Chapter - I

INTRODUCTION
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"The fundamental duty of a man is to see others life and pleasure as
his own, he should not do any thing which is in his benefit but causes
harm to another. Whether he does it knowingly or unknowingly he
will be responsible for any wrong caused by him" -YAJURVEDA
[Chapter-40, Mantra-6]

As Aristotle once observed, political justice can exist only “among people
who are associated in a common life with a view to independence, and who enjoy
freedom and equality.” This seemingly simple statement locates the three core
values of liberal-justice: freedom, equality and by implication, security. Freedom
is a state of choice and action which gives individuals the power of autonomous
will and self-determination, and with it, the rights and responsibilities of moral
agency. Security is merely a form of negative freedom—specifically the freedom
to be left alone by others. It reinforces the power of self-determination by
protecting people from outside incursion. Equality stands on different ground.
Although it applies to freedom, it is not, in itself, an aspect of freedom. Instead, it
guarantees that all people enjoy freedom, thus establishing their basic dignity and
worth as moral agents, and sets criteria for coordinating freedoms among
individuals in a political association. Of course, these values are not always
harmonious. They can and often do come into conflict i.e. one person’s exercise of
freedom is frequently a threat to the security of someone else. Likewise, one’s
assertion of equality may operate to limit the freedom of those with extraordinary
powers or needs. There steps in the tort law, with the stated objective to determine
the mechanism- how to resolve these conflicts. Tort law is a socio-legal
mechanism which mediates the relationships between citizens in conflict and
between those citizens and the state. The objective of tort law is primarily to
compensate the victim, deter others as well as the defendant from repeating/
committing the same again, vindicate the legal right of the victim, distributes the
loss suffered as a result of wrongful activities and punishes albeit, in a limited
manner, the wrongdoer. To incur liability under tort law, the victim and the
plaintiff necessarily need not have a formal legal relationship. Unlike a contractual

relationship- the spectrum of tort law is very wide in its amplitude i.e. it imposes liability-strict or otherwise- between unrelated individuals in a given society for actions arising out of their normal societal intercourse.

Tort, like other concepts in law, suffers from definitional inadequacy. It is not as if no attempt has ever been made to define tort, but each definition has suffered from inadequacies, which are too pronounced to ignore. Salmond defined tort as “a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation”. While Winfield defined tort in terms of tortious liabilities; tortious liability arises from a breach of a duty primarily fixed by law; this duty is towards persons in generally and its breach is redressible by an action for unliquidated damages. To put it more precisely a wrongful act, a legal damage and a legal remedy are the basic ideas on which the edifice of tort law stands. Negligence constitutes the basis of liability in tort law.

The tort of negligence forms one of the most dynamic and rapidly changing areas of liability in the modern common law. Its expansion since the nineteenth century reflects the pressures which the rise of an industrial and urban society has brought to bear upon the traditional categories of legal redress for interference with protected interests. The growth: and increasing sophistication of insurance have also contributed to this expansion. A doctrinal examination of negligence must not lose sight of this wider social and economic context within which the tort has developed, which is reflected in fluidity of the central legal concepts and the courts' ever-increasing recourse to 'policy' as an explanation for their decision.

The intellectual challenge for providing an all encompassing and comprehensive definition to the term “negligence” is well documented. Probably the first attempt to define negligence was in Blyth v. Birmingham Waterworks Co.

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3 W V H Rogers , Winfield and Jolowicz on Tort, 17th Edn Sweet & Maxwell, UK at p.11
4 J. G. Fleming, "Remoteness and Duty: the Control Devices in Liability for Negligence" (1953) 31 Can. BR 471.
6 Blyth v. Company Proprietors of the Birmingham Water Works 1856, 11 Ex. Ch. 781
wherein Alderson, B. described negligence as "the omission to do something which are a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do". This is the definition of negligence most often quoted but Beven in his well-known work on Negligence considers that though as a description it is invaluable the formula is too wide for a definition. Pollock in his book on Torts, states with reference to this definition that "We have always to remember that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care".

"The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. Circumstances which give rise to this duty to take care are the subject of normative enquiry. 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 standard of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human error; and the conception of legal responsibility may develop in adaptation 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. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. 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 to take care and on the other side to a right to have care taken". - Observed Lord Macmillan in Donoghue v. Stevenson7

7 Donoghue v. Stevenson [1932] All ER Rep 1; [1932] AC 562;
In *Halsbury's Laws of England* under the subheading "meaning of negligence" appears the following passage:

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case and the categories of negligence are never closed. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all...... The degree of care required in the particular case depends on the accompanying circumstances and may vary according to the amount of risk to be encountered............".

The authority for this latter proposition is the House of Lord's decision in *Glasgow Corporation v. Muir*; where Lord Macmillan said:

"My Lords the degree of the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life.....In ordinary circumstances or where simple operations are being performed persons are not as a rule required to guard against every conceivable result of their actions nor are they bound to exercise scientific care or to take extravagant precautions. They must have regard both to the probability of injury resulting and to the probable seriousness of the injury. They may weigh the cost and the difficulties of the precautions. They are in general entitled to assume that others will comply with statutory regulations."

**Negligence: Conceptual Study from Criminal Law Perspective:**

At early common law, a victim could pursue justice for the same wrongful act either through a forerunner of criminal law or through a forerunner of tort law.
But over time, criminal law and tort law have evolved to encompass a number of distinctive and contrasting features.

(1) The state prosecutes violations of criminal law. A victim's consent is neither necessary nor sufficient for a prosecution to be brought. In tort law, by contrast, the victim decides whether to bring a tort claim and is free to choose not to do so. This structural difference is sometimes given a more substantive gloss: criminal law prohibits "public" wrongs and tort law "private" wrongs. But what exactly does that mean? Part of what it means is this second point of distinction:

(2) Tort law typically requires harm as a prerequisite to a remedy. Criminal law does not. Specifically, criminal law punishes not only: (a) Acts those are harmful to others, but also: (b) Acts that are harmful only or mainly to the actor being punished; (c) Dangerous acts that have not yet caused harm; and (d) Acts that the community considers immoral, even if the acts are not "harmful" in the narrower sense of the term. By contrast, tort law mainly provides a remedy for harmful acts, not for acts that create risks of future harm, and not for acts that are considered immoral but not harmful.

