

India – Liability Insurance – Two Developments

Digital Personal Data Protection Act & Codification of Torts

Two important developments have taken place in the recent past in our country which have a bearing on liability insurance – one in the domain of legislature and the other in the domain of judiciary.

1. The Digital Personal Data Protection Act, 2023

This is an Act to provide for the processing of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes and for matters connected therewith or incidental thereto.

The text of the Act can be accessed [here](#).

Copious amount of literature is available on the salient features of the Act in the public domain. Therefore, it is not discussed here. One of the areas of interest and concern is how this legislation would address the grievance of the person whose data is breached. Surprisingly, this area has been ignored by this legislation. This Act does not provide right to seek compensation under Chapter III (Rights and Duties of Data Principal). It does not provide for payment of compensation to data principals whose personal data has been breached, even though there was a recommendation (Recommendation no. 73) by the JPC for insertion of a new clause as under.

"62. (1) The aggrieved data principal referred to in section 32 may file a complaint to the Authority within such period and in such manner as may be specified by regulations.

(2) The data principal may seek compensation under section 65 by filing an application to the Authority in such form, manner and within such period as may be prescribed.

(3) The Authority may forward the complaint or application filed by the data principal to the Adjudicating Officer for adjudging such complaint or application, as the case may be."

This is a deviation from the Information Technology Act which allowed affected data principals to claim compensation from a body corporate which fails to implement reasonable security safeguards and as a consequence, have caused wrongful loss or gain. Not only the Act does not provide for compensation to be granted for data principals whose privacy has been violated and who have suffered a loss, but Section 43 A of the Information Technology Act 2000 Act which provided a remedy earlier to aggrieved persons to get compensation has also been deleted. Even assuming that the residuary penalty clause in the Act offers some relief, it would be very negligible.

“Residuary penalty. – Whoever contravenes any rules or regulations made under this Act, for the contravention of which no penalty has been separately provided, shall be liable to pay a compensation not exceeding twenty-five thousand rupees to the person affected by such contravention or a penalty not exceeding twenty-five thousand rupees.”

In light to the foregoing, for cyber insurance providers, under this legislation, penalties would be a matter of concern if they are covered and if they become admissible. For now, liability resulting from breach of digital personal data does not appear to pose any major challenge. Other exposures and consequences of breaches under other laws remain though.

2. Codification of Torts:

India suffers from tort deficit. Law of tort is not codified and is still in the process of development. With the result compensation to the affected party remains largely unclear and unpredictable in terms of time, process, and outcome.

The approach of Indian legislature to torts is summed very well by the following statement:

“Most of Dostoevsky's novels employ a nameless narrator. A person who observes in-depth but at the same time removed from the process. Sometimes he ends up becoming a part of the story he is telling while other times he does not. In India, the legislature's approach towards the development of tort law has adopted the same apathetic, removed attitude as that storyteller. And much like the storyteller it finds itself deeply involved and extricated in a predicament of its own making”¹

On an appeal to issue of direction for codification of torts, Hon'ble Supreme Court of India recently in **“Union of India & Others vs. K. Pushpavanam & Others”** stated as under:

“As far as the law of torts and liability thereunder of the State is concerned, the law regarding the liability of the State and individuals has been gradually evolved by Courts. Some aspects of it find place in statutes already in force. It is a debatable issue whether the law of torts and especially liabilities under the law of torts should be codified by a legislation. A writ court cannot direct the Government to consider introducing a particular bill before the House of Legislature within a time frame.”

“No Constitutional Court can issue a writ of mandamus to a legislature to enact a law on a particular subject in a particular manner. The Court may, at the highest, record its opinion or recommendation on the necessity of either amending the existing law or coming out with a new law.”

Judgement can be accessed [here](#).

In summary, codification of torts helps in development of liability insurance. It appears to be a long shot at the moment.

Those interested to get the big picture on liability insurance in India, may like to read the article “Liability Insurance in India – Challenges and Opportunities – Way Forward” [here](#).

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