Chapter-II

REVIEW OF LITERATURE
Tort is a broad church and many hymns, ancient and modern can be heard within it. It is one of the most ancient branches of law, which is still evolving by responding to changing social and economic conditions. Jurisprudentially it is intriguing because it demonstrates the sifting boundaries of judicial creativity. In the annals of legal literature pertaining to tort, negligence occupies pride of place. Negligence is a relatively recent action to achieve the status of an actionable tort in the long history of tort. The legal literature on the conception of negligence is rather sketchy, in the sense that independent theorizing in the subject is virtually absent. The available literature on the subject is restricted to merely discussing the obiter dicta(s) judgments pronounced by various Judges in different cases in various common law jurisdictions. Against this rather restrictive backdrop the research scholar has attempted to present the views of a cross section of the eminent authorities on the subject.

The starting point of negligence as an independent actionable tort is the decision of House of Lords in the landmark case “Donoghue v. Stevenson” in the year 1932. In the seventy five or so years since its inception as a distinct cause of action in Donoghue v Stevenson, negligence has developed to become the pre-eminent tort, eclipsing older actions such as trespass, nuisance and breach of statutory duty. This was purely for historical reasons. The early cases of this tort, as Winfield observes, dealt with appositive “acts” rather than “omissions”, or with “misfeasance” rather than “non-feasance”. Liability for omission started at the beginning of the nineteenth century. Thereafter tremendous growth in the field of science and technology brought human beings more into direct contact, abolition of distinction between direct and indirect injury, abolition of forms of action, rapid increase in the number of accidents and faster traffic were the main factors responsible for its development.

105 Harwood V -Principles of Tort Law; 4th Edn. Cavendish Publishing Ltd. London at P.V
106 [1932] AC562
Most of the academic writers on the subject unanimously agree with the definition of negligence provided by Aldrson B. in *Bylth v. Birmingham Water Works Co*\(^{108}\):

"It is the breach of a duty caused by omission to do something, which a reasonable man guided upon those principles, which ordinarily regulates the conduct of human affairs, would do, or doing something which a prudent and reasonable man wouldn’t do."

One of the earliest academic work on the subject has been that of Sir Frederick Pollock\(^{109}\), who in his treatise "*The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law*" has laid down a conceptualized perspective on Negligence. In his celebrated work, the learned Author has laid down the general conception of Negligence. The Author propounds a general rule that every one is bound to exercise due care towards his neighbours in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default.

While agreeing with the observations of Baron Alderson in *Bylth v. Birmingham Water Works Ltd*\(^{110}\), he states that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care. He further observed that negligence is the contrary of diligence, and no one describes diligence as a state of mind. In so far as the question of evidence is concerned, Pollock opined that in a claim of negligence proof of actual knowledge may be of great importance. He also observed that the standard of duty does not vary with individual ability. To emphasize his point of view he has referred to the observation of the Supreme Court of Massachusetts. Wherein it’s observed that:

"If a man’s conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his

\(^{108}\) (1856) 11 Exch 781, 784


\(^{110}\) (1856) 11 Exch 781, 784
personal equation or idiosyncracies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation”.

From the above, it is evident that according to Sir Frederick Pollock negligence is a conduct rather than any psychological event. The learned Author has further, in his celebrated work, analyzed the evidence required for a claim of negligence. He wrote that negligence a question of mixed fact and law, due care and caution, as we have seen, is the diligence of a reasonable man, and includes reasonable competence in cases where special competence is needful to ensure safety. Whether due care and caution have been used in a given case is, by the nature of things, a question of fact. But it is not a pure question of fact in the sense of being open as a matter of course and without limit. He has also laid down his conception pertaining to the “burden of proof” in a claim of negligence. According to him, where there is no contract between the parties, the burden of proof is on him who complains of negligence. He must not only show that he suffered harm in such a manner that it might be caused by the defendant’s negligence; he must show that it was so caused, and to do this he must prove facts inconsistent with due diligence on the part of the defendant.

The learned author also discussed auxiliary rules and presumptions pertaining to the concept of negligence and discussed the judicial attitude prevailed in United States in the matter.

The above work is the most celebrated traditional literature on the subject. Sir Fredrick Pollock, in his work, has laid down a theory of negligence, the jurisprudential perspective pertaining to evidences required in a negligence claim, conception of contributory negligence and intricacies of separation of law and fact in United States in a claim pertaining to negligence. He also supported Winfield’s perception of negligence i.e. it is contrary to diligence and not described diligence as a state of mind111.

Prof. Winfield in his Text Book of the *Law of Tort* has explained the essentials of negligence in the following words:

"Negligence as a tort is a breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff."

Oliver Wendell Holmes\textsuperscript{112}, another celebrated writer on the subject, proposes that tort law provides monetary compensation to redress a plaintiff's claim that the defendant injured her, interfered with her property, invaded her privacy, or invaded another legally protected interest. In some circumstances, where future harm is threatened, equitable relief, usually in the form of an injunction, may be available. While the circumstances that led to the harm might also support a criminal prosecution, claim for breach of contract, or other civil law complaint, the law of torts focuses on non-contractual rights and liabilities arising where no one promised to pay for the damages and without regard to whether the government could prosecute the actor for a crime.

Dan B. Dobbs\textsuperscript{113} thinks that "tort is a conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability." A tort is about redress or equitable relief to prevent or restrain injury.

However the major shift came after the pronouncement of the House of Lords in the famous *Donoghue v Stevenson*,\textsuperscript{114} where after the conception of negligence changed for good. When compared to the importance that the House of Lords attached to 'Donoghue" the decision, it received only moderate attention in the academic journals. Sir Frederick Pollock writing in the Law Quarterly Review praised the Scottish Lords of Appeal for cutting free from the supposed current of English authority\textsuperscript{115}. Professor Winfield wrote; 'it cannot be doubted that the decision meets the needs of the community'.\textsuperscript{116} It is remarkable that no writer at that time appeared to have appreciated the significance of the general principle of foreseeability propounded by Lord Atkin. In 1941 there were fears about the

\textsuperscript{112} Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).
\textsuperscript{114} [1932]AC562
\textsuperscript{115} The Snail in the Bottle, and Thereafter, 49 LQR 22.
\textsuperscript{116} 51 LQR 249.211.
implications of Lord Atkin's general principle. Landon\textsuperscript{117} was of the view that negligence was not actionable unless the duty to be careful exists. 'And the duty to be careful exists where the wisdom of our ancestor has deemed that it shall exist.' He thought that Lord Atkin could not have intended that the criterion of neighborly duty should be a universal one. In 1955, a leading text book, \textit{The Law of Torts}, by Street, at pages\textsuperscript{114} and\textsuperscript{115}, stated that normally a duty of care in negligence was found by referring the case to an appropriate category of liability. The writer said, 'If the Court wishes to deny a duty it will usually hold that it is not bound by the dictum of Lord Atkin, or else ignore it altogether, show that the alleged duty falls outside the existing categories, and stress the lack of precedent. Sometimes a reason of policy for denying the existence of a duty is expressly given. If the Court views the plaintiff's case favorably it may accept the dictum of Lord Atkin as binding and apply it directly, or, alternatively, apply some other general test of foreseeability'.