(3) Criminal law often imposes much more severe sanctions than tort law, of course: loss of liberty or even of life. So the procedural protections in criminal law obviously are much more extensive and (in theory at least) a much greater barrier to liability. For example, the criminal defendant, unlike the tort defendant, must be proven guilty beyond a reasonable doubt, the exclusionary rule sometimes applies, and the double-jeopardy rule precludes the same jurisdiction from pursuing multiple convictions for the same conduct.

(4) Criminal law, in theory at least, contains a proportionality principle, requiring that the punishment "fit" the crime and the seriousness of the harm or wrong he has committed or threatened. But tort law does not purport to provide remedies proportional to the injurer's wrong: normally, compensation is the remedy, whatever the nature of the tort or wrong. To be sure, the compensatory remedy is scaled to the severity of the harm caused, and, in that sense, is proportional. But the tort remedy usually does not vary with the culpability of the
injurer. Suppose, in three separate incidents, injurers A, B, and C cause precisely the same harm to their respective automobile accident victims; but A is strictly liable for a manufacturing flaw in the automobile, a flaw that could not have been prevented by due care; while B is negligent for momentarily taking his eyes off the road; and C is negligent for dangerously passing another car on a busy highway. A, B, and C will pay precisely the same damages. Of course, punitive damages, in the small number of cases where they are awarded, are an important exception: they do achieve some degree of proportionality between the level of the injurer's culpability and the damages he must pay. But even punitive damages are not nearly as sensitive to differences in degrees of culpability as criminal law sanctions are. Although the degree of reprehensibility of the injurer's conduct is sometimes reflected in the size of a punitive damage award, many other factors also affect the size of that award, including whether the injurer's course of conduct caused widespread harm to persons other than the plaintiff.

(5) Criminal law contains a much broader spectrum of fault or culpability than that in tort law. The spectrum is wider along two dimensions: the state of mind, or \textit{mens rea}, element and the conduct, or social harm, element. Thus, the requisite culpable state of mind in criminal law ranges from strict liability to negligence to recklessness to knowledge to purpose, with punishment varying according to that \textit{mens rea}.

By contrast, most of tort law is governed by a negligence standard. There are relatively few categories of intentional torts and even fewer categories of recklessness and strict liability. To be sure, a number of distinct torts address distinct forms of conduct and social harm other than the physical harm that negligence law protects. For example, the protection of emotional harms ranges from emotional distress negligently created by an actor whose conduct threatened physical harm, to invasions of privacy, to defamation. Nevertheless, the number of discrete tort causes of action pales in comparison to the number of distinct crimes.

(6) Criminal law requires a greater minimal level of fault before liability will be imposed than does tort law. This is a very crude generalization, with many exceptions. Still, the minimum fault requirement tends, in criminal law, to be
something like gross negligence or even recklessness, while in tort law, ordinary negligence usually suffices.

Criminal law does contain some doctrines of strict liability, especially with respect to the grade of the offense (e.g., reasonable mistake is no defense if it only goes to the amount of illegal drugs that the actor possesses or to the value of the goods that he has stolen) and also with respect to mistake or ignorance of law, where even reasonable mistake or reasonable ignorance is normally no defense. But, strict liability is less widespread in criminal law than in tort law. Tort recognizes such strict liability doctrines as liability for abnormally dangerous activities, for manufacturing defects in products, and for wild animals. Tort law also pervasively imposes strict liability in the form of vicarious liability, especially the liability of employers for the tortious acts of their employees. More fundamentally, criminal law targets conduct that is impermissible. Or, as economists might say, the optimal incidence of criminal conduct is zero. But tort law sometimes creates liability for perfectly permissible conduct, conduct that we would not want to preclude. Criminal law exclusively imposes sanctions, while tort law sometimes prices an activity.

(7) Criminal law pays much less attention to the victim's conduct than does tort law. First, in criminal law, victim fault hardly ever matters. Contributory negligence is not a criminal law defense, but it is routinely taken into account in tort law. Second, the consent of the victim to the behavior of the wrongdoer, or to the risks imposed by his behavior, is much more likely to be a full defense in tort law than in criminal law. Criminal law includes many so-called victimless crimes, that is, crimes in which both of the immediate parties to the transaction consent, such as prostitution, gambling, and drug distribution. And consent is generally no defense to causing serious bodily injury, as opposed to minor bodily injury, in criminal law; but in tort law, it will more often serve as a full defense.

(8) Criminal law is statutory. The doctrine of common-law crimes is largely defunct. By contrast, tort law remains mainly a set of common-law, judge-made doctrines (although the statutory overlay is increasing).
This fundamental difference is related to many others. For example, criminal law tends to produce more detailed specifications of wrongful behavior than tort law, which, in important domains (especially negligence), creates liability standards that are maddeningly vague. At the same time, criminal law changes rapidly and in response to changing conditions. Tort law provides a more flexible framework for challenging new forms of wrongdoing, such as clergy malpractice or invasions of privacy through new technology.

(9) Excuses to liability are recognized in criminal law much more readily than in tort law. Thus, the insane are generally liable for their torts, but are not criminally responsible. Moreover, criminal law and tort law differ in their treatment of children: even relatively young children are often liable for torts, but they are not criminally responsible.

If corrective and retributive justices are compelling rationales for the distinctive doctrines and remedial structures of tort law and criminal law, respectively, then the doctrines and structures of these different areas of law have a less contingent explanation. And then the crime/tort distinction has a basis in principle—or more precisely, a principle more nuanced than maximizing social welfare—and is not just a product of institutional constraints, administrative costs, and historical accident. As observed by R. A. Duff:

"The answer might depend on whether we can properly view criminal law, as well as tort law, as addressing the need to repair a relationship of the defendant to an actual victim. This perspective might or might not be defensible, but it does not merely reflect a conceptual conflation of criminal law and tort law functions or principles".

Theories of Negligence:

Under Civil law, negligence has been discussed as an element constituting liability for a tort. In the Penal Code, negligence has been discussed as an element constituting a crime. According to the Civil Code, negligence is applicable to all acts where as, under Penal Code, negligence is only applicable to the items for

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which the Criminal Code prescribes punishment against negligence. The two Codes follow their own logic in many other aspects: the effects resulting from negligence and the basic principles. On the other hand, when these codes are applied to handle social problems in reality, it is found that the two Codes share similar concepts regarding the duty of care. Accordingly, someone can raise enormous discussion about the homogeneity and differences between the Civil Code and the Penal Code in negligence.

