Chapter - III

METHOD OF STUDY
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Progression of human civilization is characterized by the lateral expansion of human endeavor to master the complexities of the secrets of nature. Human being’s role, at the start of the civilization was limited to the simple task of hunting for food and procreation. Gradually it changed from this basic functional model to contemporary form of society, where governance, science, and technology played a defining role in shaping human behaviour. Each and every human being in a given society is related to each other in one form or another. This inter-dependence is the result of the basic human quest to secure the most for him. This aspect of human psyche often instigates a human being to trample upon the just and legitimate needs of fellow human beings. This aspect of human behaviour probably shaped the formulation of what are commonly known as “State” and “Government”. While the purpose of a State is to secure the welfare of its citizens, the basic functioning of the Government regulates human conduct through law, which is not a product of human will, but is a common conviction. Socio-political history of the nineteenth century shaped the World, as we see it today. Torn between conflicts, which were not essentially limited to battles fought between soldiers on the battle fields across the world, conflicts between various other institutions of society like church and political power in the Europe, Occupationists and natives of the occupied countries for independence across Asia and Africa, Intellectual battles between various schools of thoughts like liberals, fascists, communists, democrats have had a profound impact on the shape of the world order and the position of individuals therein. In the basis of ideological moorings, nations were formed and societies took shape therein. The position of individuals in that given society also shaped the legal system of that society. While State become the all powerful for communists, fascists; Individuals become the central theme of democrats and liberals. Simultaneously huge strides made by man in the field of science and technology, led to the growth of industrialized
society. At the beginning of twentieth century, despite odd aberrations here and there, barring democracy, all other forms of government or political systems lost their relevance in the world. Individual, being the edifice upon which a democracy rests, the welfare of individual formulated the basis of the legal system. Preservation of an individual's limb and body, as well as his freedom, liberty became the central focus of the legal system.

However as stated earlier, the economic dynamics of the modern industrialized society led to impediments in the wholesome enjoyment of the basic freedom as well as residual rights and liberties, as envisaged by the legal system of a democratic or a welfare state. Necessity is the essence of change. No system can survive by remaining static. In order to secure every individual his basic freedom as well as residual rights and liberties, legal philosophy gave shape to institutional mechanisms, whose basic objectives are to secure the enjoyment of individual his basic freedom as well as residual rights and liberties, irrespective of his economic status, social standing and corresponding power. Law functionally assumed a dichotomized shape in terms of Civil and Criminal law. While Civil law regulates legal private rights, Criminal law regulates conducts, which the State generally regards as an antithesis to the common good of the society.

On the above logical basis, it is implicit that the State expects an individual to perform or abstain from performing an act in a given environment. However such action should be in conformity with normal human conduct, which a logical and prudent human being would have undertaken or abstained from undertaking in that given environment. This conduct or "lack of it" is commonly termed in legal parlance as "negligence". The term "negligence" used in this context assumes a compendious meaning. "Negligence" per se: conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without any
hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes. 217

The review of the literature interposes some of the interesting issues. It is true that theories do not guide us in our actions. However, it expands our horizons, helps us to see alternative constructions of the phenomenon of tort law, and thus leaves us with an enriched sense of the possible. Tort law is a multifaceted enterprise, and each theory highlights factors that matters to tort law. It presumed that theory not only expands lawyers’ horizons, but can and should inform lawyerly arguments about particular problems in tort law. It simply suggests that different theoretical insights ought to be brought to bear differently in different contexts.

It might be possible simply to treat each tort case as sui generis, but every lawyer and academic who has occasion to think about such cases is invited to invoke ideas or assumptions as to what, more generally, can or should be said about the subject. Legal theories, no less than political theories, are resistant to falsification: in the face of seemingly disconfirming data, auxiliary hypotheses can be invoked, assumptions modified. To some, this feature of theorizing provides grounds for condemning the whole enterprise of theorizing. More temperately, one might simply doubt that theoretical disputes will find their final resolution in observation.

In law, theory is important not merely as an eye opener: it is also an important part of practical judgment and decision-making. Perhaps we can aspire to no more than a never-ending “conversation” among jurists who are self consciously aware of the positions they articulate, but that is a somewhat modest ambition for so practical a discipline as law.

217 Black’s Law Dictionary.
Various tort theories often entail opposing interpretations and prescriptions. What is needed then, and what we do not find in twentieth century tort theory, is a theory that really is grounded in the law of tort—one that makes as much sense as can be made of the practices and principles of tort law as we find it. Of the theories surveyed, corrective justice theory comes closest to that goal. Unfortunately, it operates at such a high level of abstraction as to offer not so much a theory of tort, as a theory of the structure or form of tort. Even then it has not yet offered a fully adequate account of that structure.