On the 25th anniversary of 'Donoghue' the following was written by R.F.V. Hueston in the \textit{Modern Law Review}\textsuperscript{118}:

The significance of the 'neighbour principle' has been over emphasised by both its supporters and its opponents. It was not intended to be, and cannot properly be treated as being, a general formula which will explain all conceivable cases of negligence. Even at a fairly high level of abstraction it needs considerable qualifications and reservations before it can be accepted. It is indeed a sign of the poverty of thought about the laws of torts in this country that the proposition should be called upon to bear a weight so manifestly greater than it could support.,

The reception in the Commonwealth was more perceptive than that shown in England. In the Canadian Bar Review\textsuperscript{119}, although written at Oxford, F. C. Uderhay said that 'Lord Atkin's judgment is at once stamped as perhaps the most impressive and certainly the most authoritative effort ever made to generalize the English law of negligence', and described the 'neighbour principle' as 'a guide to

\begin{footnotes}
\item[117] (1941) 57 LQR 183
\item[118] [1951] 20 MLR 1, 23
\item[119] F.C. Underhay, 10 Can Bar Rev 615.
\end{footnotes}
Judges where before there was none.' Fleming in 1953\textsuperscript{120} wrote an appreciation of the place of modern negligence in the legal order and he hailed the decision as the most creative factor in the modern law of tort liability. He stressed its dynamic qualities and forecast that it might prove the most disruptive force in the eventual break up of the conglomerate system of nominate torts. He saw the driving force of policy as being reflected in the concept of the 'neighbour principle', 'which gives expression to a strong contemporary postulate of justice which seeks to make liability commensurable with fault (except where this ideal yields to a supervening policy demanding near unqualified liability for activities fraught with exceptional danger). He also noted perceptively that the negligence liability was not so much concerned about fashioning patterns of human behaviour in advance than with the adjustment of losses which had occurred without adverting to their legal consequences.

Other prominent authors/writers on the subject like Nicholas J McBride & Rodrick Begshaw, Vivienne Harpwood etc. have all followed the path laid by the classicalists like Salmond, Pollock and Winfield etc. After analyzing the literature on the subject, especially in the Common Law Domain, the research scholar observes that negligence as a tort requires more than mere lack of care. A claimant who wishes to sue in negligence must show:

- that the defendant owed him a legal duty to take care;
- that there was a breach of this legal duty by the defendant; and
- that the breach caused him recoverable damage.

After centuries of glacial development in the English forms of action, negligence law in America began to take shape during the 1830s and 1840s as a general theory of liability for carelessly caused harm. Conveniently (if roughly) dated to Chief Judge Shaw's 1850 decision in Brown v. Kendall\textsuperscript{121}, negligence emerged as a distinct tort sometime during the middle of the nineteenth century\textsuperscript{122}. The essence of the tort was that a person should be subject to liability for carelessly causing harm to another\textsuperscript{123}. Also essential to negligence, evident from

\textsuperscript{120} J.G. Fleming, Remoteness and Duty: The Control Devices in Liability for Negligence (1953) XXXI 471 Can Bar Rev.
\textsuperscript{121} 60 Mass. (6 Cush.) 292 (1850).
\textsuperscript{122} Percy H. Winfield, The History of Negligence in the Law of Tort, 42 L.Q. REV. 184,195-96(1926)
\textsuperscript{123} James Henry Deering, The Law Of Negligence 1 (1886).
an early date, was the necessity of a causal connection between the defendant’s breach of duty and the plaintiff’s damage that was natural, probable, proximate and not too remote.\textsuperscript{124}

As early courts and commentators explored the developing tort of negligence, they increasingly divided it into its essential pieces—“elements”—centered on a defendant’s failure to exercise due care and the plaintiff’s proximately resulting harm.\textsuperscript{125} As negligence law proceeded to evolve, its elements were stated in a variety of ways, but most courts and commentators in time came to assert that it contains four elements. In perhaps its most conventional current iteration, negligence is formulated in terms of duty, breach, cause, and damage. Yet, courts and commentators continue to disagree on what the four elements should contain, on just how the various ideas recognized as essential to negligence claims should be stuffed into the four pigeonholes. Many courts frame the law of negligence within three elements—duty, breach, and proximately caused harm. And at least one court has reduced the More completely, two courts, some commentators and the Restatement (Third) of Torts\textsuperscript{126} attribute element status to five essential aspects of negligence, the standard four above plus proximate cause. This is because each of the five components is complex and conceptually distinct, and because all must coexist or a negligence claim will fail.

Disputes over how the elements of negligence should be formulated arise every generation or so when the American Law Institute “restates” the law of torts,\textsuperscript{127} which is what it is doing now. Normally, most courts and commentators have other (arguably more important) fish to fry and little interest in trifling with how one element or another should be conceived or phrased. Yet the outline of a tort structures how lawyers frame specific issues, which affects how scholars conceive and critique the law and how judges apply it to cases they decide. Thus,

\begin{itemize}
  \item Deering, Supra Note 3, § 1, At 27 Citing Francis Wharton’s \textit{Law Of Negligence}
  \item David G. Owen -\textit{The Five Elements Of Negligence-} Hofstra Law Review (2009)
  \item Supra As 177
\end{itemize}
how the components of negligence are formulated is important to an elemental understanding of the nature of this tort and how it properly should be applied.