To review the traditional and the new theories of negligence is a complex process. However, in the following segment attempts have been made to enumerate the theories of negligence

**Subjective Theory of Negligence:** Negligence as a state of mind is the opposite of intention. An act is intentional when it is purposeful and done with a desire or the object of producing a particular result. An act is negligent when it is done, not with the desire of producing a particular result, but actually producing that result by carelessness or indifference. There may be negligence as to the act as where a man thoughtlessly leaves open the gate of a field so that cattle escape into the highway or negligence as to the consequences of the act, as where a man intentionally throws a stone over a wall, careless as to the chances of anyone on the other side of the wall being hit by the stone, but without intending to hit anyone. A negligence state of mind, is consistent with an intention to exercise at any rate some care, as where a motorist, in a hurry, drives quickly down a crowded street and collides with a pedestrian, here, he does not intend to have a collision and exercises as much care as he can consistently with his desire to drive quickly. His negligence consists in his carelessness indifference to in exposing pedestrians to the risk of a collision because he is not prepared to subordinate his desire for speed to drive carefully. Austin is considered as the exponent of this theory. He advocated that negligence is a state of mind as opposite to intention. An act is intentional when it is purposeful and done with the desire or object of producing a particular result. An act is negligent when it is done not with the desire of producing a particular result, but actually producing that result by a carelessness or indifference.
In India, Justice Veeraswamy accepted this approach when in Animugham Pillai v. Ghanasoundrara Pandian\(^\text{11}\); he followed Re Nidamurthi Naga Bhushnam\(^\text{12}\) and opined that "Culpable negligence is acting without consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the education incumbent upon him, and that if he had, he would have the consciousness. The imputability arises from the neglect of the civic duty of circumspection. Rashness implies an awareness of the mind and the possible consequences, the person concerned nevertheless persisting in an act of expectation that it is in his power to meet an emergency or has taken steps to avoid or prevent any mischance or mischievous or injurious thing' happening. The essence of the rashness lies in the consciousness or awareness of mind with reference to the act done and indulging in that with a fool-hardy hope or expectation against anything untoward happening. On the other hand, negligence presupposes a negative state of mind, an absence of awareness or consciousness of what would be done, such state of mind being consequent upon failure to apply or exercise the requisite caution or precaution."

**Objective Theory of Negligence:** Negligence is often used in the sense of careless conduct without reference to any duty to take care. The use of the term in this sense has introduced some confusion into the subject, and has tended to obscure the true meaning of negligence. When there is a duty to take care, the standard of care frequently is that of the reasonable man, although this is not always so and consequently, failure to take reasonable care and negligence are sometimes used as synonymous terms regardless of whether or not there is any duty.

Pollock had adopted the view that negligence is not a state of mind but merely a type of conduct. It refers to the behaviour of a person who, although innocent of any intention to bring about the result in question, has failed nevertheless to act up to the standard set by law which is usually that of a reasonable man. Negligence is not a particular state of mind or form of *mens rea*.

\(^{11}\) (1958) 65ACJ242(Mad)
\(^{12}\) 7 M.C.H.R.362
at all, but a particular kind of conduct. It is a breach of duty of not taking care and "to take care" means to take precautions against the harmful result of one's actions and to refrain from unreasonably dangerous kind of conduct. As Pollock puts it "Negligence is contrary to diligence, and not describes diligence as a state of mind."\(^{13}\)

In *Veeran v. T.V. Krishnamoorthy*\(^{14}\) the Court observed,

"A reasonable man so regulates his conduct as to avoid producing any undesirable consequence which he forces as probable. That is the normal standard of careful conduct. If the conduct in question falls short of that standard or if the circumstances of the act are such that a reasonable man should have seen the probability of the accident then the defendant who failed to do likewise or who envisaged it and rejected it as too remote a chance, has to be regarded as having been negligent. It is unnecessary in law to prove that he actually foresaw the event or the consequences. It is enough if the circumstances are such that he as a reasonable man ought to have foreseen them."

The law takes no cognizance of carelessness in abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty had caused damage. Lord Wright in *Lochgelly Iron and Coal Company v. McMillan*\(^{15}\) said, "In strict analysis negligence means more than heedless or careless conduct, whether as omission or commission it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty owes". Finally, in *Union of India v. Hindustan Lever Ltd*\(^{16}\) the Court held that "negligence 'is a breach of duty to take care resulting in damage to one whether in person or property. The said duty to take care may be imposed by statute or it may arise due to relation in which one may stand to another."  

In the "traditional theory of negligence" the duty of care constituting negligence is regarded as the duty of foreseeing results, according to which a

\(^{13}\) Pollock, *Torts* (11th Ed.) p. 455;  
\(^{14}\) AIR 1966 Ker. 172  
\(^{15}\) *Lochgelly Iron and Coal Co. v. McMillan*  
\(^{16}\) AIR 1975 P&H 259
person should exercise extreme caution to foresee specific results, and it is understood that the duty of foreseeing results is born of the foreseeability of results. This is accepted as the common view in both the Civil Code and the Penal Code. The traditional theory of negligence does not always eliminate the duty of avoiding results but interprets that violation of the duty of foreseeing will result in violation of the duty of avoidance, i.e. that these two are sequential.

On the other hand, the precedents in both civil and criminal cases tend to indicate that negligence is regarded as violation of the duty of avoiding results, which is contrary to the common view. In light of the tendency noted in these precedent cases, the "new theory of negligence" is born, which argues that negligence is violation of the duty of avoiding results, i.e. negligence is caused by a faulty act (an act which deviates from the standard act required for a person to live a social life). This new theory is based on the following idea: although acts with accompanying possible risks are foreseeable, e.g. when a medical doctor performs an operation, he/she can foresee a possibility of making a failure which may put a patient to death, or when a person drives a car, he/she can foresee a possibility of causing a traffic accident, the social life would be confused if none of those who perform such acts can be saved from negligence. For the acts useful for the society, the person of the act is not blamed for negligence as far as he/she has performed that act without any fault, i.e. he/she has observed the duty of avoiding results (the duty of objective carefulness). This concept is related to "the principles of reliance" or the theory of "permissible risks".