The foregoing review suggests certain methodological guidelines from which theorists of tort might benefit as they go about the business of theorizing the “new negligence” and, more generally, the new tort law of this century. These are not offered as ineluctable or self-evident postulates for clear thinking about tort. Rather, they are suggested as practical measures that might help improve academic discourse in this area:

• Distrust disavowals of theory; no influential tort scholar of the last century could legitimately claim to have eschewed theory in favor of what is ‘merely’ practical, useful, pragmatic, or realistic. There is no reason to think the scholarship of the next century will differ in this regard.

• Distinguish theories that aim to interpret tort law from those that offer prescriptive accounts, whether hypothetical or categorical. If the issue concerns interpretation, assess what kind of interpretive claims are being made: historical, conceptual, functional, or other.

• Resist the temptation to characterize disputes between tort theories as a fight between theories that posit a purpose or function for tort law and theories that do not. Some theories are entirely instrumental, whereas other leave room for concepts that are not reducible in any simply way to functional considerations. Still, all the theories presented here posit a pragmatic point to tort law. None, for example, explain or defend tort in terms of its beauty or elegance.
Distinguish between a theory's account of the 'purpose(s)' or aim(s) of tort law, on the one hand, and its incidental effects on the other. A corrective justice theorist, for example, might suppose that 'point' of tort law is to do justice between the parties, yet still acknowledge that the effect(s) of tort law sometimes include the deterrence of misconduct or the compensation of needy victims.

Recognize that the domain of tort theory is not exhausted by a two-sided fight between economic theories and justice-based theories. The last century witnessed, as we have seen, at least a five-way battle and, as noted above, I have not tried to be comprehensive in my catalogue of tort theories. Moreover, even those theories identified as "economic" and "justice" theories have varied widely in the type of claims they make.

These suggestions will possibly help the scholars avoid some of the confusions of twentieth-century tort theory, and promote more charitable understandings of the different positions within this corner of the academy. Perhaps they might even lead to theoretical advance. They ought to be taken, however, in conjunction with a different sort of caution, one that consists not of a plea for methodological improvement but instead suggests a shift in perspective.

As indicated in the Introduction, the project of twentieth century tort theory was launched by the industrial revolution, and has for the most part continued to bear that birthmark. To Holmes and those who followed in his footsteps, tort law was the law of mechanized accidents. On their view, the classical account, born of a pre-industrial era, had nothing to say on the pressing policy question of whether these accidents would be governed by a standard of strict liability or negligence. Even corrective justice theorists, who in some ways are more sympathetic to the classical account, have drunk deeply from the Holmesian well. Thus, they, too, have tended to focus on the law of accidents and the question of strict liability versus negligence.
Prediction is a hazardous business, particularly when undertaken by a law research scholar. Still, one may speculate that, in the near term, mechanized accidents will cease to provide the focal point of tort. Even in the heartland of modern accident law – products liability – one already sees a relative increase in claims grounded in failure to warn and inform, as well as misrepresentation. These are not the mechanical mangling around which Holmes organized tort theory. Moreover, at least as alleged, they involve culpable acts rather than inevitable accidents nor difficult cost-benefit judgments about design safety. In short, the post-industrial revolution may soon pose to the Holmesian project the same risk of obsolescence that the industrial revolution posed to the classical account.

Thus, it is quite possible that tort theorists soon will be required to provide not just theories of tort law qua accident law, but comprehensive and comprehending theories of tort, theories that see the “new negligence” as part of a multi-faceted yet broadly coherent law of wrongs. Ironically, the traditional account might provide a promising starting point for such efforts.

Objectives of the Study

The primary objective of the present doctoral research is to conduct an in-depth study on the following aspects of Negligence.

i) to critically analyze the conceptual frame work of “ Negligence” and its location in the Laws of Tort,

ii) to trace the historical growth tortious liability both at international as well as at domestic level keeping specific focus on laws of negligence

iii) to identify the typology of negligence and tortious liabilities and study its legal characteristics

iv) to review theories of Negligence and tortious liabilities and identify research scholars view points on new types negligence and liability

v) to critically examine the legal elements of Negligence

vi) to identify some of the New emerging areas of tort and analyze its legal dimensions
vii) to analytically examine the Judicial trend of the Indian Judiciary while interpreting the legal issues of negligence and tortious liability, and
viii) to predict and suggest new proposition of law that are likely to be useful in the future and specifically in the globalized world.