David G. Owen dwelled upon the perceptional difference in the common law domain and non-common law jurisdictions like United States The author stated that the standard four-element account of negligence—as duty, breach, cause, and damage—misleadingly conflates two distinct ideas that too often are linked uncomfortably together under the umbrella term, “cause”: factual causation and proximate cause. The first of these two intertwined requirements of the negligence tort, “cause in fact,” concerns the question whether a cause-and-effect relationship between the defendant’s wrong and the plaintiff’s harm actually exists—the existence vel non of an actual, factual link between the defendant’s breach of duty and the plaintiff’s possibly resulting damage. The second issue, “proximate cause,” assumes the existence of actual causation and inquires into whether the relationship between the wrong and harm was sufficiently close—whether the causal link was proximate rather than remote. No doubt these two pleas reside together in the same pod, yet they remain two separate pleas.

He further stated that surely it is not wrong to group the requirements of negligence into two, or three, or four elements instead of five, for there is nothing absolute in how the elements should be numbered or defined. At an existential level, what is most important is not the number of elements but their content, how negligence law is best conceived. But at a level of practical understanding, how a tort is formulated is of real importance, for it clusters and defines the boundaries of the substantive ideas themselves. Negligence thus is most usefully stated as comprised of five, not four, elements: (1) duty, (2) breach, (3) cause in fact, (4) proximate cause, and (5) harm.

The stark contrast between of conceptual perspective of negligence is nowhere more pronounced than in the above monograph by the learned author David G. Owen, the Carolina Distinguished Professor of Law, University of South Carolina-USA. Today competing perspectives characterize the field of tort law.

While some law professors may view the subject as value-free and neutral, tort law remains inevitably contested and contestable socio-legal terrain. To consider how: (1) plaintiffs state a claim and defendants respond to those causes of action; (2) the tort litigation process determines the facts (the events that produced the injuries) and the law (the rules determining who should bear the loss); (3) different perspectives reflect value preferences supporting the plaintiff’s claim for legal redress and the defendant’s response; (4) identity categories, such as race, gender, and economic wealth, reverberate throughout the torts processes in the twenty-first century, litigators as well as academics need to understand a case from different and often competing perspectives.

In every historical era, tort perspectives reflect the dominant ideologies. The jurisprudence of legal formalism dominated early tort law. At early common law, a tort plaintiff would need to “show that he had sustained a physical contact on his person or property, due to the activity of another.” Legal formalism constrained early tort law; a plaintiff would be denied a cause of action simply because his or her injury could not fit into an “existing and recognized writ.” Writs were formalistic forms of action used to vindicate rights and remedies.

Morton J. Horwitz’s work on the history of tort law, wherein he has exposed the theme of underlying value choices, in the transformation of American Law. The legal realists of the 1920s and 1930s challenged formalistic assumptions by conducting empirical research and applying the social sciences to the law. Contemporary tort law is a pluralistic field with diverse perspectives on how to resolve an evolving and varied set of legal dilemmas. It was the economists, championed by the path-breaking work of Guido Calabresi and Richard Posner, who recast analysis of the tort system in economic efficiency.
terms. But, at least the adherents of optimal resource allocation and their antagonists from other “law and” perspectives labored within the same vineyards — namely, academia\textsuperscript{135}.

The torts casebook as traditionally conceived does not devote much attention to competing perspectives and academic commentary. Traditional casebooks, for example, do not address the way tort doctrines such as the reasonable man theory reflects patriarchal assumptions. All casebooks discuss legal remedies but few examine the gender injustice that results from caps on non economic damages. Every torts casebook examines risk/utility as a method of setting the standard of care in negligence, but few critically examine this doctrine from a law and economics perspective. Tort law represents more than a collection of causes of action; it also embodies ways of seeing the world.

Two competing perspectives in tort law are law and economics and corrective justice, which are “unfriendly camps.” Law and economics focuses on deterrence, paying little attention to justice, fairness, or distribution. In contrast, corrective justice focuses on justice issues avoiding questions of allocative efficiency, externalities, or the economic welfare of society.\textsuperscript{136} Scholars widely acknowledge the impact that the law and economics movement has had on the study of tort law.\textsuperscript{137} Though controversial, economics provides a useful heuristic framework to approach nearly every tort doctrine and defense.

Beginning in the 1970s, corrective justice theorists such as Jules Coleman,\textsuperscript{138} George Fletcher\textsuperscript{139}, and Ernest Weinrib\textsuperscript{140} began to examine liability rules from the perspective of fairness, allocation, or distribution of resources\textsuperscript{141}. While many scholars, lawyers, and judges employ the law and economics or

\textsuperscript{138} Jules L. Coleman, Readings in the Philosophy of Law, Published by Taylor & Francis,(1999)
\textsuperscript{139} George Fletcher. Fairness and Utility in Tort Theory. 85 Han. L. Rev (1972)
\textsuperscript{140} Ernest Joseph Weinrib, The Idea of Private Law, Published by Harvard University Press, pp. 237 (1995)
\textsuperscript{141} ibid
corrective justice views, critical race theory, feminist jurisprudence, pragmatism, and social justice also offer useful insights challenging the more dominant views.\textsuperscript{142} Goldberg explaining the interpretative, prescriptive and critique of five dominant tort theories: “compensation- deterrence theory, enterprise liability theory, economic deterrence theory, social justice theory, and individual justice theory”.

The research scholar introduces some of these theories and provides the perspective i.e. how the multiple perspectives may promote a better understanding of the policies underlying tort cases and theories, from American Legal System Perspective. Anita Bernstein views the law torts is infused with multi dimensional perspectives\textsuperscript{143}. Saul Levmore\textsuperscript{144}, examines and explains as to how law and economics, feminist theory, statistics, sociology and political theory can provide the modern lawyer with “tools with which to understand the materials at hand”\textsuperscript{145}.

The research scholar liberally borrows for the above named authorities and introduces six perspectives to explore how the plaintiff’s attorney as well as defense counsel would use competing tort law perspectives while reflecting upon a claim of negligence.