In addition, several new theories of negligence have been proposed. In the Penal code of American Jurisdiction, there is the "theory of apprehensive feeling" (i.e. the new version of new negligence theory). In the new negligence theory, the foreseeability of results is required as a precondition that results may be avoidable and this foreseeability of results should be considered not merely in an abstract manner but in connection to progress of specific causality. On the other hand, the theory of apprehensive feeling argues that feelings of apprehension or anxiety are sufficiently enough as elements which increase strictness of the duty of avoiding results in connection with unknown risks such as environmental pollution or scandals regarding drug regulation or production, and as a precondition which
acknowledges the duty of avoiding results. On the other hand, there are several opinions proposed in the area of Civil Code. One theory is as follows: the duty of care as a precondition of negligence should be based on the ordinary person as the standard as far as the duty is related to the ordinary citizens' lives, whereas a business entity which uses high-level expertise and complicated organization to perform a large-scale business should take the duty of conducting investigations and surveys in organized and continuous manners in order to explore a possibility of occurrence of risks and prevent such risks from occurring; and if the business entity fails to conduct such surveys, resulting in occurrence of damage or loss, then that entity is blamed for negligence on the ground of violation of the duty of care with which they had to foresee occurrence of risks.

The second theory is as follows: negligence is separated from the issue related to subjective mental state and is an objective issue, and in other words, negligence is the issue of whether or not the person concerned has taken reasonable actions to prevent damage or loss which exceeds acceptable levels; and if such damage or loss beyond the acceptable levels should be caused, the person should be blamed for negligence whether the results are foreseeable or not.

The background to the above-described changes over time in negligence theories, i.e. from the traditional theory of negligence to the new theory of negligence and further to the new version of new theory of negligence, is the progress in science and technology and their application to society. The new theory of negligence is intended to provide ease for users of technologies which are useful for society but also possesses potential risks such as automobiles and medical practices, for which the traditional theory of negligence may blame such users for negligence. The most recent theory of negligence is intended to impose strict liability on acts of business entities which, through the use of new technology, may cause damage to an unspecified number of the general public, e.g. environmental pollution, scandals regarding drug regulation or production, and adverse effects on safety of foods.

Negligence theories are closely related to the progress in science and technology and their application to the society, as described above. The debut and widespread use of life sciences related technology, i.e. totally novel technology,
have raised the necessity of investigating negligence theories from the new points of view. For example, reproductive medical technology differs from the above-described technologies supporting the new negligence theory, such as automobiles and medical care technologies, because application of reproductive technology may cause abstract and extensive risks. Life sciences related technology differs from environmental pollution and scandals regarding drug regulation or production, which support the most recent theory of negligence, since reproductive technology is not a type of business performed by large enterprises having complicated organizations and large-scale facilities but may be a type of small-scale research and in some cases, as small as personal research. On the other hand, the recent progress in life sciences allows a certain technology to be applicable to not only a specific area but also every corner of the society, creating the situations in which we should not only focus on individual issues separately. This is also true for information technology, the field of science and technology that has also attained remarkable progress like life sciences related technology. The research scholar considers it necessary to keep these points in mind when investigating regulation of life sciences related technology in the future.

Apart from the issue of whether violation of the duty of foreseeing results is directly regarded as negligence or violation of the duty of avoiding results is regarded as a precondition of negligence, foreseeability is an important element constituting negligence. For the foreseeability, there exist several opinions regarding what should work as the standard.

In accordance with the objective theory, the ordinary person's ability of exercising caution works as the standard. When results are foreseeable by the ordinary person, the duty of foreseeing results is valid even if the person who did the act concerned was not able to foresee the results. Whereas the subjective theory postulates that the ability of exercising caution of the person who does the act concerned works as the standard. But the compromise theory propounds that the ability of exercising caution of the person who does the act concerned works as the standard, but if that ability exceeds the ordinary person's ability, then the ordinary person's ability works as the standard. Precedent cases are based on the objective theory and many of the conventional views agree with the objective
theory. There are different opinions regarding laws: some claim that laws prescribe standardized duties irrespective of differences in abilities among individuals and force citizens to observe such duties, through which they try to function as rules and regulations; and others claim that laws are based on the idea that unlawful acts break confidence by the person receiving damage or the third individual, although such confidence is regarded as a precondition for ordinary community life. However, those following the subjective theory criticize that whether the act conducted is blamed or not, i.e. whether or not the person who conducted the act concerned is held responsible for negligence or not, should be based on the ability of exercising caution of the person him/herself who conducted the act, as indicated by the following case: when a person drives a car and causes an accident because of a disease which is not foreseeable by the person, it is not appropriate to blame that person for negligence.

In criminal law studies, the following opinion regarding handling of the objective theory becomes predominant: the ordinary person works as the standard when violation of the duty of objective carefulness is evaluated as an element constituting negligence, and the person who did the act works as the standard when violation of the duty of subjective carefulness is evaluated as responsibility (when an individual injures another individual by negligence, the awareness that the subject to be injured was a human is evaluated according to the standard of the ordinary person, but legal causes for exclusion of responsibility such as the state of unsound mind are evaluated according to the standard of the person who did the act concerned.

In this section, the research scholar cannot complete discussion about whether these theories are right or wrong and confines himself to the matters which support these theories, instead of focusing on the question whether they are right or wrong. First of all, let us focus on foreseeability. It seems that there has existed the assumption that what is foreseeable by the ordinary person is right, when discussing foreseeability by comparing the ordinary person with the person who did the act concerned in terms of the ability of exercising caution. The compromise theory assumes that in some cases, the person who did the act concerned is superior to the ordinary person in the ability of exercising caution.
However, none of the theories regards the following as a proper assumption: irrespective of the ability of exercising caution, i.e. no matter what caution is exercised, the ordinary person is always wrong and the person who did the act concerned has always right understanding. Such reversal can frequently be noted in the field of science. In the area of life sciences in particular, in connection with regulation of technology, we frequently encounter the following situation: what is believed right by not only the ordinary citizens but scientific associations is not considered by specific research scholars to be correct, and these research scholars perform their own studies according to their independent opinions. Results obtained by these research scholars are highly appreciated since their studies and results have originality. Even if regulation of life sciences is imposed not by restricting research but by limiting application of technology, research scholars are the subjects to be regulated and in most cases, application of technology in their studies may be restricted. Under such circumstances, although the common idea throughout the society is important, the yardstick of research scholars’ judgment is decisive. It is therefore likely that the general conditions accepted by research scholars’ groups such as scientific associations are always opposed to what research scholars individually foresee.

In the United States, state laws and precedent cases indicate that product liability actions are generally grounded on theories of negligence, strict liability and breach of warranty. Strict liability is not always the issue. Advantages of individual defendants vary depending on awarded damages. Among these theories, the concept of technology standards is primarily based on strict liability in particular.

