Chapter - VII

DISCUSSION
The tort of negligence, unlike trespass and deceit, was not a nominated tort in the yearly phases of common law. Even though attempts were made in *Nocton v Lord Ashburton*\(^{776}\), but such attempts were weighed down because of potential for conflict with deceit, property and contractual values which were too influential at those periods for the emerging tort of negligence to hurdle. It prompted Lord Atkin to comment upon the preoccupation of the common law with rigid categorization at that time:

"It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman, or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified.\(^{777}\)

Prior to the landmark judgment in *Donoghue v Stevenson*\(^{778}\), the law had developed along the line of fixed closed categories. The categories all related to variants of negligent conduct causing damage to the person or property. These included categories relating to master and servant, the duties of owners and occupiers to people who came onto their land, the duties relating to the circulation of dangerous articles, and the knowing circulation of articles that had a hidden danger. The categories were virtually closed and an elaborate set of complex rules

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\(^{776}\) [1914] AC 932  
\(^{777}\) *Duty of Tort in Torts* [1934] Columbia Law Review, 42  
\(^{778}\) [1932] AC562
had grown up surrounding them. There were real difficulties in applying the categories of liability and exclusion. These rules, far from adding certainty to the law, because of their subtleties, led to confusion. The law of this time reveals the real problem that may be caused by a rigid insistence upon clusters of windowless monad-like categories.

Before 1932 there was no general principle of liability in tortious negligence and the law before that date was accurately described by Asquith LJ, in *Candler v Crane, Christmas & Co* as 'having been built up in disconnected slabs exhibiting no organic unity of structure'. As he said:

"These categories attracting a duty had been added to and subtracted from time to time. But no attempt had been made in the past to rationalize them; to find a common denominator between the road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of care and some other classes who might be expected equally to be so bound should be exempt - no attempt, that is, save that of Lord Esher MR (from which his colleagues dissociated themselves) in *Heaven v Pender*."  

These rigid categories of duty provided little opportunity for expansion. The first effort to open up another category occurred in the 'no zone' area of product liability. In this zone the common law, in the case of *Winterbottom v Wright*, had tied itself to the fallacy that, if tortious negligence concurred with a contractual duty, then the contractual duty shut out the tortious one, as only parties to the contract could sue. This insistence upon contractual values over tortious ones was to become a typical conservative theme used to impede the development of tortious negligence. Under this fallacy only parties privy to the contract had a right of action. In the United Kingdom the privity fallacy, in

779 The problem is well illustrated in respect to what was to be classified as a dangerous article and the difficulties of classifying such an article. The views of Lord Buckmaster should be compared with Lord Atkin, in *Donoghue*, as to the effect of *Dominion Natural Gas Co Ltd v Collins E Perkins* [1909] AC 640-646.
780 [1951] 2 KB 164; 188
781 (1842) 152 ER 402
782 This doctrine, in the course of the United States cycle of negligence, had been exploded earlier by Cardozo J in *McPherson v Buick* (1916) 217 NY 382.
respect to product liability, was exploded in the case of *Donoghue v Stevenson*\(^{783}\). Donoghue v Stevenson, also, heralded the starting point of negligence being recognised as a nominate tort. Before dealing with that case it is necessary to consider a failed early attempt to integrate the categories of negligence into a general principle.

The first attempt at abstracting a general principle for unifying some of the categories of negligence was made by Brett MR in *Heaven v Pender*\(^{784}\). The case is interesting, because of the conflicting approaches revealed by the judgments of Brett MR and the other members of the Court.

The plaintiff, who was a servant, was injured while working in a dry dock. The injuries were caused by scaffolding failing that had been provided by the defendant in respect of the dry dock. The reasoning of Brett MR foreshadowed a general principled approach to tortious negligence, but the other members of the Court preferred an incremental categorization approach of extending an existing category.

Brett MR attempted to lay down a general proposition for imposing negligence liability. He thought that, whenever one person was by circumstances placed in such position with regard to another, that everyone of ordinary sense would at once recognize, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or the property of the other, then a duty arose to use ordinary care and skill to avoid such danger.

This principle was extracted by an analysis of the existing categories and precedents giving rise to negligence liability. Brett MR thought that there was such a general duty, because the relationships between the parties in such categories had a common thread of liability. This principle of liability was engendered because a person of ordinary sense would have at once recognised that if he did not use ordinary care and skill under such circumstances, there

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783 \([1932] AC562\)
784 \((1883) 11 QBD 503.\)
would be a danger of harm to the other person. He was of the view that contract was not the source of these duties, and that the duty was created by the law independently of contract on the basis of this principle. However, he recognised that a contract could exist alongside such legal duty.