\textbf{Law and Economics: Concepts & Methods}: “The Law and Economics movement has established a strong beachhead in law and legal education because it provides a powerful tool for assessing the costs and benefits of a given legal rule or case outcome.”\textsuperscript{146} Tort law is largely about reducing the cost of accidents in the most efficient manner possible. “Standard textbooks in economics define the field as the study of resource allocation in the presence of scarcity. Laws affect resource allocation and help to determine what, how, and for whom.”\textsuperscript{147} Tort law determines who bears the burden of an injury and what forms of injury are

\textsuperscript{143} Anita Bernstein, Perspectives on a Torts Course, 43 J. LEGAL EDUC. 289 (1993).
\textsuperscript{144} Saul Levmore, Foundations Of Tort Law, Oxford University Press, (1994)
compensable. Kermit L. Hall\textsuperscript{148} states that the critical question of tort law is, "who would pay for the damages and on what basis — what legal standard — would their responsibility be based"). The twenty-first century tort lawyer needs to be able to make policy-based arguments considering competing perspectives. If one makes an argument before a judge with a law and economics perspective, one may need to evaluate the economic concepts/theories such as "Pareto Optimality" or "Kaldor-Hicks Efficiency". Pareto efficiency is an allocative decision that makes at least one individual better without making any other individual worse off. In contrast, the Kaldor-Hicks compensation principle would define an outcome as efficient if those made better off would compensate those made worse by a given allocative decision. Many economically based models have unrealistic assumptions such as "the parties have perfect information" and "there are no transaction costs." Another criticism is that efficiency leaves considerations of consumer protection, fairness, and distributive justice unaddressed or unduly minimized.

Economics provides an analytical framework to approach many tort law issues. "Tort reformers" use law and economics arguments such as specific cost-containment and efficiency to argue for caps on damages. Law and economics, an interdisciplinary field, applies economic theory to examine the formation as well as impact of tort law and tort damages. Public choice, neoclassical, and game theory are, in turn, competing approaches within law and economics.

However, the two most important forms for the study of tort law are positive (descriptive or "what is") economics or normative (prescriptive or "what should be") economics. Positivistic economics employs the vocabulary of the scientific method. A judge employing a positive economics perspective will ask what rule of tort law will induce the industry to undertake efficient precautions. Positive economics describes how legal rules influence behavior whereas normative economics prescribes changes that will increase the efficiency of legal rules or institutions.\textsuperscript{149} Discussing basic economic principles and applying the

\textsuperscript{148} Kermit L. Hall Ed. \textit{Tort Law In American History} (1987)

economic principles to legal problems law and economics scholars view that deterrence is the primary rationale for torts, easily outstripping corrective justice and compensation."\textsuperscript{150} Guido Calabresi's\textsuperscript{151} applied economic analysis to explain the functioning of specific and general deterrence to tort remedies. It is "axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents."

Specific deterrence assesses a price to a particular wrongful act whereas general deterrence fulfills the larger function of vindicating the broader societal interest by making wrongful acts more expensive and less attractive to potential wrongdoers. "The idea of punishment or retribution is that it is just for the defendant to suffer for his misconduct. The idea of deterrence is quite different. It is that a sufficient sum should be exacted from the defendant to make repetition of the misconduct unlikely."\textsuperscript{152} Personal injury verdicts send the deterrent signal "tort does not pay."\textsuperscript{153} Judge Guido Calabresi, formerly Yale Law School's Dean and latter a judge on the U.S. Court of Appeals for the Second Circuit, has been a prominent figure in law and economics. He broke new ground with his writing entitled "Some Thoughts on Risk Distribution and the Law of Torts", by applying economic principles to tort law\textsuperscript{154}. Law and economics has become the most influential paradigm of torts scholarship. Judge Calabresi would later expand on his 1961 article's economic approach to torts in another article\textsuperscript{155}, developing a framework for analyzing market deterrence on achieving accident law's primary function of reducing the cost of accidents. Calabresi argued that accident law can best be viewed as a social problem to be cured in the most efficient and optimum way. Calabresi argues that primary accident losses may be reduced where primary accident costs exceed prevention costs. Furthermore, loss-spreading arrangements reduce secondary losses. Calabresi and Hirschoff propose a search for the

\textsuperscript{150} Michelle M. Mello & Troyen Brennan, *Deterrence Of Medical Errors: Theory And Evidence For Malpractice Reform*, 80 Tex. L. Rev. 1595, 1603 (1995).
\textsuperscript{154} *Some Thoughts On Risk Distribution And The Law Of Torts*, 70 Yale L. J. 499 (1961)
cheapest cost-avoider as the sine qua non of strict products liability. For example, the manufacturer is usually in the best position to avoid losses in the research laboratory as opposed to the consumer marketplace. Law and economic scholars often view judge-made common law as an attempt to “bring about (economically) efficient results.”

Law and economics scholars who determine efficiency on the grounds of wealth maximization have influenced American tort scholars who now focus upon efficiencies, transactions costs, redistributive motives, and indeterminacies. The more liberal law and economics scholars go far beyond wealth maximization and economic efficiency in their analysis. Judge Calabresi incorporates his economic analysis in his judicial decision-making. Tort law’s capacity to efficiently punish and deter conduct through socially compensatory damages is another economics-based observation central to Calabresi’s theory of punitive damages. He reasoned that in many cases, “compensatory damages are . . . an inaccurate measure of the true harm caused by an activity.” Judge Calabresi contends that punitive damages in tort law play multiple roles including the enforcement of social norms through private attorney’s general, deterrence. Judge Calabresi takes issues with law and economics proponents who reduce complex tort rights and remedies to economic efficiency. Economists quickly embraced Ronald Coase’s theorem that the choice of a specific legal rule did not affect allocative efficiency. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently so to prevent many transactions that would be carried out in a world in which the pricing system worked without costs.

156 Guido Calabresi And Jon T. Hirshoff, Toward A Test For Strict Liability In Torts, 81 YALE L. J. 1055, 1060 (1972).
159 Cirilo, 216 F.3d At 244
Professor Coase received the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel in 1991 "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy."162 "The Coase Theorem is based on exchange. Exchange is a bargain. Bargaining is a game."163

Corrective Justice: Concepts & Methods: Corrective justice views the goal of tort law to be providing victims with the legal weapons necessary to right wrongs. Of course, tort remedies will seldom be able to restore the plaintiff to the pre-injury situation in the literal sense. While the circumstances that led to the harm might also support a criminal charge, a claim for breach of contract, or other complaint, the torts case focuses on rights and liabilities that arise although no one promised to pay for the damages and without regard to whether the government could prosecute the actor for a crime. Corrective justice theory is based on the simple and elegant idea that an injurer who wrongfully injures another must make the injured party whole. This idea of justice presupposes the Aristotelian idea of normative equilibrium. One party wrongfully injuring another disturbs this equilibrium. Corrective justice restores it.164 Aristotle’s distinction between voluntary and involuntary harm anticipates modern concepts of negligence165. Corrective justice is central to the jurisprudence underlying negligence. “For the defendant to be held liable, it is not enough that the defendant’s negligent act resulted in harm to the plaintiff. The harm has to be to an interest that has the status of a right, and the defendant’s action has to be wrongful with respect to that right.”166 Corrective justice posits a correlative relationship between the doer and sufferer of harm. The reason that the plaintiff is entitled to win a torts lawsuit is the same as the reason why the defendant should lose it. Vindicating the moral

166 Ernest Weinreb, Corrective Justice In A Nutshell, 52 U. TORONTO L.J. Id. At P 352 (2002).
basis of society through a just verdict is important, not increasing overall societal wealth through promoting economic efficiency.