There are four opinions for these technology standards, i.e.

1. traditional practices in an industry which have been commonly performed regarding manufacture of a similar type of products to the product concerned,
2. legal, administrative, or industrial voluntary quality and safety standards,
3. level of knowledge attainable in fields of science and technology, and
4. feasibility and availability from the factual and economic points of view.

There are no uniform or fixed definitions.
The above-described view does not border itself in the factum of wrong. If the abstract risk described in the above theories means effects caused by prohibited acts, effects caused by permissible acts, effects which occur naturally, etc. such as the genetic effects attributable to exposure to radiation, then it becomes possible to make evaluation from the viewpoint of probability along with progress in science and technology, and following this, evaluation standards may be investigated for risk or safety of whole matters including the above. In Japan, from the legal point of view, none of rules or regulations may currently incorporate this way of evaluation from the viewpoint of probability, into safety evaluation. However it has been observed that some safety-related administration of the national government of Japan has started to try to incorporate this way of probability-based evaluation when setting safety management objectives.

Criticism against this created the new theory of negligence, according to which persons who invaded the legally protected interests (i.e. who caused a traffic accident) can escape negligence as far as they fulfill the duty of avoiding results (i.e. they observe the relevant rules and ordinances). However, if the method of probability-based evaluation becomes accepted by the society (or internationally), then the risk of facility or equipment concerned is evaluated by comparing the risk of the others and within such comparative evaluation results, duties for persons conducting acts to fulfill are defined. The debut of such new regulation may trigger re-examination of the existing theories of negligence or create new duties of avoiding results (new duties of care).\(^\text{17}\)

**Historical Development:** The tort of negligence is a relative newcomer to the law. As students of legal history are well aware, in the case of direct and immediate injury to the person and damage to property, liability was originally strict and the cause of action was known as trespass. Neither intention nor fault arose. In the case of indirect injury to person or property, liability for personal injury and damage to property depended upon proof of some element of fault in lieu of trespass. This form of action was known as action on the case.\(^\text{18}\) With the

\(^{17}\) [http://www.nistep.go.jp](http://www.nistep.go.jp)

\(^{18}\) [Fleming, The Law of Torts, 9th ed at P 24.](#)
advent of industrialization, it soon became apparent that strict liability for direct trespass could not survive the modern conditions, and liability for personal injury and injury to property came to depend upon intention and fault, instead of causation. In its transitory state from the old form of action on the case, negligence was described as carelessness in a matter where carefulness is obligatory. According to one early source, "negligence and wrongful intent are the alternative forms of mens rea, one or the other of which is commonly required by law as a condition of liability". By 1883, the foundation stone of the modern law of negligence was laid. In Takaro Properties Ltd v Rowling:

......... this development has been no more than "the product of pragmatism and judicial intuition" and that the basic purpose of the tort "[is] to shift or distribute the losses [reflecting] a realisation that potential defendants today are often well able to foresee and guard against economic effects of their carelessness by building up internal reserves as a form of self-insurance, or by group insurance schemes which spread individual losses in the widest fashion."

In Heaven v Pender, a painter employed by a painting contractor was injured whilst using some staging erected by a dry dock company. The painting contractor was engaged by the ship owner and there was no contractual relationship between the dry dock company that erected the staging and the painting contractor. His men were simply using the staging erected by the defendant. In Brett MR's judgment were sown the seeds of the modern tort of negligence. He said:

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think, would at once recognize that 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 property of the other, a duty arises to use ordinary care and skill to avoid such danger."
The Master of the Rolls was in the minority when he expressed that principle in such wide terms. The other two members of the Court founded liability on the basis that the injured plaintiff was an invitee of the dry dock company and therefore an obligation arose by virtue of that relationship to ensure that appliances supplied for immediate use were not dangerous. The majority expressly eschewed Brett MR’s generalization saying that such liability was confined to goods that are dangerous per se or dangerous to the knowledge of the defendant.

**Origin:** From the inception, negligence meant a failure to do something which a reasonable man would have done in the circumstances or the doing of something that such a person would not have done in the circumstances.\(^{24}\) It was early recognized that negligence would afford no remedy in law in the absence of a duty of care owed, not to the world generally, but to the particular plaintiff.\(^{25}\) Principally, the development of the law of negligence has been built on this foundation namely, identification of circumstances which give rise to a duty of care. At first, the existence of a duty was determined by reference to the nature of the activity being undertaken e.g. keeping dangerous goods, driving on the highway, being in a shop upon an implied invitation, and so on. A hundred years ago not only were the situations which gave rise to a duty of care carefully categorized, but also, the damage recoverable was confined to injury to person and property. Acknowledging that there was an obligation not to deceive another, the author of an early edition of Salmond on Torts\(^{26}\) said "but I am commonly under no obligation to take care that the statements I make to him are true."\(^{27}\)

The major landmark in the history and growth of the negligence is the House of Lords landmark decision in the famous *Donoghue v Stevenson* case\(^{28}\). Until that time the conventional legal wisdom had been that the manufacturer of an article, other than one that was either dangerous to the knowledge of the

\(^{24}\) *Blyth v Birmingham Waterworks Co* (1856) 11 Ex at 784.

\(^{25}\) *Thomson v Quartermaine* (1887) 18 QBD 694; *Butler v Fife Coal Co Ltd* [1912] AC 159.

\(^{26}\) WT Stallybrass *Salmond on The Law of Torts*; 7th ed (1928).

\(^{27}\) ibid at 25.

\(^{28}\) (1932) AC 562.
manufacturer or dangerous *per se*, owed no duty of care outside that imposed by the contract under which the article was sold. In support of the hapless Ms Donoghue, it was contended that a new category of negligent liability should be opened up, namely, in cases in which a manufacturer puts onto the market a product intended for consumption, packaged in such a way that inspection prior to consumption is impossible. Its interpolate to note that in those days drinking ginger beer appeared to be a hazard, for a Mr. Bates was also the victim of a dubious bottle of ginger beer.\(^*\) This one exploded, but, unlike Ms Donoghue twenty years later, Mr. Bates recovered nothing on the basis that there was no privity of contract between him and the manufacturer and the ginger beer was neither dangerous *per se* nor dangerous to the knowledge of the defendant, even though with the exercise of reasonable care, the danger of explosion would have become apparent to the company.