Brett MR maintained that it followed that there must be some larger proposition which covered the various categories of negligence. The logic of inductive reasoning required that where two major propositions led to exactly similar minor premises there had to be a larger premise which embraced both of the major propositions. He would have decided this case on the general principle extracted, but he also said that the case could be decided on the minor proposition alleged - namely, the proposition that there was in a sense, an invitation of the plaintiff to use the stage and accordingly, it was equally open to decide the case in terms of an existing category.

The importance of *Heaven v Pender* is evident from the fact that apart from being a source for the general principle approach of Lord Atkin, in *Donoghue v Stevenson*, the dictum of Brett MR has been credited with being the genesis of the modern law of negligence. The early part of the 20th century saw the first of the World Wars, and in its wake the rise of socialist values. World War I showed that people had to rely on others and could not exist on a self-reliant basis. Rationing and mass production had been features of World War I and helped destroy the notion of laissez-faire. The great Depression in the late 1920s underlined that there might be the need for the state to interfere in economic control. Social equality and general protectionist policies slowly started to emerge. Serious erosion to classical contract values was occurring, for not everything could be solved by bargained-for consent. The United States was the first country to forecast social changes to the common law and this is seen in the writing of *Bohlen*.

785 *Alcock v Chief Constable of South Yorkshire* [1991] 3 WLR 1096. Lord Oliver at p 1112 who thought that the development of the idea of duty of care was fitful, until this expression of a general conception and it was for this reason that Brennan J in *Sutherland Shire Council v Heyman* (1985) 68 ALR 55 had said that Heaven v Pender was the historical point at which duty was clinched in the law of negligence.

786 *Affirmative Obligations in the Law of Torts*, (1905) 44 Am L. Reg NS 209
This change of social attitude, in the United States, was ventilated in the case of McPherson v Buick\textsuperscript{787} which saw the Courts breaking out of the contract mould and asserting the protectionist claims of the tort of negligence. In 1932 the United Kingdom in the case of Donoghue v Stevenson followed suit. This case signaled the arrival of the nominate tort of negligence and set the stage for a principled view of negligence.

Lord Atkin's opinion in \textit{Donoghue v Stevenson}\textsuperscript{788} was the first serious attempt in England, since the judgment of Brett MR, to attempt a generalised approach to the imposition of negligence liability. The case must be considered against the background of its times. The case was not dealing with economic issues, liability for nervous shock, or problems of nonfeasance. The case was dealing with an 'affront to the person', namely defective manufactured goods causing personal injury.

Nevertheless, the connection between the negligent manufacturer and the injured plaintiff was against the background of a series of contracts to which the injured plaintiff was not a party, in the area of personal injury or damage to other physical property, of the privity of contract fallacy generated by \textit{Winterbottom v Wright}\textsuperscript{789}.

When the House of Lords came in 1932 to consider \textit{Donoghue v Stevenson}\textsuperscript{790} the general rule of exclusion in respect to the supply of products was that the manufacturer owed no duty of care to a consumer apart from contract. To this general rule there were two exceptions, neither of which fitted "Donoghue" these exceptions were liability for the supply of a dangerous product, or knowingly supplying a defective product with a latent defect. In 'Donoghue' there was an attempt to introduce a third exception, namely that of the case of goods, unfit for human consumption that were manufactured in such a way that inspection was not possible.

\textsuperscript{787} (1916) 217 NY 382.
\textsuperscript{788} Supra at Page 76
\textsuperscript{789} (1812) 1 All ER 402
\textsuperscript{790} Supra at Page 76

351
Judicial Approach in Majority speeches in *Donoghue v Stevenson*:

1. Category Approach: In *Donoghue v Stevenson* the three majority speeches had different approaches as to how liability was formulated. Lord Macmillan adopted a category approach, but pointed out that the categories of negligence were alive and could be broadened and expanded to meet the changes of society. Lord Macmillan, after summarising the earlier cases, thought that the current of authority, contrary to the minority opinions, had by no means always been set in the same direction. His was an expansive view as to liability and should be contrasted with the notion that the categories were closed and rigidly fixed by precedent. Lord Macmillan said:

“In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty of care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adoption to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed....Where there is room for diversity of view; it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty of care, and on the other side to a right to have care taken”.

Special Duty Relationships: Assumption of Responsibility:

Lord Thankerton embraced a *special relationship test* based upon reliance. Lord Thankerton thought that to succeed the consumer had to establish a special relationship with the manufacturer, for the manufacturer had no general duty towards the consumer to exercise diligence and the normal action would be against the party who had supplied the article. His Lordship then analyzed the

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791 Supra at Page 76
792 [1932] AC562
793 [1932] AC562
special facts of the case and concluded that there was a legal duty arising out of
the special circumstances of the case. He said:

"The English cases demonstrate how impossible it is to catalogue
finally, amid the ever varying types of human relationships, those
relationships in which a duty to exercise care arises apart from
contract, and each of these cases relates to its own set of
circumstances, out of which it was claimed that the duty had
arisen. In none of these cases were the circumstances identical with
the present case as regards that which I regard as the essential
element - namely, the manufacturer's own action in bringing
himself into direct relationship with the party injured."