Critical Race Theory: Concepts and Methods- A growing body of scholarship confirms that race matters when it comes to tort rights and remedies. Critical race theorists argue that the legal system cannot ignore the racial dynamics underlying many cases. Theorists ask practitioners and scholars to acknowledge that, even though national ideals aspire to equality, not all Americans receive equal treatment and opportunities. Furthermore, treating those situated differently in merely an equal manner can produce systematic injustice. Inter-sectionality, an analytical tool used by some critical race theorists and others concerned about equality, examines the ways that race, ethnic, economic, and educational factors interact to create and perpetuate oppression and postulates that that more than one axis of oppression may be operating in a given situation. The late Jerome Culp, a Black law professor, always introduced himself to his students as the “son of a poor coal miner.” Culp tells of his visit when in college to a white suburb where an elderly white woman “turned[ed] her back and assumed a ‘pseudo-fetal posture’ ” as Culp and his companion approached. “She saw us not as the well-dressed black college students that we were, but as mythic black revolutionaries.” Culp asks his class if it would have been as assault if he leaned over and whispered, “Boo.”. Culp “posed the hypothetical to alter the assumptions that we make about the relationships between people and the tradeoffs imposed by the law.” The story illustrates “how race influences the construction of law and legal doctrine” and that other rules limit Culp and require his self-censorship.

Tort law remedies against the perpetrators of hate crimes illustrate how the civil justice system can serve to supplement the criminal law. Morris Dees, Director of the Southern Poverty Law Center, and others have utilized civil lawsuits as a weapon against organizations that championed racial violence. In

168 Jerome Mecrista Culp, Jr., Autobiography And Legal Scholarship And Teaching: Finding The Me In The Legal Academy, 77 Va. L. Rev. 539, 539 (1991)
1988, racist thugs in Portland, Oregon beat an Ethiopian man to death with their firsts, a baseball bat, and steel-toed boots. The victim, an Avis shuttle bus driver, was inadvertently dropped off in front of his home just as a White Pride gathering was breaking up169. "A skinhead named Kenneth Mieske came up behind [the victim] with a baseball bat," striking him repeatedly so violently that his skull was split wide open170. Morris Dees represented the victim’s family and won a $12,475,000 verdict against Tom and John Metzger, the organizers and leaders of the White Aryan Resistance (WAR). WAR was assessed a multi-million dollar punitive damage award because it sent violent racists into the city for the explicit purpose of fomenting racial strife.” Plaintiff Verdict for $12,475,000,171 The Public Broadcasting Service documentary, Forgotten Fires, depicts the Klan as aiding and abetting a series of arson fires through inflammatory rhetoric, which falsely claimed that black churches were teaching their members how to be welfare cheats.172, In one of the church fire cases, a South Carolina jury ordered the Klan to pay $37.8 million for conspiring to burn down the Macedonia Baptist Church. The assets of the Klan and some of its leaders were seized and used, in part, to help rebuild the black church173. Criminal law can effectively target the direct perpetrator of violent racist acts but the organization that promotes racial hatred and encourages violent acts against minorities generally runs little risk of government prosecution. Tort victims and their lawyers play the role of “private attorneys general” by financing civil lawsuits that uncover and publicize patterns of systematic wrongdoing. Punitive damages are the classic remedy for the private attorney general because the claimant receives a bounty beyond the amount necessary for compensation as a reward for serving the public interest. The private attorney general plays a vital societal role when government enforcement agencies lack the will, expertise, or financial resources to police new social dangers.

171 Northwest Personal Injury Litigation Reports (Dec. 1990) at 1
172 PR Newswire (April 26, 1999) at 1
173 Brad Knickerbocker, Latest Tactic Against Hate Groups: Bankruptcy, Christian Science Monitor (Aug. 25, 2000) at 1
Tort law has long been a means of social control against oppressors. In the cases discussed above, the individual racists committing crimes were dealt with on the criminal side of law, but tort damages struck at the organizational roots of evil. Although tort law can be a weapon that can be mobilized to protect racial and cultural minorities, tort law has often fallen short of fulfilling this promise. The modern torts scholar and litigator need to consider the realities of race, class, and gender on tort recovery. Caps on non-economic damages, for example, will typically have a disparate impact on elderly black women who will find it difficult to find representation because they have low imputed earnings. Professor Camille Nelson employs traditional intentional tort doctrines such as assault, battery, and negligence based concepts such as the infliction of nervous shock to construct tort remedies for the mental and physical harms caused by racial abuse. She reconceptualises the victim of racial hatred as a “thin-skulled” or “egg-shell” claimant.

The English case, *Dulieu v. White & Sons*, first articulated the eggshell plaintiff doctrine. In *Dulieu*, the court observed: If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer’s claim for damages that he would have suffered less injury or no injury at all, if he had not had an unusually thin skull or an unusually weak heart. The traditional “eggshell plaintiff” rule requires the defendant to take the plaintiff as he finds him. In racial abuse cases, the hateful defendants must compensate the plaintiff for harm an ordinary person would not have suffered. The victims of racial hatred are especially vulnerable claimants because of the long history of racial violence in this country. Professor Nelson connects the “racial dots” in traditional tort law, extending the eggshell doctrine to the victims of racism. She reconceptualises the “leveler of a racial abuse and the orchestrator of racial conduct” as an intentional tortfeasor because they “intentionally inflict harm based upon race — this is usually calculated and premeditated behavior.” She contends that tort remedies for

175 *Dulieu v. White & Sons*, [1901] 2 K.B. 669,
176 Ibid at 679
cross burnings and other racial abuse may be predicated upon the special vulnerability of [intended] victims.

