Chapter - VIII

MAJOR IMPLICATIONS, SUGGESTIONS & CONCLUSION
CHAPTER-VIII

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Major Implications:

A detailed analysis of the various ways in which the Courts of civil-law world have gradually and spontaneously developed the law of negligence and manifested in the case laws discussed in the preceding chapters above show that the courts have widened the scope of social relativity and responsibility with reference to the changing character of industrial society. The American decisions in the Macpherson v Buick Motor Company\textsuperscript{831} and the English decision in Donoghue v Stevenson have laid the foundation of the modern law of negligence as an independent. The principles laid down in these two decisions are no doubt basic tenets of the law of negligence but at the same time the progress of law has widened in four directions: first, through the expansion of the term 'manufacturer' so as to include repairers and others: second, through the dilution of the concept of 'dangerous' things to a degree which makes it possible to say that today any object may be 'dangerous' in certain situations i.e. if handled in a manner falling below a reasonable standard of care; third, through the use of \textit{res ipsa loquitur}, which has in effect, reversed the presumption of fault. The manufacturer or keeper of the things is generally presumed to be responsible for suite of the product or operation emanating from his enterprise, unless he can prove intervention by an unconnected third party of \textit{force majeure}; fourth, through the erosion of the former distinction between liability for the acts of a servant and non-liability for the acts of an independent contractor.\textsuperscript{832} This consistent developmental change is also found in the erstwhile communist countries in East Europe and in France. For example, the Civil Codes of the East European countries provide that persons and enterprises whose activities present special danger to the persons around them, such as rail roads, street cars, factories and mills, vendors of inflammable

\textsuperscript{831} 217 M.Y. 382, Ill N.E. 1050 [1916].

\textsuperscript{832} Friedman: \textit{Law in a Changing Society}, 2nd Edn. page 167
materials, keepers of wild animals, persons engaged in the erection of buildings and other structures etc. are liable for injuries caused by the source of increased danger, unless they prove that the damage was caused as the result of force majeure or as the result of act or gross negligence on the part of the injured party.

Considering much of the progressive evolution of negligence law in doctrine and its application J. G. Fleming have found five conventional elements of the cause of action for negligence. They are:-

1. "A duty, recognized by law, to conform to the requisite standard of care for the protection of the plaintiff against the kind of harm in question. This is generally identified as the 'duty issue' and acts as a lever for judicial control over policy".

2. "Failure to attain the requisite standard of care or briefly breach of duty. This is the 'negligence issue': entrusted to the trier of fact".

3. "Actual injury. If my negligence providentially happens not to scathe anybody, I am entitled to acquittal from all civil liability, though not necessarily from criminal penalties, as, for example, for careless driving. By parity of reasoning no redress is afforded for mere indignity or oilier non-material injury; though if the same had been perpetrated by me intentionally, as in committing an assault and battery, the anti-social nature of my conduct would have supplied a sufficient reason for vindicating my victims' sense of dignity with substantial, even aggravated damages for the affront".

4. "A reasonably proximate casual link between the breach of duty and the harm. This is a perennially vexing problem of 'remoteness of damage' or 'proximate cause'.

5. "The absence of prejudicial conduct by the plaintiff. This the defendant may invoke against him by pleading either the partial defence of contributory negligence, which no longer fully defeats his claim but


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merely reduces his recovery, or the defence of voluntary assumption of risk, now happily almost obsolete."

*Donoghue* deviated from the traditional principle, "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy." Contrary to this traditional principle the generalization formulated in Donoghue is that, "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 and omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably so have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question". The concept of morality was dealt with by Lord Diplock when he observed-"An omission which was likely to have as its reasonable and probable consequence damage to the health of the victim or the thieves, but for which the priest and the Levite would have incurred no civil liability in English Law."

During the last seventy years the neighbour dictum has taken the shape of "*duty dictum*" i.e. "a duty to act" likes a reasonable man in a relational situation. Thus, at present, "*duty to take care*" is the limiting factor upon the concept of negligence".

Another important aspect of *Donoghue v Stevenson* is that when the judges intend to come out of the restrictions imposed by the doctrine of precedent, they can do so with reference to the "neighbour dictum" and justify the liability.
Doctrine of public policy applied by the courts, has taken an important role to play in changing concept of policy of the courts.

The law of negligence in India, as it stands today is a curious mix of Common Law Principles as well as home grown solutions to problems, typical to India. The reasons are not difficult to fathom.

Spirituality has been the dominant note of Indian culture. Dharma has for it objective the attainment of temporal welfare through spiritual well-being. The predominance of “duty” over rights put the latter in shade. In the absence of any assertion of right, the violation of duty could only draw objective penal sanctions. Therefore the elements of negligence find difficulty in securing reorganization. Coupled with the above, abject poverty coupled with lack of education has also contributed to the abysmal state of tort of negligence as an actionable tort. Therefore the lack of original theorizing on the subject by Indian Authors is also not surprising.