The special duty was created by the manufacturer bringing itself into a
direct relationship with the consumer caused by the lack of the opportunity of
intermediate inspection. The manufacturer had assumed the responsibility of safe
content to the ultimate consumer.

3. THE GENERAL PRINCIPLE APPROACH:

Lord Atkin endeavored to postulate a general concept of negligence. For
Lord Atkin the law had not achieved any unifying statement of principle, only
redress for a random assortment of injuries. This was because the Courts had
cconcerned themselves with the individual circumstances of each dispute, and it
had been sufficient to state in each case whether the duty existed or not. He
thought that a duty which was common to all the cases must logically be based
upon some element common to the cases where such liability was found to exist.
The principle or general conception lay below the surface and all that was visible
through the cases were illustrations of its application. He then set out his famous
proposition794:

"The rule that you are to love your neighbour becomes in law, you
must not injure your neighbour; and the lawyer's question, who is my
neighbour? receives a restricted reply. You must take reasonable care to
avoid acts or omissions which you can reasonably foresee would be likely to
injure your neighbour. Who, then, in law is my neighbour? The answer

794 Supra at 173
seems to be -persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

After adopting the principle formulated by Lord Esher in *Heaven v Pender*\(^795\), with the restrictions imposed by *Le Lievre v v Gould*\(^796\), Lord Atkin thought there would be cases where it would be difficult to determine whether the contemplated relationship was so close that a duty would arise.

Lord Atkin had come to see that the field of civil wrongs and legal liability depended upon moral obligation, but the legal obligation was narrower than the moral obligation. However, Lord Atkin warned against the tendency to rely upon vague and misleading generalizations and of the importance of deciding cases in terms wider than necessary when, essential factors might be omitted and the inherit adaptability of English law should be restricted.

The common denominator of the majority speeches was an expansive conception of liability. Whether by an insistence that the categories could be extended or expanded, or by the creation of special duties that depended on a variety of relationships, or by an abstracted general principle, the common law was asserting its right to expand to meet the changing needs and demands of society.

The research scholar has reflected upon the strategies used in the majority view and concluded as per the following:

Lord Atkin thought that a valuable starting point for an appropriate analogy was the attempt at a general definition made by Brett MR in *Heaven v Pender*\(^797\), although he conceded that such statement was demonstrably too wide. Lord Atkin thought that if the precedents resulted in debarring a remedy in the

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\(^{795}\) (1883) 11 QBD 503
\(^{796}\) [1893] 1 QB 491
\(^{797}\) (1883) 11 QBD 503
case before him, that they would be so contrary to principle that he would hesitate to follow any of them that did not have the authority of the House. Lord Atkin stressed that the common law was made by the Judges by the application of general principles. Lord Macmillan, similarly, thought that if precedent violated conscience or the result of them was to reach an answer that was wholly unreasonable and unjust then they did not represent the common law.

Lord Atkin finished his speech and justified his decision on the grounds that it was 'in accordance with sound common sense'. Similarly, Lord Macmillan thought that the decision made was 'sufficiently consonant with justice and common sense' to admit the claim. Both Lords Atkin and Macmillan were insisting that precedent and analogy had to be viewed taking a wide and broad perspective of principle and measuring the ultimate result against the pragmatic open-ended concepts of justice and common sense.

The dissenting judgment delivered by Lords Buckmaster and Tomlin in Donoghue v Stevenson reflects the strategies and policies of traditional values prevailing in the Common Law System.

Lord Buckmaster began his opinion with the warning that precedent should prevail over flexibly relaxing the law to bend to the demand for a remedy:

'The law applicable is the common law, and though its principles are capable of application to meet conditions not contemplated when the law was down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit'. He adopted a rigid stance to the extension and opening of the existing categories.

Lord Tomlin said that the consequences of accepting the general principle were alarming in that:

'For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle.'
Lord Buckmaster precluded a special duty approach as follows:

"The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or implied by statute. If such a duty exists, it seems to me to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty. Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to English law, although I believe such a right did exist according to the laws of Babylon".

Lord Tomlin adopted the speech of Lord Buckmaster and precluded a special duty evaluation. He thought that if the appellant was to succeed it must be upon the proposition that every manufacturer or repairer of any article was under a general duty to everyone who may thereafter legitimately use the article to exercise due care in the manufacture or repair and he maintained that it was logically impossible to stop short of this point.

The historical significance of *Donoghue v Stevenson* in making negligence a nominate tort was declared by the Privy Council in the case of *Grant v Australian Knitting Mills* as Lord Wright pronounced that:

"It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty of care is to be deduced".