Critical race theory offers a great deal of promise to explain the differential injuries experienced by people of color and the often frustrating experiences they have trying to redress their injuries in the civil justice system. Race, as well as social class and gender, matters when it comes to jury selection as well as case selection. Juries undervalue tort claims if people of color are the victims. Insurance companies reduce their settlement offer if a person of color is the tort victim, according to the research and litigator’s experience of Frank McClellan: People of color usually exercise vigilance to detect and control the impact of racism when they know that white people will participate in decision-making that will affect their lives. Personal experience has demonstrated that race-based assumptions will conspicuously infect decision-making. Tort cases involving “personal” injuries or large money damages present significant risks to clients who are people of color. A substantial risk is that race will trump other considerations affecting the resolution of the dispute in jurisdictions where people of color represent a minority among the judicial decision makers. In the American society, race plays significant impacts on the case resolution; most tort cases are resolved through negotiations that occur outside of formal proceedings. In addition, tort principles and rules are value-packed. When one examines the informal process, one must conclude that DuBois’s description of the great American challenge of the twentieth century remains the great American challenge of the twenty-first century. That challenge is reflected in American tort system as “the problem of the color-line.” Modern tort lawyers must consider race because juries undervalue tort claims if people of color are the victims. McClellan calls for empirical research to study the role of race in deflating the value of tort verdicts and settlements for persons of colour.

179 Ibid. At 773
The best available empirical data supports the proposition that race impacts tort awards and settlements. A critical race theorist would be skeptical of the media’s portrayal of a tort system out of control. The narrative that a hapless grandmother caused her own injury and blamed a deep-pocket corporation reflects the pervasive ageism and sexism of American society. This portrayal of an unworthy plaintiff shares much common ground with the false stereotype of the black welfare mother driving a Cadillac. Similarly, critical race theorists would see parallels between the concept of Stella Liebeck as an irresponsible claimant and the false stereotype that black juries are overly sympathetic to plaintiffs. For people of color, the role of juries has peculiar equivocal significance. People of color are aware of the democratic symbolism of the jury as “preserv[ing] liberty by wresting “the law” from the experts.” People of color are also conscious, however, that the “firm rooting” of the jury in the American past did not include representation of women, blacks, or Indians, and that unrepresentative jury decisions have frequently underscored their marginalized status. Indeed the reprieve of no jury has been seen as an advantage for people of color: jury decision-making on more than one occasion, after all, has confirmed that the political majority devalues the worth of the lives and dignity of outsiders.

In fact, Stella Liebeck was a staunch Republican and the New Mexico jury was composed largely of white jurors. The jurors in Albuquerque, New Mexico tend to be more “conservative” and juries in southern New Mexico are “real, real hard.” A critical race theorist would ask the question of whether the hot coffee case would have ever been brought, and whether the white jury would have reached the same verdict, if the plaintiff had been an elderly black woman. Race remains an important factor guiding an attorney’s decision to file a suit. Perhaps the most important insight of a critical race perspective questions the continuing exclusion of blacks and other minorities from juries deciding tort cases.

182 Winthrop Quiqley, N.M. Juries Are Often Generous, ALBUQUERQUE (N.M.) JOURNAL (Feb. 21, 2001) At A1
The “tort reformer’s” concept of a “hell hole jurisdiction” reflects a race-based view since each of these supposed plaintiff-friendly jurisdictions have a large minority population. Perhaps it is not a coincidence that the McDonald’s verdict occurred in New Mexico. An empirical study found that that a mere increase of the Hispanic county poverty rate of 1 percentage point could raise tort awards as much as 7 percent.\(^{184}\) If the hypothesis of Helland and Tabarrok is correct, the McDonald’s hot coffee case could have resulted in a larger verdict if more poor Hispanics were included on the jury. The inter-sectionality of race and class play a role in plaintiff’s choice of venue. Significantly, a growing number of states place restrictions on plaintiffs’ choice of venue because of the perception that poor, minority juries are more generous in their judgments. The centrality of race in tort litigation and jury selection, as well as the tendency of conventional tort teachers to overlook this variable would be another critical race theory observation\(^{185}\). These factors probably compelled President George W. Bush to call for limitations on tort liability for medical malpractice and an end to frivolous lawsuits in his 2007 State of the Union Address.\(^{186}\) Indeed, President Bush called for tort reform in nearly every State of the Union Address of his administration and he believes introducing limitations on tort law is a high domestic priority\(^{187}\). Tort critics claim the overuse of tort remedies is responsible for declining U.S. competitiveness, excessive delays in developing new products, the withdrawal of useful pharmaceuticals and medical devices from the market, and high insurance rates. These “tort reformers” claim that defensive practices to avoid groundless litigation create a tort tax on all goods and services. In contrast, plaintiff’s lawyers believe they are protecting the public from careless or dangerous actors.

Critical Feminism: Concepts and Methods. Feminist theory criticizes the misogynistic view of women that characterizes society and advocates the
“radical notion” that women are people. Critical feminism makes gender a central focus of inquiry, asking “the woman question.” The “woman question” identifies and challenges the omission of women and their needs from the analysis of any societal issue. Critical feminism examines power relationships, making the political visible. The notion that “the personal is political” challenges the public and private dichotomy that characterizes liberal thought.

Traditional tort law has been openly patriarchal. Thomas Koenig and Michael Rustad observe that courts and legal academics have traditionally overlooked the degree to which tort law is gender-linked: Social scientists have documented the ways that gender discrimination and sex role socialization track women and men into separate, although overlapping, social and occupational spheres... Many scholars argue that by not taking full account of the manifold differences between males and females, law and the courts are deeply biased against women.\(^\text{189}\) The “perspective-less-ness” of the dominant views of tort law also overlooks the role of gender in tort rights and remedies.\(^\text{190}\) “This tendency in tort law to overlook or diminish a woman’s pecuniary loss is connected to the fact that the injuries from reproductive loss, sexual harassment, or assault seem more emotional than physical.”\(^\text{191}\) Contemporary women rely primarily upon tort remedies rather than government regulators to ensure the safety of medical products. Females benefit disproportionately from the liberalization of recovery for reproductive injury in the fields of medical malpractice and products liability. Lucinda Finley found “reproductive or sexual harm caused by drugs and medical devices [have] a disproportionate impact on women because far more drugs and devices have been devised to control women’s fertility or bodily functions associated with sex and childbearing than have been devised for men.”\(^\text{192}\) Over the past few decades, punitive damages have expanded from punishing intentional


\(^{189}\) Thomas Koenig & Michael Rustad, His And Her Tort Reform: Gender Injustice In Disguise, 70 WASH. L. REV. 1, 8 (1995).