Introduction to the Case-Study Method

The Case Study218 is one of several ways of doing legal research. Other ways include empirical, surveys, doctrinal, multiple histories, analysis of archival information and impact analysis. Rather than using large samples and following a rigid protocol to examine a limited number of variables, case study methods involve an in-depth, longitudinal examination of a single instance or event: a case. They provide a systematic way of looking at events, collecting data, analyzing information, and reporting the results. As a result the research scholar may gain a sharpened understanding of why the instance happened as it did, and what might become important to look at more extensively in future research. Case studies lend themselves to both generating and testing hypotheses219

Yin, on the other hand, suggests that case study should be defined as a research strategy, an empirical inquiry that investigates a phenomenon within its real-life context. Case study research means single and multiple case studies, can include quantitative evidence, relies on multiple sources of evidence and benefits from the prior development of theoretical propositions. He notes that case studies should not be confused with qualitative research and points out that they can be based on any mix of quantitative and qualitative evidence. Single-subject research provides the statistical framework for making inferences from quantitative case-study data. This is also supported and well-formulated in Lamnek’s work.220 "The

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case study is a research approach, situated between concrete data taking techniques and methodological paradigms.

Different Types of Case Studies:

There are several formats through which case studies can be conducted. Some of the following methods are popular among research scholars:

**Exploratory Case Studies:** Exploratory case studies condense the case study process: research scholars may undertake them before implementing a large-scale investigation. Where considerable uncertainty exists about program operations, goals, and results, exploratory case studies help identify questions, select measurement constructs, and develop measures; they also serve to safeguard investment in larger studies. The greatest pitfall in the exploratory study involves premature conclusions: the findings may seem convincing enough for inappropriate release as conclusions. Other pitfalls include the tendency to extend the exploratory phase, and inadequate representation of diversity.

**Critical Instance Case Studies:** Critical instance case studies examine one or a few sites for one of two purposes. A very frequent application involves the examination of a situation of unique interest, with little or no interest in generalization. A second, rarer, application entails calling into question a highly generalized or universal assertion and testing it by examining one instance. This method particularly suits answering cause-and-effect questions about the instance of concern. Inadequate specification of the evaluation question forms the most serious pitfall in this type of study. Correct application of the critical instance case study crucially involves probing the underlying concerns in a request.

**Program effects Case Studies:** Program effects case studies can determine the impact of programs and provide inferences about reasons for success or failures.
Prospective Case Studies: In a prospective case study design, the research scholar formulates a set of theory-based hypotheses in respect to the evolution of an on-going social or cultural process and then tests these hypotheses at a predetermined follow-up time in the future by comparing these hypotheses with the observed process outcomes using "pattern matching" or a similar technique.

Cumulative Case Studies: Cumulative case studies aggregate information from several sites collected at different times. The cumulative case study can have a retrospective focus, collecting information across studies done in the past, or a prospective outlook, structuring a series of investigations for different times in the future.

Narrative Case Studies: Case studies that present findings in a narrative format are called narrative case studies. This involves presenting the case study as events in an unfolding plot with actors and actions.

Embedded Case Studies: An embedded case study is a case study containing more than one sub-unit of analysis. Similar to a case study, an embedded case study methodology provides a means of integrating quantitative and qualitative methods into a single research study. However, the identification of sub-units allows for a more detailed level of inquiry. The embedded case study design is an empirical form of inquiry appropriate for descriptive studies, where the goal is to describe the features, context, and process of a phenomenon.

A case study research methodology relies on multiple sources of evidence to add breadth and depth to data collection, to assist in bringing a richness of data together in an apex of understanding through triangulation, and to contribute to the validity of the research. The unique strength of this approach is this ability to

combine a variety of information sources including documentation, interviews, and artifacts (e.g., technology or tools). "The case study is preferred in examining contemporary cases or events, when the relevant factors cannot be manipulated". The embedded case study approach is particularly relevant to examination of factors and issues of where the boundaries between the legal interests and context are not clearly evident.

Measure

For the purpose of the present Doctoral research the research scholar has preferred to adopt embedded case method. The draft methodology is composed of five steps.

(1) Identify Key Issues of Negligence and Stakeholders: This initial stage involves, among other preparatory work, reviewing the international legal instruments being confirmed by the legal community of India; examining legal statement and Restatements; locating books, reports and on laws of negligence. So far as stake holders of negligence are concerned apart from conventional parties the new emerging patterns of stake holders have also been considered.

(2) Investigation of the Existing Reports: This step involves obtaining and analyzing key background information from different statement and restatement Reports, Law Commission Reports & Case Reports dealing with major issues of negligence. These reports in fact present provide the basic logical framework for the present research work.