Lord Wright adopting the speech of Lord Atkin and, in particular, the passage that defined one's neighbours as those 'persons so closely and directly affected by my act' stressed the fluidness of the negligent concept:

798 [1936] AC85
This general concept of reasonable foresight as the criterion of negligence or breach of duty (strict or otherwise) may be criticised as too vague, but negligence is a fluid principle, which had to be applied to the most diverse conditions and problems of human life. It is a concrete not an abstract idea. It has to be fitted into the facts of the particular case. Willes J defined it as absence of care according to the circumstances. It is always relative to the individual affected. This raises a serious additional difficulty in the cases where it has to be determined not merely whether the act itself is negligent against someone, but whether it negligent vis-à-vis the plaintiff.

Although Donoghue v Stevenson was not the last word on the species, yet it laid foundation of a milestone upon which the law developed during the last almost hundred years. Donoghue shall be remembered in future for the methodology it applied for determination of the matter in issue. The decision laid down the following two invaluable legal principles:

(A) A reckless manufacturer of a dangerously defective product is liable to a consumer to whom it causes personal injury.

(B) Liability for unintended harm in interpreting the theory of duty of care.

Besides the aforesaid two legal principles it formulated, Donoghue articulated an important constructive criticism about the system itself: "It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities I shall consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House." 799

Donoghue's impact on subsequent cases: The world moves faster than the formulation of legal principles, legal doctrines and enactment of legal rules, thus, at all material limes, there remains a gap which has to be filled in by the applied jurisprudence.

799 [1932] AC562
Moreover, right-duty relation has taken a new turn on account of tremendous scientific advancement. Traditional concept has altogether changed in the new legal order where relationship between the manufacturers and the consumers is well established. The periphery of the doctrine of remoteness has been shrunk to a great extent. Thus Lord Thankerton's theory of special relationship between manufacturers and consumers was put into acid test in Lambert v Lewis. The question arose as to whether the manufacturer also owed a duty to the innocent bystander with whom he had no such special relationship. The Court rules: "Where a pedestrian is injured by the defective car can sue just as well as its owner. Everyone (or nearly everyone) is entitled not to be maimed by defective goods carelessly made. The question of the plaintiff's proof of the manufacturer's negligence as suggested by Lord Macmillan in Donoghue v Stevenson arose in Grant v Australian Knitting Mills. The plaintiff complained of dermatitis resulting from the use of underpants manufactured by the defendant which contained excess sulphites. The defendant pleaded and proved by leading evidence that he had manufactured 4,735,600 pairs of underpants without any complaint. But Court observed: "No one can reasonably say that manufacturer with a failure rate of only one in a million is not a reasonably careful manufacturer, it is indeed an astonishing performance which should earn a prize. And one cannot say that he was not reasonably careful with the pants in question, since there was no evidence as to them, save there is defect."

The Plaintiff succeeded and the manufacturer was by a decree, directed to pay because the pants were defective when they left factory. It is also seen in James Crowe that the special relationship theory though expresses the duly in terms of taking reasonable care; virtually it results in a guarantor's liability. The world has become shorter by virtue of communication facilities. If often occurs that goods are manufactured in one country and exported to another country. When such exported goods are found defective and harm the consumers of the importing country, the consumers face difficulty in suing the manufacturer abroad. Such problem came up for decision in English Court. In Castrace v Squibb &

801 [1936] AC. 85.

358
Sons\textsuperscript{803} the Court held: The Courts can get round this by imposing duty upon the foreign manufacturer that the foreign manufacturer should have warned of the danger in the place when the goods were marketed. Due to difference of subjective and objective condition amongst the civil societies application of law and functional jurisprudence differ. Still then there must be universal rule to deal with the problems. There is a special regime for manufacturers and distributors of goods. Although such regime is absent England, yet, attempts are being made to make the law at par. On account of scandal for production of defective drug thalidomide the Pearson Commission was set up which recommended that the manufacturer should be strictly liable for personal injury caused by a product, which was defective in the sense that it was not, as presented, as one had a right to expect. Essentially similar proposals have emanated from Strasbourg (for the Council of Europe) and from Brussels (for the EEC). Defective construction by the contractor or sub-contractor is a problem lacing throughout the civil societies.