In *Donoghue v Stevenson*, Lord Buckmaster was in the minority. What he had to say makes interesting reading a little less than seventy five years later:

"There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems 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. 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.\(^*\)

One can only imagine the apoplexy that his Lordship would suffer upon hearing of *Bryan v Maloney*.\(^*\) Lord Atkin, whose famous dictum in *Donoghue v Stevenson*\(^*\) has rung down through the ages, eschewed the task of "elaborate classification of duties"\(^*\) and searched the earlier cases for an expression of unifying principle to determine the existence of a duty of care. His Lordship

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29 *Bates v Batey & Co Ltd* [1913] 3 KB 351.
30 *Supra* at 577-578.
31 *(1995) 182 CLR 609.*
32 *(1932) AC 562.*
33 *Supra* at 579.
immediately recognised that the dictum of Brett MR in *Heaven v Pender* (supra) was too wide, but was prepared to adopt it as a guiding principle, provided it was confined by the concept of proximity. As is well known, he described the proximity concept in these terms:

"Who then is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought to reasonably have them in my contemplation as being so affected when I am directing my mind to the acts or omissions that are called into question."

So the modern concept of duty of care in the tort of negligence was born, but one doubts if even the farsighted Lord Atkin contemplated that his child might grow as it has, like Topsy, under the stress of changing policies, for Lord Atkin's principle of the duty of care was limited to guarding against personal injury and property damage, and then only in cases where such injury or damage was, or ought to have been, within the reasonable contemplation of the defendant.

**The First Major Interpretation:** The consequences of the alleged escape of Ms Donoghue's snail from the bottle of ginger beer soon spread around the common law world. In *Grant v Australian Knitting Mills*\(^37\), an Australian case in which the neighbour principle was applied to aid the unfortunate plaintiff who contracted dermatitis from sulphites negligently left in the material of which his underpants were made. For some thirty years after *Donoghue v Stevenson*\(^38\), the tort of negligence jogged along under the perceived unifying principle of proximity which, in those days, meant reasonable foresight of injury to person or property. However, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*\(^39\) it was argued as to 'should there be a duty of care in the case of financial harm suffered in consequence of spoken words, or, as counsel for the appellant in the House of Lords so picturesquely put it'

\(^{34}\) *Supra* at 580

\(^{35}\) Charlesworth, *The Law of Negligence*, 2nd ed (1947) at 14 states that "An expression of opinion given without due care and skill by one person to another knowing that it is likely to be acted upon by a third party gives no right of action to the third party if he acts upon it to his detriment."

\(^{36}\) Cf *Woods v Duncan* [1946] AC 401; *Bourhill v Young* (1943) AC 92.

\(^{37}\) (1936) AC 85

\(^{38}\) (1932) AC 562.

\(^{39}\) (1964) AC 465.
"It would be strange if a person who handled his pen so carelessly as to put out X's eye were liable to pay damages, but not if he handled it so carelessly in writing, that X was financially ruined." 40

Counsel for the respondent submitted that the event that attracted liability and created the requisite proximity in Donoghue v Stevenson 41 was the inability to inspect the goods before consuming them. He contended 42 that the words of advice given by the Bank were not kept hidden and were free to be examined and therefore the necessary proximity was not there to create a liability. What did the House do in response to such able pleas? Absent a contract or fiduciary relationship between the person seeking the advice and the person giving it, was there any duty of care? In a breathtaking sweep, Lord Reid held that the neighbour principle in Donoghue v Stevenson43 had nothing to do with the case, observing that there is no comparison to be made between words and deeds44. His Lordship realized that the problem inherent in fixing the Bank with liability for their careless advice was to put a limit on the extent of any liability for the harm done. Overturning well established law,45 Lord Reid seized upon some passing words in a rather obscure Scottish case46 to pronounce that there was no reason to confine liability for careless advice to cases of contract or fiduciary duty. However, to limit liability for careless words once spoken, he declared that the law was that liability extended to all cases:

"... Where it is plain that the party seeking the information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."47

With great respect to his Lordship, it seems that although his words have the clothing of legal reasoning, the extension of liability for negligent advice in

40 Ibid at 470.
41 (1932) AC 562.
42 Ibid at 474.
43 (1932) AC 562.
44 Ibid at 483.
45 Derry v Peek supra; Candler v Crane Christmas & Co (1951) 2 KB 164; Le Lievre v Gould (1893) 1 QB 491.
46 Nocton v Lord Ashburton (1914)AC 932.
47 Supra at 486.
1964 had little to do with legal principle and a lot to do with policy namely, that where there has been the requisite reliance, it is in the community's best interests that the loss be borne by the giver of the advice. If this is right, the question that immediately arises is what was the basis for declaring that new policy and are the highest appellate courts of the land the best equipped vehicle for the identification and articulation of current policy for loss sharing? Consideration of this question must bear in mind that the courts in the common law world are designed to decide individual disputes between citizen and citizen, and citizen and State. Lord Morris did at least apply Lord Atkin's neighbour principle saying\(^{48}\) that he could see no distinction in logic or principle between injury caused by reliance on the safety of the contents of a bottle of ginger beer and reliance upon words spoken. One pauses to note that this application of legal principle, apparently crystal clear to Lord Morris, had until then, escaped the attention of many others with an interest in this field of law. In order to limit liability, Lord Morris said that the liability only arose when a person possessed of a special skill undertakes to apply that skill for the assistance of another person who relies upon that skill. This, he declared\(^{49}\) was "settled" law!! Perhaps a more accurate description of his Lordship's dictum would be "settled policy", applied to provide a fetter on the extent of liability for loss caused by the negligently spoken word. The decision attracted considerable academic discussion and criticism e.g., D M Gordon, *Hedley Byrne v Heller* in the House of Lords\(^{50}\)in which the author described the decision as a "drastic break with tradition" and one to be regarded with "misgiving".

This overview of the development and growth of the tort of negligence would be incomplete without examining the issue whether any legal principle is discernible, for the leading judgments are redolent with reference to the legal principle. After all, it cannot be denied that today, the tort of negligence is the dominant cause of action at common law for recovery of loss.\(^{51}\) Deane J pointed out:\(^{52}\)

\(^{48}\) *Supra* at 496.
\(^{49}\) *Supra* at 502.
\(^{50}\) (1964) 38 ALJ 39
\(^{52}\) Jaensch v Coffey *supra* at 584.
"Lord Atkin did not seek to identify the precise content of the requirement of the relationship of 'proximity' which he identified as a limitation upon the test of reasonable foreseeability. It was left as a broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another."