\(^{190}\) Martha Chamallas, Civil Rights In Ordinary Torts Cases: Race, Gender And The Calculation Of Economic Loss, 38 LOY. L.A. L. REV. 1435 (2005)


\(^{192}\) Finley, Supra, 64 TENN. L. REV. At 855

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torts committed maliciously to controlling reckless product manufacturers and health care providers. Should it be relevant to a decision maker that only women use the product? Would it be relevant if most of the women using the product were poor and women of color?  

In recent years, some scholars have argued that assessing issues from a feminist perspective must be refined in some contexts to acknowledge differences in the experiences of women as a consequence of race and class. One author observes: The notion that there is a monolithic “women’s experience” that can be described independent of other facets of experience like race, class, and sexual orientation . . . [may be called] “gender essentialism.” . . . The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: “racism + sexism = straight black women’s experience,” or “racism + sexism + homophobia = black lesbian experience.” Thus, in an essentialist world, black women’s experience will always be forcibly fragmented before being subjected to analysis, as those who are “only interested in race” and those who are “only interested in gender” take their separate slices of our lives.

In the twenty-first century, torts scholars are beginning to understand and take into account the role of gender in tort litigation. Empirical research confirms that women as tort claimants receive smaller economic awards for similar injuries because they earn less than men do and spend fewer years in the workplace.

Tort reform’s capping of non-economic damages and punitive damages have a disparate negative impact on women’s recovery. Without the prospect of non-economic and punitive damages, many grievously injured women will be unable to convince an attorney to take their case. Consequently, from the

194 Angela P. Harris, Race And Essentialism In Feminist Legal Theory, 42 STAN. L. REV. 581, 588–89 (1990).
perspective of critical feminists and critical race theorists, tort reforms that propose limitations on punitive damages are gender and race injustice in disguise. A proposed federal tort reform capping non-economic damages at $250,000 imposes a regressive tort tax on judgments recovered by women, children, and the elderly. Professor Finley's study also illustrates the importance of non-economic damages for the elderly, who usually have no imputed earnings and relatively insignificant out-of-pocket expenses. Torts lawyers who will be representing or defending clients in tort litigation need to consider the impact of societal gender roles.

Think about the different views of work and family roles in the cases in this text. Many cases will involve the hidden injuries of race, class gender, and age. Consider whether a legislature adopting a given tort reform is devaluing an identity category by not considering the social reality of that category.

Pragmatism: Concepts and Methods: Pragmatism is a philosophical tradition based on the idea that every concept should be understood in terms of its practical effects. This idea means that every theory should be seen as relating to some particular practice and, more specifically, as a theory that generates implications for the reform of that practice. For example, as Catharine Wells explains: pragmatic theory of bridge building should begin by looking at actual practices of bridge construction. The examination of these practices is both descriptive and normative; it is not aimed simply at enumerating the methods of construction, but at determining which methods produce the "best" bridges. And the question — What is the best bridge? — cannot be answered in the abstract; we cannot give the same answer on the first day as we might give after a thousand years of bridge building. Theory and practice evolve together within a context of human purpose and activity; the practice informs the theory while the theory, in turn, informs the practice. Thus, the hallmark of a pragmatic method is its continual reevaluation of practices in the light of the norms that govern them and of the norms in the light of the practices they generate.

197 Ibid. at 1283.
From a pragmatic perspective, one of the difficulties with traditional legal theory is that it makes an absolute distinction between fact and value. "Thus, for example, it pits the realist 'is' against the formalist 'ought.' The pragmatist rejects this division and urges instead that every abstract conception should be understood in relation to its consequences for human activity." Applying this theory to judicial decision making, Wells contrasts "the notion of impersonal decision making — the kind that a computer might do — and situated decision making — the kind that requires a real human agency. . .J udges are not computers [and] they are not entirely free from legal constraint." Thus, legal judgments occupy a middle ground. In concluding that legal decision making is inherently situated, Wells urges judges to attend to their situation, recognizing the impossibility of being an impersonal agent in the decision-making process, while striving to be fair minded. "Fairness requires that we consider all points of view and this, in turn, requires that we open our minds and our hearts to the viewpoints of others." 

Jean Love, a well-known torts scholar, sums up the promise of pragmatism as follows: "pragmatism offers both the hope of a constructive way of thinking about society's problems and the hope of a common language." She explains: By "common" language I mean two things. First, I mean "common" in the sense of "ordinary." Pragmatism encourages us to speak in the language of common ordinary people, rather than in the language of metaphysical philosophers. Second, I mean "common" in the sense of "shared." Pragmatism helps us to talk across our differences by encouraging us to pay attention to context. In one situation, I may play the role of the oppressed — a woman among men, for example. In another situation, I may play the role of the oppressor — a white woman in a predominantly white society, for example.
Social Justice: Concepts and Methods: Social justice theorists start from the proposition that tort law remains contested terrain precisely because it is public policy in disguise. Tort law not only alleviates "the plight of the injured" but it also furthers the "cause of social justice." John C. P. Goldberg coined the term "social justice theory" to refer to the work of theorists who view torts as a means of social control over powerful corporate interests.

Goldberg states: Social justice theorists conceive of tort law as a device for rectifying imbalances in political power. Specifically, they posit that tort concepts correct for pathologies of interest-group politics. Moneyed interests, particularly corporations, block or distort legislation and capture regulatory agencies designed to monitor and control them. As a result, these interests are able to pursue the self-interest of their executives and shareholders at the expense of the public by producing dangerous products and hiding critical information about their dangerousness. By arming citizens with the power to sue corporations for misconduct outside of the legislative and regulatory process, tort law serves to correct this imbalance of power. In particular, it permits independent judges and especially juries to hold corporate America and other powerful actors accountable.