Such a question involving defective construction and its financial consequences came before the House of Lords in \textit{Junior Books Ltd. v Vettchi Co. Ltd.}\textsuperscript{804} Facts of the case may briefly be stated here. In 1969-70 Junior Books Ltd. had built for their main contractors a factory of Grangemouth. Earlier, in July, 1968 the pursuer's architects had nominated the defenders \textit{Vettchi Co. Ltd.}, as subcontractors to lay flooring consisting of a magnesium oxychloride composition in the production area of the factory. The pursuer's architects, in so nominating the defenders had relied on the fact that the defenders were specialists in the laying of flooring. The defenders had accepted the nomination and after entering into a contract with the main contractors, laid flooring of the specified composition in the specified area. It was the duty of the defenders to mix and lay the flooring with reasonable care. The defenders were in breach of that duty in that they failed in a number of respects, to mix and lay the flooring with reasonable care. In consequence of that breach of duty by the defenders the flooring began to develop cracks in 1972 and had gone on cracking more and more ever since. As a result of the cracking of the flooring the pursuers suffered the following items of damage or loss: (1) necessary relaying or replacement of the work of the flooring £ 50,000;


359
(2) storage of books during the carrying out of the work £ 1,000; (3) removal of machinery to enable the work to be done, £ 2,(X)0; (4) loss of profits due to disturbance of business £ 45,000; (5) wages of employees thrown away £ 90,000; (6) overheads thrown away £ 16.CKK); (7) investigation of necessary treatment of flooring £ 3,000; totaling £ 2.07,000.

The defendants contended that the duty was limited to a duty to exercise reasonable care so to mix and lay the flooring as to ensure that it was not a danger to persons or property, excluding for this purpose the property brought into being by the work and labour done, that is to say the flooring itself.

The pursuers contended that the duty was a duty to exercise reasonable care so to mix and lay the flooring as to ensure that it was free of any defects, whether dangerous to person or property or not: alternatively, if the duty was in principle that put forward by the defenders were under a duty to exercise reasonable care to avoid, included the properly brought into being by the work and labour done, that is to say the flooring itself. The judgment was delivered by Lord Brandon, Lord Roskill, Lord Fraser and Lord Russel. Lord Brandon delivered a dissenting judgment.

Interpreting the speech of Lord Atkin in Donoghue v Stevenson, Lord Brandon observed: "The principle laid down in Donoghue is wider. When a person can or ought to appreciate that a careless act or omission on his part may result in physical injury to other persons or their property; he owes a duty to all such persons to exercise reasonable care to avoid such careless act or omission". The principle laid down in Donoghue was applied by Lord Brandon. His Lordship held, " The effect of its application is that the defendants owed a duty to the pursuers to exercise reasonable care so to mix and lay the flooring as to ensure that it did not, when completed and put to its contemplated use, constitute a danger of physical damage to persons, or their property, other than the flooring itself." His Lordship further held,"... in principle and depending on the facts of the particular case, purely pecuniary loss may be recoverable to an action founded on defect alone." Lord Brandon relying upon Hedley Byrne & Co. Ltd. v Idler & Partners
Lord Brandon also relied upon the speech of Lord Wilberforce. The logical answer to the question: Establishment of a duty of care in a particular situation must be approached in two stages. First, one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighborhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty to the class of person to whom it is owed or the damages to which a breach of it may give rise.

Lord Roskill in his speech first emphasized on the development of the law of negligence and His Lordship discarded the "flood-gates" theory. Since Donoghue v Stevenson, the principles laid down therein have been extended by the House of Lords, once what was policy consideration is now the principal consideration. According to His Lordship the advance having been made in 1932, the doctrine then enunciated was at first confined by judicial decision within relatively narrow limits. The gradual development of law will be found discussed by the editor of Salmond and Houston on Torts (18th ed., 1981 PP.289). His Lordship observed: "Lord Atkin's phraseology in Donoghue v Stevenson 'injury to the consumer's life or properly', it was though that the duty of care did not..."
extend beyond avoiding physical injury or physical damage to the person or the properly of the person to whom the duty of care was owed; that limitation has long ceased." His Lordship pointed out that the majority decision in Morrison Steamship Co. v Greystoke Castle (Cargo owners) [(1947) A.C. 265] is sometimes overlooked by the House of Lords.809

His Lordship relied upon *Dutton v Bognor Regis U. D.*810 Similar question was also raised in *Batty v Metropolitan Property Realization Ltd.*811 Once again the argument based on absence of physical damage was advanced and it was rejected.

Lord Roskill himself put a pertinent question to be answered by him. The House now has to decide the question as to whether the relevant Scot and English law today extends the duty of care beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself?" His Lordship answered the question as follows:-

