). Its carelessness led to the outbreak of the 2nd wave of Covid-19(4.4.3).

4.4.1. Remedy is available for breach of duty under DMA.

The DMA provides for a scheme of action against the government for breach of duty (3.4.1.a). The loss suffered is direct and substantial (3.4.1.a)

4.4.1.a. A scheme for breach of duty is available in DMA and EDA.

In Lonrho Ltd. case, it was stated that “on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit of a particular class of individuals.”⁶⁹ It is submitted that the DMA allows the aggrieved party to sue the government for its breach of duty and other offences. A perusal of Chapter X of DMA shows that the Act lists elaborately, penalties for offences committed under the Act. Moreover, § 12 of the DMA mandatorily provides for the National Authority defined under § 3 of the said Act to recommend guidelines for the minimum standards of relief to be provided to persons affected by the disaster and it shall include, inter

⁶⁶ Disaster Management Act § 11; § 11(b)

⁶⁷ *Reepak Kansal v Union of India and ors* LNIND [2021] SC 198

⁶⁸ *ibid*

⁶⁹ *Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173

alia, ex gratia assistance on account of loss of life. It is submitted therefore that it is the statutory duty of the National Authority to provide in the guidelines for ex gratia assistance on account of loss of life who died due to Covid-19, which is declared as a “Notified Disaster”. Hence, in case of a breach, the government is bound to provide compensation under the DMA.

It is also submitted that although § 4 of EDA prohibits legal proceedings against acts done by persons in good faith, the government is liable. This is because, the government is not a “person” (4.4.1.a.i)

4.4.1.a.i. Government is not a “person”

The EDA does not define “person”. Hence the recourse of GCA, 1897 is taken. According to the GCA, a ‘person’ “shall include any company or association or body of individuals, whether incorporated or not”.⁷⁰ It is submitted therefore that the Government is not a “person” under § 4 of EDA and this section doesn’t apply to it.

4.4.1.b. § 12 provides for ex gratia compensation

It is submitted that the word “shall” occurring twice in § 12 of the Act puts a constitutional and statutory obligation on the part of the Central/State Government to recommend guidelines for providing ex gratia assistance which is in the nature of sustenance assistance.⁷¹ It is further submitted that the word “shall” occurred in § 12 of the DMA 2005 should be construed as “mandatory” and shall not be read as “may”, as contended on behalf of the Union of India. This is because when the language used in the section/provision is plain and unambiguous, no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable.⁷² Hence, “shall” should be read as “shall” only. It is submitted that if the word “shall” used in § 12 of the DMA 2005 is read as “may”, as sought to be canvassed on behalf of the Union of India⁷³, the concept of “situation interpretation” evolved would negate the very object and purpose enshrined in § 12 of the DMA 2005 since the purpose is immediate sustenance assistance to the aggrieved family.⁷⁴

⁷⁰ General Clauses Act 1897, §.3 (42)

⁷¹ *Gaurav Kumar Bansal v Union of India* [2022] SCC OnLine SC 357

⁷² See *Bhavnagar University v Palitana Sugar Mill (P) Ltd.* [2003] 2 SCC 111 [25]-[26]

⁷³ *DLF Universal Limited v Director, Town and Country Planning Department, Haryana* [2010] 14 SCC 1 [13]

⁷⁴ *Shin-Etsu Chemical Co. Ltd. v Aksh Optifibre Limited*, [2005] 7 SCC 234 [85]

4.4.2. Government breached its duty to keep adequate supply of oxygen

Although the government engaged HealthONE for ensuring adequate supply of medical infrastructure including oxygen⁷⁵, it was its duty to see HealthONE getting prompt oxygen supply. It is submitted that when HealthONE approached the government for additional oxygen supply, it inordinately delayed the supply to the extent of indirectly depriving the whole of Badlapur of oxygen. This delay is unforgivable especially during a crisis when top researchers and virologists had advised the need for ensuring adequate supply of oxygen on priority.⁷⁶ It is submitted that the doctrine of *parens patriae* gets attracted. Lack of resources or other financial considerations resulting in denial of oxygen to a whole area leading to death of innocents cannot be a legitimate answer.⁷⁷ A reason for this delay might also be a lack of proper coordination between HealthONE and various departments of the government of UoI. Thus, it breaches § 35(a) of DMA. In *Municipal Corporation of Delhi, Delhi v. Association of Victims Of Uphaar Tragedy & Others*, the Hon'ble Supreme Court pointed out, "The key to successfully meeting the consequences of disasters is preparedness. There can be no complacency."⁷⁸ The government's complacency, it is submitted is what led to injury to the plaintiff.

4.4.3. Damage to the petitioners' is direct, substantially a result of Government's carelessness

It is submitted that the DMA despite posing a general duty on the government to mitigate disaster and protect those affected by the disaster (3.3.2), the loss caused to the petitioners is 'particular, direct and substantial damage'⁷⁹ and hence, actions will lie against the government. Government's breach of statutory duty and carelessness (3.4.2) led to the outbreak of the 2nd wave pandemic as the Health Ministry, without taking due care and caution announced relaxations of Covid restrictions.⁸⁰ This led to people losing their guard on the restrictions, hence rise in Covid cases⁸¹, thus increasing the demand for oxygen and hence the shortage and death of hapless innocent

⁷⁵ ¶ 14 moot Proposition

⁷⁶ *Ibid*

⁷⁷ *Charan Lal Sahu Etc. v Union Of India And Ors* 3 SCC 255 and *Reepak Kansal v Union of India and ors* LNIND [2021] SC 198

⁷⁸ *MCD v. Assn. of Victims of Uphaar Tragedy* [2005] 9 SCC 586

⁷⁹ *Lonrho Ltd v Shell Petroleum Co Ltd* (No. 2) [1982] AC 173

⁸⁰ ¶ 13 moot Proposition

⁸¹ *ibid*

petitioners' family members. Therefore, the petitioners are also entitled to ex-gratia compensation from the government apart from the compensation for breach of statutory duty.

THE PRAYER

Wherefore, in light of the issues raised, arguments advanced, and authorities cited, may this Hon'ble Court be pleased to:

- a) Hold HealthONE negligent for its inability to ensure adequate supply of oxygen in CRF, Badlapur thus causing the death of 8 innocents. Thus, award compensation thereof.
- b) Hold UoI vicariously liable for the negligence of HealthONE. Thus, award compensation thereof.
- c) Hold UoI liable for breach of statutory duty under the DMA and/or EDA. Thus, award compensation thereof by issuing writ of mandamus for directing the appropriate authority to perform its statutory duty/constitutional duty in future.

Award compensation of Rs. 10 crores due to the aforementioned offences committed by the Union of Indus and HealthONE.

AND/OR,

Pass any other order it may deem fit, in the interest of Justice, Equity and Good Conscience.

All of which is most humbly and respectfully submitted.

Sd/-

Counsel for the Plaintiff