Thus, negligence actions by gunshot victims and public nuisance actions by cities that bear the cost of treating those victims make up for the absence of effective gun control. Likewise, product liability suits restrain pharmaceutical companies from profiteering on dangerous and ineffective drugs. The social justice conception of torts is most closely associated in practice with Ralph Nader. Scholars who have developed this conception further include Richard Abel, Anita Bernstein, Carl Bogus, Thomas Koenig, and Michael Rustad. The social justice school, as its name suggests, treats torts as a form of social control. It seeks to control corporate misconduct by generating penalties that send a message of

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203 Leon Green, Tort Law, Public Law In Disguise, 38 TEX L. REV. 257, 269 (1959–60)
deterrence to corporate America. In tort, the citizen can both vindicate his or her own claim to rights against the powerful and act as a private attorney general policing the conduct of these actors. \(^{206}\) "Social justice theory emphasizes the pivotal role played by damage awards — particularly punitive damage awards — in restraining self-interested corporate conduct. Only punitive damages, social justice theory supposes, can establish that ‘tort does not pay’ by hitting the rich and powerful in the bank account." \(^{207}\)

The theory of social justice may be seen in tort litigation where private plaintiffs uncovered “smoking gun” documents that revealed that there was an industry-wide conspiracy of asbestos manufacturers to conceal the deadly consequences of unprotected exposure to asbestos dust that destroyed the health of hundreds of thousands of American workers. Social justice theorists stress the importance of private attorney generals because a private citizen “can both vindicate his or her own claim to rights against the powerful and act as a private attorney general policing the conduct of these actors.” Another insight of the social justice theorists is that torts may be instrumental in bringing about social justice because of the “evolving and open-ended nature of tort causes of action, a quality that permits tort plaintiffs to bring to light, and seek remedies for, new forms of domination and exploitation as they emerge.”

*Johns-Manville Corporation*, for example, suppressed publications that would have warned the medical community of the risks of asbestosis \(^{208}\). The company had a policy of not informing employees that x-rays taken by company doctors revealed clear evidence of asbestosis. \(^{209}\) Johns-Manville executives claimed that their failure to warn workers was motivated by concern for employees so they “can live and work in peace and the company benefit by their many years of experience.” \(^{210}\) Private attorneys general litigating their claims, rather than public regulators, brought the asbestos problem to light.

\(^{207}\) Goldberg, Supra, At 561.
\(^{208}\) *Janssens v. Johns-Manville Co.*, 463 So. 2d 242, 249 (Fla. 1984)
\(^{209}\) Ibid, at 263.
\(^{210}\) Ibid. at 250.
It is evident from the above that while the authorities on the subject, in the common law domain, played a catching game to develop a universal theory of negligence, in the other jurisdictions like America and Canada, theorizing of the concept of negligence is more universal in nature as well as contemporary in content. It took into account the changes in society due to the tremendous growth in science and technology and its impact on the traditional "neighbour theory" as espoused by the Common Law Scholars. The five-element approach permits the division of the conventional, two-pronged element of "causation" (or "proximate causation") into its separate components, cause in fact and proximate cause, in recognition of the distinctness and complexity of issues embraced by each. Cause in fact requires a determination of cause and effect, which involves a sometimes rigorous comparison of physical, historical facts in the actual universe with those in a hypothetical universe from which the defendant’s negligence is removed. Actual causation thus logically precedes and usually has little to do with the proximate cause inquiry into the array of fairness and justice considerations bearing on the propriety of imposing negligence responsibility on a person whose wrongdoing actually, though remotely, caused the plaintiff’s harm.

However, the negligence per se doctrine did not survive unscathed either. There has been influential voices expressing concerns about the 'inflexible application' of the criminal standard and its particularly concentrates on criticisms that a defendant in a civil case cannot avail himself of the technical defenses or protection existing in the criminal law; that the consequences of being held liable in tort can be much greater than the criminal penalty imposed; and that criminal and civil liability have very different purposes.

The research scholar has also examined works by prominent India authors like Shri C. Kameshwara Rao, Dr. Gourdas Chakrabarti, Shri Ramaswamy Iyer and Shri Ratan Lal & Dhiraj Lal. However these prominent authors have

214 Lal, Ratan & Dhirej: Law Of Torts - 2004 Edn
followed the English Authors and have not laid down any independent theory pertaining to the law of negligence.

Major technological advances create new forms of injury that require updating the law of torts. In the 1960s, products liability evolved to address the social problems caused by marketing dangerously defective products. Today, tort law is evolving to address new injuries from the vulnerabilities of Internet networks. Society faces new threats related to cyber security, software, and the mutual vulnerabilities of the networked world. Software vulnerabilities negligently enable cyber crimes such as the misappropriation of trade secrets, computer crimes and abuse, and economic espionage. Creative lawyers apply ancient personal property torts, such as trespass to chattels, to counter threats such as computer viruses and the disruption of massive amounts of e-mail spam. Old torts counter new Internet-related threats such as the enablement of cyber crime, inadequate cyber security, online privacy, and identity theft. In the light of the above, the research scholar observes that the whole gamut of available literature on the subject, suffers from inadequacies and independent theorizing in the concept is virtually absent.

Against afore-mentioned background the research scholar proposes the following issues/questions to be examined in the course of this work:

1) Negligence-civil and criminal- conceptually divergent from each other, but theoretically; both subjective and objective- merge together in the premises of liability and compensation.

2) The construction of negligence- statutory, professional, contributory and composite- demands different legal parameters and creates confusion, while interpretation.


3) The theoretical distinctions between sovereign and non-sovereign functions do exist but the judicial attitude, especially in India favors the demise of such academic distinction.


5) Proximity of acts between parties plays a significant role in determining the negligence and subsequent liabilities thereof in tort.

6) “Social security”, “Public policy”, and “Capacity to pay” are playing a dominating role in the determination of negligence by the judiciary in India.

7) The general defenses available for negligence in the law of torts are surely moving towards legal obscurity and liability-strict and absolute-is increasingly becoming the legal yardstick.

8) Post economic liberalization, with respect to the dimension and extent of the civil law of negligence, the judiciary in India has assimilated in itself the changes in the conceptual perspective that took place not only in the Common law jurisdictions like England and Australia but also in United States and Canada. This facilitates the scope for a new perspective by Indian judiciary- justice and compensation is of primacy, not technicalities of procedural laws and rules, which are being habitually abused to slight the quest of justice.

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