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809 [1972] 1 Q.B. 373, 396, 403-4. Two ships collided. For simplicity they may be called A and II. Both ships were to blame, albeit in unequal proportions. The owners of the cargo on ship A became liable to contribution in general average to the owner of ship A. The cargo owners then send ship H to recover the relevant proportion of that liability for general average contribution. They succeeded in that claim. Here the recovery of economic loss was allowed. "The plaintiff who bought the house in question long after it had been built and its foundation inadequately inspected by the defendants' staff, was certified to recover from the defendant, the estimated cost of repairing the house as well as other items of loss including diminution of value. There was in that case physical damage to the house. It was argued that the defendants were not liable for the cost of repair or diminution in value. This argument was expressly rejected by Lord Denning VI. It and by Stamp L.J. Hut Stamp L.J. was sympathetic to the argument. Lord Stamp stated, "It is pointed out that in the past a distinction has been drawn between constructing a dangerous article and constructing one which is defective or of inferior quality: It may be liable to one who purchases in the market a bottle of ginger beer which I have carelessly manufactured and which is dangerous and causes injury to person or property, but is not the law that I am liable to him for the loss he suffers because what is found inside the bottle and for which he has paid money is not ginger beer but water. I do not warrant, except lo an immediate purchaser and then by contract and not in tort, that the thing I manufacture is reasonably fit for its purpose. The submission is I think a formidable one and in my view raises the most difficult point for decision in this case. Nor can I see any valid distinction between the case of a builder who carelessly builds a house which although not a source of danger to person or properly, nevertheless owing to a concealed defect in its foundations starts to and crack and become valueless, and the case of a manufacturer, who carelessly manufactures an article which, though not a source of danger to a subsequent owner or to his properly, nevertheless owing 10 a hidden defect quickly disintegrates. To hold that either the builder or the manufacturer was liable, except in contract, would be to open up a new field of liability, the extent of which could not, I think, be logically controlled, and since it is not in my judgment necessary to do so for the purposes of this case. I do not, more particularly because of the absence of the builder, express an opinion whether the builder has a higher or lower duty than the manufacturer. ...So again one goes back to consider what was the character of the duty, if any, owed to the plaintiff and one finds on authority that the injury which is one of the essential elements of the tort of negligence is not confined to physical damage to personal property but may embrace economic damage which the plaintiff suffers through buying a worthless thing, as is shown by the Hedley Byrne's Case."

810 116 Sol Jo 16

"I think today the proper control lies not in asking whether the proper remedy should lie in contract or instead in delict or tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not (it is sometimes overlooked that virtually all damages including physical damage is in one sense financial or economic for it is compensated by an award of damages) but in the first instance in establishing the relevant principles and then in deciding whether the particular case falls within or without those principles. To state this is to do more than to restate what Lord Reid said in the Dorset Yacht case and Lord Wilberforce in Anns. Lord Wilberforce in the passage I have already quoted enunciated the two tests which have to be satisfied. The first is 'sufficient relationship of proximity,' the second, any consideration negativing, reducing or limiting the scope of the duly to the class of person to whom it is owed or the damages to which a breach of the duly may give rise. My Lords, it is, I think, in the application of those two principles that the ability to control the extent of liability in delict or in negligence lies. The history of the development of the law in the last fifty years shows that fears aroused by the 'flood gates' argument have been unfounded."

With regard to the degree of proximity to give rise to the cause of action for the suit Lord Roskill relied on the following facts made our by the respondents: (1) the appellants were nominated sub-contractors, (2) the appellants were specialists in flooring: (3) the appellants knew what products were required by the respondents and their main contractors and specialized in the production of those products; (4) the appellants alone, were responsible for the composition and construction of the flooring; (5) the respondents relied on the appellants' skills and experience; (6) the appellants as nominated sub-contractors must have known that the respondents relied on their skill and experience; (7) the relationship between

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the parties was as close as it could be short of actual privity of contract: (8) the appellants must be taken to have known that if they did the work negligently (as it must be assumed that they did) the resulting defects would at some time require remedying by the respondents expending money on the remedial measures as a consequence of which the respondents would suffer financial or economic loss.

Lord Russell agreed with Lord Fraser and Lord Roskill and dismissed the appeal. In *Hedley Byrne & Co. v Heller & Partnership*[^813^] the interesting question of law arose whether and in what circumstances a person could recover damages for loss suffered by reason of his having relied on an innocent but negligent misrepresentation? Lord Reid observed: "It seems to me quite immaterial that they did not know who these contracts were: there is no suggestion of any specialty which could have influenced them in deciding whether to give information or in what form to give it. I shall, therefore, treat this as if it were a case where a negligent misrepresentation is made directly to the person seeking information, opinion or advice, and I shall not attempt to decide what kind or degree of proximity is necessary before there can be a duty owed by the defendant to the plaintiff. 'Lord Morris observed:"... it should now be regarded as settled that if some one possessed of a special skill undertakes, quite irrespective of contract, to apply' that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry a person, takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise." Lord Devlin observed: "I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of


364
fiduciary duly, but include also relationships which in the words of Lord Shaw in *Nocton v Lord Ashburton* are equivalent to contract."