Growth of Tort of Negligence in India:

The Indian Law of torts, in general, and the law relating to negligence in particular is mostly based on the English Common Law as approved and adopted by the Courts in India based on the principles of justice, equity and good conscience. It is not surprising as the foundation of modern judicial infrastructure was set up by the British during their years of subjugation of India. Indian judiciary, after independence, have evolved the principles pertaining to liability in tort by modifying and adopting existing Common Law principles and developing India Specific principles which are typical to socio-political realities of India.

Judicial activism in India has led to the development of different principles like Absolute Liability, Constitutional Tort and Polluters Pay Principles etc. have significantly contributed to the growth of this branch of law. Through these principles, the Indian judiciary have taken a new look to the conception of negligence from an India Centric perspective i.e. the Indian Judiciary has interpreted the concept of negligence and liability in tort by factoring the socio-economic and political reality of the Indian Society.

Another striking feature of development of the Tort law in India is the enactment of statutes like the Public Liability Insurance Act, 1991, Environment Protection Act, 1986, Consumer Protection Act, 1986, Human Rights Protection Act, 1998, Pre-natal Diagnostics Techniques Regulation and Prevention of Misuse Act, 1994 etc. One of the common features of these statutes the re-look at the conception of negligence and fixing off statutory negligence on concerned parties for their tortious acts.
The development of the Indian law of torts and conception of negligence is best summed up by the observations of Chief Justice Bhagwati:

"we no longer need the crutches of a foreign legal order.....we in India cannot hold our hands back and I venture to evolve new principles of liability which English Courts have not done. We have to develop our own law and if we find it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise on account of hazardous and inherently dangerous industry............"  

Kinds of Negligence

The term 'negligence' has been used many a times with some epithets:

(a) Comparative Negligence.-Where an injury has been occasioned by the wrongful act of two parties the plaintiff is not required to strictly analyze proximate or immediate cause of the event so as to find out whom he could sue. Subject to the rule as to the remoteness of damage, the plaintiff may sue all or any of the negligent parsons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage. He is entitled to recover the full amount of damages from any of the defendant. Where by the fault of two or more persons damage is caused the liability to make good the damage or loss shall be proportionate to the degree to which each person was at fault. It is settled law that in the case of composite negligence causing the accident, all the persons concerned are jointly and severally liable.

(b) Statutory Negligence.-The term "negligence" also figures in the expression "statutory negligence". When statute prescribes a certain standard of behaviors with a view to avoiding injury to persons, it has been said that the failure to come up to that standard is statutorily equivalent to "negligence" without proof of carelessness. If a person is exercising his rights under a statute he is not

53 M. C. Mehta v. Union of India (1987) 1 SCC395
liable unless it is proved that he acted unreasonably or negligently. In the case of a public authority exercising statutory powers, there may or may not exist a duty to take care in favour of particular individuals. Where such a duty exists an individual who is injured by negligence in the performance of such a statutory duty had a right of action in respect of that negligence unless the statute expressly or impliedly excludes such liability\textsuperscript{58}. It seems that the decision of the House of Lords in \textit{Lochgelly Iron and Coal Co. v. McMillan} \textsuperscript{59} has settled that an action for breach of a statutory duty which involves the notion of taking care not to injured,\textsuperscript{60} is for the purposes of an action for damages equivalent to negligence.

"Whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute"\textsuperscript{61}. Lord Wright said that the breach of such a duty had been "correctly described as statutory negligence". But, in a later case\textsuperscript{62} the same Court expressed a contrary views submitted that here second thoughts are best. There are obvious differences between the two claims: In the one standard of care is fixed by the Legislature in the latter by the Court; in one the defence of \textit{volenti non fit injuria} is applicable and in the other, it is not. Again negligence and breach of statutory duty are usually treated as two separate causes of action from a pleading point of view.\textsuperscript{63} Further, a breach of statutory duty does not automatically throw on the defendant the onus of proving he was not in reach of his common law duty\textsuperscript{64}. Even if breach of statutory duty is not the tort of negligence there is no reason why it should not be of the some other tort\textsuperscript{65}. But, even though the causes of action are separate there is really only one head of damage for which redress is sought. So that satisfaction of one cause of action ends the whole claim\textsuperscript{66}.

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\textbf{(c) Advocate's Negligence.-} An advocate of the High Court in the exercise of his profession is bound to exercise reasonable skill and prudence but he is not
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\textsuperscript{58} Jeet Kumari Poddar \textit{v. Chittagong Engineering and Electric Supply Co. Ltd.}. AIR. 1947 Cal. 195 at p. 197

\textsuperscript{59} (1934) A.C. 1

\textsuperscript{60} \textit{Monk v Warbey} (1935) 1 K.B. 756

\textsuperscript{61} So the statutory precautions must be carried out even though statutory precaution might be equally effective: \textit{Stein and Co. Ltd. v. O'Hanlon}. (1965) A.C. 690.

\textsuperscript{62} \textit{Lochgelly Iron & Coal Co. v. McMillan}. (1954) A.C. 1 at p. 23

\textsuperscript{63} \textit{London Passenger Transport Board v. Upson}. (1949) A.C. 155 at p. 168.


\textsuperscript{65} \textit{Davis v. Everard (F.T.) and Sons Ltd.} (1960) 1 Lloyd's Rep. 59.

expected to be infallible. It is not in the best interest of the legal profession as a whole or of any member of it that there should be any lax or loose standard of professional conduct. Mere negligence however gross cannot amount to misconduct professional or otherwise. As was stated by Lord Esher, M.R., in 33 Sol. J. 397(2):

The motion was made against a solicitor for such misconduct in his profession as would call upon the Court either to strike him off the rolls or deal with him by of punishment in some other manner... But when such a motion was made asking the Court to exercise penal jurisdiction over a solicitor, it was not sufficient to show that his conduct was such as to support an action for negligence or want of skill. In order to support such a motion as the present it must be shown that he had done something dishonorable to him as a man and dishonorable in his profession. A solicitor was bound to act with the utmost honour on behalf of his client.