(3) Selection of Sample Cases: Torts are a particular area of law handled by an injured party filing a civil suit for damages. If a case is won, damages may include medical expenses, lost wages, or pain and suffering. Some torts can be considered a crime in addition to a tort, and the offender could also face criminal charges. There are three tort classifications: intentional, negligent and strict liability torts. Following modalities are often adopted to classify tortuous liability
Step1: Decide whether a reasonable person would know that her actions or failure to act would result in harm. If so, the tort is classified as intentional. For example, if a person assaults someone, it is reasonable to assume that injury would result. In this case, it would also be a criminal offense.

Step2: Be objective when thinking through an injury sustained by what appears to be an accident. While it is possible that an accident could be considered an intentional tort, it is more likely that it would be classified as a negligent tort. For example, the defendant is backing out of a parking place and hits you, causing injury.

Step3: Determine if the wrong was caused by a product. If so, the classification of tort would be strict liability. In this case, it doesn't matter whether it was intentional. For example, a person is injured in a vehicle due to a manufacturing defect. With this tort, the line of defendants can become extensive because it includes all companies involved in the manufacturing of the product

But, for the purpose of the present research the sample cases have been classified in the following format

a) Cases that explains the conceptual framework of laws of negligence
b) Cases that Interprets the legal Elements of negligence
c) Cases that deals with new dimensions of laws of negligence, and
d) Cases that deals with new emerging areas of negligence and liability.

(4) Number of Sample cases: In case studies, number seldom plays a significant role. What is important is the nature of the case. Therefore, as stated above the cases have been classified as per their nature and relevance of the present research issues.
(5) Analysis of Cases: The selected cases are analyzed in the following format

i) Investigating Reading. To understand fully what is happening in a case, it is necessary to read the case carefully and thoroughly. Sometimes quick reading could be misleading. Unless the fact of the case is properly analyzed it becomes very difficult to identify the major legal issues involved therein.

ii) Defining the Legal Issue. Ordinarily, a case is engaged with several issues or problems. Therefore, identifying the most important problems and separate them from the more trivial issues are crucial activity. After identifying what appears to be a major underlying issue, examination of related problems in the functional or applied perspective is essential.

iii) Identifying New Emerging Legal Dimensions: Besides conventional issues the research should also attempt to identify new emerging areas of laws of negligence and its legal dimensions. From the review of cases the following dimensions of laws of Negligence have been identified:
   a) Negligence and Mass Tort
   b) Negligence and Product Liability
   c) Professional Negligence
   d) Negligence and State liability

iv) Application of Legal Ratio: After identification of legal issues, the rights and liabilities of the parties are determined on the basis of set principles of law (Precedent) or the provision of law. Sometimes, judicial dictums of foreign Courts provide vital legal logic for the interpretation of law. Several authoritative commentaries of law and the views of legal exponents have also been considered for proper analysis of law.

(6) Discussion and Implication of the research: Each legal system has got its distinctive characteristics. The Indian legal system has developed a plethora of codified legislation to deal with negligence in the sphere of consumer issues, industrial and mining safety issues, environmental issues, motor vehicle, railways, air travel as well as carriers. These legislations have undergone judicial scrutiny
as well as amendments to meet the demand of changing social conditions. After analysis of the sample cases, the findings are discussed from legal perspective and legal inferences are drawn. These two components are extremely significant because, its outcome can lead the policy makers to restructure the framework of law as well as convince the judicial and legal community to redefine the jurisprudence of Laws of Negligence

**Derivation of Chapters:**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Contents</th>
</tr>
</thead>
</table>
| I       | Introduction | • Conceptual analysis of Negligence.  
          |       | • Development of the concept of negligence  
          |       | • Recognition of the concept of negligence by the Indian Legal System. |
| II      | Review of Literature | • Issues and Research Questions  
          |       | • Hypothesis |
| III     | Method of Study | |
| IV      | Negligence: Legal Elements. | |
| V       | Emerging Dimensions of Laws of Negligence | |
| VI      | Legal Frame Work of Negligence & Judicial Trend in India | |
| VII     | Discussion | |
| VIII    | Major Implications, Suggestions and Conclusion | |
Horizon of the Research:

The law of torts in India presently, is mainly the English law of torts which itself is based on the principles of the common law of England. However the Indian courts before applying any rule of English law can see whether it is suited to the Indian society and circumstances. The application of the English law in India has therefore been a selective application. In this context, in *M.C. Mehta v. Union of India* 223 Justice Bhagwati observed:

“We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.”

But in the age of Globalization where transnational tort issues are the major issues in such situation it is difficult to hang on to only Indian cases. Possibly this is the reason for which of late, both English and American decisions have started influencing the judicial view points of Indian Courts. Hence, keeping these developments in view the Anglo-American cases have been considered as a matter of reference and formulation of judicial principles. However, primacy has been accorded to Indian cases.

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223 AIR 1988 SC 1037