Some important questions concerning problems of negligence have been answered by the English Courts. In *National Westminster Bank v Burlay Bank International*, Kerr J. held, "A bank does not owe a duty to the payee to take care of its customers' cheque." A bare majority of the House of Lords in *Moor Gate Mercantile v Twitching* held, "A member of the organization which receives records and divulges information about the hire-purchase contracts affecting members' motor-cars does not owe a duty to fellow members to take care to supply relevant information." Croom-Johnson J in *Argy Trading v Lapid Developments* held: When a landlord had arranged insurance on tenanted premises, his successor does not owe any duty to the tenant to tell him that the insurance is not being continued. Templeman J. in *Daniels v Daniels*, held: "The directors of a company do not owe a duty to the shareholders to take care of the company's assets." A house is surveyed at the instance of a building society; the surveyor negligently reports that the house is worth £ 25,000. The building Society offers to send £ 25,000 for the purchase of the house, which is worth much less. The purchaser can sue the surveyor. Where excavating with a mechanical shovel, the defendant contractor carelessly damaged a cable and interrupted the supply of electricity to the plaintiffs industrialist's, factory, 400 yards away and the plaintiffs industrialists 10 prevent damages to their furnace had damaged its contents from which they would have made a profit off 400 by £ 368 and the industrialist was prevented by the absence of electric current from processing four more 'melts' which would have netted the plaintiff £ 1,767, Faulks J. held that the plaintiffs were entitled to all three sums. On appeal the Court of Appeal (Edmund Davies L. J. dissenting) held that they were entitled to the first two sums only. In this appeal Lord Denning M. R. stated:

816 [1977] 3 All E.R. 785.
818 Yianni v Edwin Evans & Sons [1982] 3 All E.R. 938 (C.A.)
"The first consideration is the position of the tannery undertakers. If the Board do not keep up the voltage or pressure of electricity, gas or water - or like wise, it then shut it off for repair - and thereby cause economic loss to their consumers, they are not liable in damage, not even if the cause of it is due to their own negligence. The only remedy is to prosecute the board before the magistrate. There is another group of cases which go to show that if the board by their negligence in the conduct of their supply cause direct physical damage or injury to person or properly, they are liable. But one thing is clear; the statutory undertakers have been held liable for economic loss only. If such be the policy of the legislature in regard to electricity boards, it would seem right for the common law to adopt a similar policy in regard to contractors. If the electricity boards are not liable for economic loss due to negligence which results in the cutting off of the supply, nor should a contractor be liable.

"The second consideration is the nature of the hazard, namely, the cutting of the supply of electricity. This is a hazard which we all run. It may be due to a short circuit, to a flash of lightning, to a tree falling on the wires, to an accidental culling of the cable, or even to the negligence of someone or other. And when it does happen it affects a multitude of persons: not as a rule by way of physical damage to them or other property, but by putting them to inconvenience, and sometimes to economic loss. The supply is usually restored in a few hours, so the economic loss is not very large. Such a hazard is regarded by most people as a thing, they must put up with without seeking compensation from anyone. Some of these are who install a stand-by system. Others refuse by taking out an insurance policy against breakdown in the supply.

"But most people are content to take the risk on themselves. When the supply is cut off, they do not go running round to their solicitor. They do not try to find out whether it was anyone's fault. They just put up with it. They are to make up the economic loss by doing more work next day. This is a healthy altitude which the law should encourage.

"The third consideration is this: if claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, even false. A machine might not have been in use anyway, but it would be easy to put it down to the cut in supply. It would be well-nigh impossible to check the claims. If there was economic loss one day, did the defendant do his best to mitigate it by working harder next day? And so forth: Rather than expose claimants to put such temptation and defendants to such hard labour—on comparatively small claims — it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage.

"The fourth consideration is that: in such a hazard as this, the risk of economic loss should be suffered by the whole community who suffer the losses—usually many but comparatively small losses—rather than on the one pair of shoulders, that is, on the contractor on whom the total of them, as added together, must be very heavy.

"The fifth consideration is that: the law provides for deserving cases. If the defendant is guilty of negligence which cuts off the electricity supply and causes actual physical damages to person or property, that physical damage can be recovered and also any economy loss truly consequential on the material damage. Such cases will be comparatively few. They will

be readily capable of proof and will be easily checked. They should be and are admitted.

"These considerations lead me to the conclusion that the plaintiff should recover for the physical damage to the one melt (£ 368), and the loss of profit on that melt consequent thereon (£ 400), but not for the loss of profit on the four melts (£ 1,767), because that was economic loss independent of the physical damage."

An action was brought by Dorset Yacht Co. against Home Office in respect of property damage by the runaway Borstal Boys. The facts of the case are that seven Borstal boys, five of whom had escaped before, were on a training exercise on Brownsca Island in Poole Harbour, and ran away one night when the three officers in charge of them were, contrary to instructions, all in bed. They boarded one of the many vessels in the harbour, started it and collided with the plaintiff's Yacht, which they then boarded and damaged further. Lord Reid held. "If the carelessness of the Borstal Officers was the cause of the plaintiff's loss, what justification is there for holding that they had no duty to take care? The first argument was that their right and power to control the trainees was purely statutory and that any duty to exercise that right and power was only a statutory duty owed to the Crown. I would agree, but there is a good authority for the proposition that if a person performs a statutory duty carelessly so that he causes damage to a member he may be liable.823 In Geddis v Proprietors of Baun Reservoir,824 Lord Blackburn said:

"For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it docs occasion damage to any one: but an action docs lie for doing that which the legislature has authorized, if it had been done negligently," Lord Reid

further held: "The reason for this is, I think, that Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interest of others."