But now the Indian mind in this industrial age is slowly dislodging from its habitual abode of slumber and tort of negligence is likely to gain prominence against the backdrop of ever increasing accidents: road, rail and industrial and rapid industrialisation and urbanization.

SUGGESTIONS:

The objective of this thesis, at the outset, is to carry out a doctrinal inquest of the concept of negligence in India, while laying emphasis on its legal dimensions and judicial approach to the concept.

After analyzing the whole gamut of the objective, the researcher is of the view that in the absence of any significant theorizing and swaying judicial reasoning’s, the Indian Law of Negligence is virtually a replica of the common
law doctrine, except flashes of brilliance like ‘Absolute Liability’ etc. The researcher further observes that fundamental to the common law doctrine of precedent is the proposition that each case is decided upon its own facts by the application of principle from preceding cases in the relevant hierarchy of courts. The true principle in any case is often only discovered by careful identification of the facts to which the statements of law relate. But if each case is decided upon its own facts, does it not follow that the doctrine of precedent is an inherently unsuitable vehicle for the determination of policy? Evidence not relevant to the issues raised by the parties' pleadings is inadmissible. Decisions like *Bhopal Gas Case*\(^834\) have far reaching economic and social consequences for the manufacturing, insurance, financing and other sectors of the community, but the common law system is designed in such a way that it prohibits the courts from receiving evidentiary material illuminating those consequences. It is accepted that the common law needs to be flexible in order to adapt to changing conditions and new developments in society, but shrouding reasons for judgments in bogus words of legal principle simply obscures the real task at hand.

The researcher scholar believes that until there is frank acknowledgement that considerations of public policy are central to the development of the law of negligence, no adequate consideration will be given to improving the system. As on today, the courts are better situated than the parliaments to develop the law of negligence, but the manner in which this should be done is important.

It cannot be beyond the wit of mankind to devise a more satisfactory scheme, one that will frankly acknowledge that the facts of a particular case raise major questions of policy and that the decision will affect the wider community; a scheme that will in such cases, permit the receipt of relevant material from those affected in the wider community. There are obvious difficulties with this approach in our common law adversary system, but none-the-less all ideas of this kind are worth consideration and discussion.

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834 *Charan Lal Sahu v. Union of India* (1990) 1 SCC 613

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CONCLUSION:

This research work as stated earlier is a doctrinal inquest of the concept of negligence in India, while laying emphasis on its legal dimensions and judicial approach to the concept of negligence. It has adopted a comparative perspective by drawing from USA Legal System as well as Common Law System.

The conceptual perspective of negligence, entwined in the concept of “duty of care”, “breach of the duty” and “consequential damages”, has evolved with the passage of time to meet the social changes. Courts have constantly invigorated their intellectual capacity to find just and equitable solutions to maintain social equilibrium and render justice. However with melting of economic borders across the globe, overwhelming reliance on technology and industrialisation, the concept of negligence is going to test new grounds.

The Law of Negligence in India, as stated earlier, is built upon the edifice of Common Law System. Even though the Courts in India have successfully applied the common law conceptions of “duty of care”, “breach of the duty” and “consequential damages” to situations in India to mitigate the sufferings of victims and compensate them adequately for their losses, still it seems to be an attempt to “bolt the stable after the horse has left” in nature rather than any thing pre-emptive. Further during the course of this work, it is also observed that there has been definitive shift in approach of the judiciary to inculcate the judicial trend/thought from USA and other non-common law jurisdiction and apply the same to the Indian situations to dispense justice. The examples are many viz. “Constitutional Tort”, “No Fault Liability” etc. But the common link between them is that they all came by way of judicial action only after considerable loss of life and property. With India opening its door to the World and rapidly transforming itself into an industrialized society, the possibilities of economic prosperity are fraught with considerable risk. Another “Bhopal Gas” tragedy or another “Satyam” may be lurking around the corner. But then do we have any
thing in place to preempt such disaster. The answer lies only in providing legislative solution to such situations.

As stated earlier this research work is an attempt to trace and submit the reasons of the development of the conception of negligence, the overwhelming reliance on judicial law making and the inability of the legal scholars to devise a universally sustainable legal theory of negligence.

The last word on the issue has not yet been spoken, but for the purpose of this work one can’t help but has to agree with the observations contained in the last passages in The Death of Contract\textsuperscript{835}, where Gilmore wrote:

"I have one final thought. We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods, which are, typically, of brief duration, everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among other things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely slated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic - as well as, frequently, extremely interesting. Then, the romantic energy having spent itself there is a new classical reformulation – and so the rhythms continue. Perhaps we should admit the possibility of such alternating rhythms in the process of the law. We have witnessed the dismantling of the formal system of the classical theorists. We have gone through our romantic agony - an

\textsuperscript{835} Gilmore, The Death of Contract, P 102-103
experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that, in this centennial year, some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead - but who knows what unlikely resurrection the Easter-tide may bring?"