ANALYSIS OF RESEARCH HYPOTHESIS:

The first proposition is “negligence-civil and criminal- conceptually divergent from each other, but theoretically; both subjective and objective- merge together in the premises of liability and compensation is sustainable as the Court does not restrict itself to the legal theory but to the facts and evidence available to it”. At times under the criminal law, jurisprudentially no distinction may be drawn between negligence under civil and criminal law but degree of negligence must be high to fasten the liability in criminal law essential element mens rea cannot be discarded while fixing the liability in criminal sense. Lord Atkin in his speech in Andrews vs. Director of Public Prosecutions stated ‘simple lack of care such as will constitute civil liability is not enough; for purposes of criminal law there are degrees of negligence, and very high degree of negligence is required to proved before felony is established’. Lord Porter said in the his speech in the same case ‘a higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability and in Syed Akbar vs. State of Karnataka the supreme court has pointed with reasons with the distinction between negligence in civil and criminal proceedings, namely, the proof in civil case mere balance of probabilities is sufficient while in criminal case proof beyond reasonable doubt is required. Negligence must be gross not an error of judgment in both the cases.

825 AIR 1979SC1848
826 Charleswoth & Percy ,ibid Para 1.13
827 (1980) SCC(1)30
In so far as the proposition the construction of negligence—statutory, professional, and contributory and composite—demand different legal parameters and creates confusion, while interpretation is concerned the research scholar is of the view that different acts of negligence entails a defendant different compensations as well as demands different parameters of evidences to prove his claims. Therefore for judicial clarity on distinction of the same is absolutely necessary.

The proposition that “the theoretical distinctions between sovereign and non-sovereign functions do exist but the judicial attitude towards such distinction favours the demise of such distinction in India” has been upheld in a number of epoch making decisions in India. With the emergence of welfare state, the activity of state has become all encompassing, therefore any artificial distinction between sovereign and non-sovereign functions would be against the constitutionally cherished goals and the same has been upheld by the Supreme Court in a number of decisions. A contextually relevant decision is *Kasturi Lal v State of Uttar Pradesh*828.

With regard to the propositions “the Law of Torts imposes liability for perceived acts of negligence rather than for any omission” and “Proximity of acts between parties plays a significant role in determining the negligence and subsequent liabilities thereof in tort” the research scholar is of the view that the genesis of any tortious action for negligence has its roots in the theoretical perspectives laid down in the landmark case of “Donoghue v Stevenson”, which has been dwelt at length in the course of this work. Any reference to the same may be a repetition of the same, however for the sake brevity we may refer to the famous neighbour theory propounded in the said case. This principle dated back to *lex Aquilia*829. In the light of the above the research scholar is of the view that the same is justifiable against the backdrop of this work.

828 AIR 1965 SC 1039
829 The *lex Aquilia* was a Roman Law which provided compensation to the owners of property injured by someone's fault.
The proposition that “Social security”, “Public policy”, and “Capacity to pay” are playing a dominating role in the determination of negligence by the judiciary in India- has its roots in the socio-economic conditions of the Country. The research scholar observes that statutory legislative devices like the Workmen’s Compensation Act, The Public Liability Insurance Act, 1991 etc. have helped in shaping the judicial attitude in India. “Capacity to pay” is a concept which has got its roots in the USA Legal System. In so far as the yardstick of “Social security” and “Public policy” is concerned the research scholar finds merit in the approach of the judiciary in India. In so far as the question of “Capacity to pay” is concerned, uniformity in approach is needed, as Indian Society is too diverse in its composition in so far as awareness and protection of individual rights are concerned.

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. This proposition has under gained credence with the pronouncement of the judgment in the M. C. Mehta v Union of India830, wherein the Supreme Court enunciated the principle of absolute liability. Justice Bhagwati speaking on behalf of the Court declared that:

“....... the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that harm occurred without any negligence on its part”.

It is evident that the traditional defenses available to a defendant in case of a claim for negligence have got no liberty in so far as the traditional defenses like “Act of God or Vis-Major” etc are concerned.

830 (1987) 1 SCC 395
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”- this proposition seeks to examine any change in judicial attitude pertaining to pre-dominance of procedural laws in litigation.

Even though Indian judiciary has adopted the conception of public interest litigation [PIL] to provide justice to poor and downtrodden in the society, thereby it has done away with the concept of “locus standi” in this category of cases. However the research scholar observes that there exist no or enough empirical evidence to support the proposition especially in reference to claims for damages caused due to negligence.

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