(d) Teacher's Negligence.-The Fryer v. Salford Corporation was the case in which a child aged 11 was receiving instructions in cooking and while doing so her apron caught fire from a gas-cooker and she received injuries. It was found on facts that there was no guard round the cooker. It was held by the Court of Appeal that the danger under those circumstances was one which ought to have been reasonably anticipated and which a local authority ought to have taken precautions to prevent by providing a guard round the stove or otherwise. The test which is applied in such circumstances is: what would a reasonably careful parent have done in like circumstances? The next decision to which attention has been invited is in Raws Thorne v Otttjej it was a case in which the headmaster of school had left the boys to play in the playground and had returned to the school premises. After he returned to the school premises a lorry arrived of which he had no knowledge. The lorry was in charge of a single driver and delivered coke in the school playground. After having unloaded the coke when the lorry was driving away, number of boys jumped on to the rear of the lorry which caused the tipping

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68 Per Costello, J., In the matter of an Advocate, A1R 1935 Cal. 484 at p. 487.
69 [1937] 3 All ER 617
70 [1953] 2 All ER 376
part to tip up. Another boy jumped on to the lorry immediately behind the driver's cab and when the tipping part of the lorry was suddenly released it came down on him and crushed his leg. On these facts, it was held by Mr. Justice Hibbery that there was no negligence on the part of the headmaster in leaving the boys in the playground without supervision and that he could not have taken steps to stop the lorry from coming during playtime. He therefore held that the headmaster and the management of the school was not liable. It was further held that the owners of the lorry had placed it in charge of a reasonable adult who could not have anticipated such interference. He also held that the driver was not negligent in failing to notice whether any boys had jumped on to the lorry. Lastly he held that a lorry as such is not allurement to children.

In Rich v. London County Council, an infant was a pupil at a school under the care and management of the defendant. An unfenced heap of coke lay in one of the playgrounds of the school and the infant was injured by a piece of coke thrown at him by another boy. In an action for damages for negligence it was found by the Court of Appeal that the school authorities had exercised adequate supervision over the boys. The principle which has been laid down is that the duty which the defendants owed to the boys was to take such care of them as a careful parent would take in like circumstances. Applying that principle the Court of Appeal held that the defendants were under no obligation to prevent the boys from having access to the coke by erecting fencing or by other similar means. The Court of Appeal further held that the supervision of the boys by the defendants was adequate and that they were not liable to the plaintiff.

The principle, which in a case of this type, the test which should be applied, is the test of what a reasonably careful parent would have done in like circumstances. Between a teacher and a student what a reasonably careful parent would have done in like circumstances is a very good test to apply. If the death of a student occurs on account of some overt act of negligence on the part of his teacher who is in charge he would be held guilty of negligence and liable to compensate the parents. To illustrate if a teacher who knows swimming enters

71 (1953) 2 All E.R.376
river water and takes a young boy with him who does not know swimming ostensibly for the purpose of the boy's pleasure or for the purpose of showing him what swimming is. It would constitute an overt act of negligence if the boy dies of drowning in such an attempt because it is his duty to gauge the depth of water assess the force of the current and reasonably apprehend whether a young untrained urchin who is placed in his charge would stand the exercise to which he subjects him. If there is any such overt act of negligence on the part of a teacher there is no doubt that the teacher will be liable in damages to the claimant. Next even if there is no overt act of negligence but there is an act of gross negligence consisting of an omission, the teacher would be liable in damages to the claimant. If a teacher who takes a party of young boys or urchins to a picnic spot leaves the party alone after giving necessary instructions and goes away elsewhere from the picnic spot where the boys are camping he would be liable in damages to the plaintiff if anyone of them under the aforesaid circumstances sustains an injury or meets with death because going away from the place and depriving the boys of his supervision would constitute an act of gross negligence. The difficulty of applying the test of what a reasonably careful parent would have done arises only in marginal cases. It cannot be gainsaid that where two teacher are in charge of 60 boys. The test of a reasonably careful parent would apply to the only in some details. A parent who takes out his boys to a picnic spot will ordinarily by looking after two or three or four. Obviously therefore he would exercise greater and more intensive supervision over them than two teachers would exercise over 60 boys. If the aforesaid circumstances the standard of applicability of the test is bound to vary case of teachers who were incharge of as many as 60 boys.

The question, therefore which arises for consideration is what degree of care they ought to have taken and what degree of negligence was involved in the incident. It cannot be gainsaid that to a young urchin river water is an allurement and excessive enthusiasm on his part would prove a trap for him. The river had a deep current because it was monsoon season. The boys were hardly 12 years of age. The danger of deep water in the river at this time was apparent and obvious. It cannot therefore be gainsaid that a greater degree of supervision over 60 days was necessary. The danger also could have been foreseen. However could they have foreseen one or two or three urchins straying away from the picnic spot
against their instructions and plying with their lives in the river water? If two parents had taken their children for picnic both would not have been engaged in eating simultaneously while their children had finished their food and were away at the well to drink water.

Therefore, the negligence in such a case is proved. So far as liability is concerned; the teachers who had accompanied the picnic party are liable. The headmaster of the school cannot be held liable because at the most what he did was to permit the picnic party to be taken out. He did nothing more. To permit a picnic party to be taken out from the school can never by itself constitute negligence. Therefore defendant No. 2 cannot be held liable. Defendant No. 4 the Municipal Corporation of Ahmedabad in its capacity as the employer of defendants who is vicariously liable for damages arising out of the incident.72

(e) Medical Negligence:

Medical negligence is merely a species of the tort of negligence. Doctors owe to their patients a duty in tort as well as in contract. It is expected of such a professional man that he should show a fair, reasonable and competent degree of skill, it is not required that he should use the highest degree of skill, for there may be persons who have higher education and greater advantages than he has nor will he be held to have guaranteed a cure. Although the standard is a high one, a medical practitioner should not be found negligent simply because one of the risks inherent in an operation of that kind occurs, or because in a matter of opinion he made an error of judgment or because he has failed to warn the patient of every risk involved in a proposed course of treatment73. The civil liability of medical men towards their patients is perhaps compendiously stated in R. v. Bateman74 as follows:

"If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge by or on behalf of a patient. He owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes

72 Shivkor Motashing(Smt) v. Ramnaresh Muni Singh. AIR 1978 Guj. 115 at pp. 118-124.
74 (1925) 94 L.J.K.B. 791
the treatment and the patient submits to his direction and treatment accordingly he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned. If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to show that he had sufficient knowledge nor will it avail to prove that he was diligent in attendance, if the patient has been killed by his gross ignorance and unskillfulness. As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man. As regards cases of alleged recklessness, juries are likely to distinguish between the qualified and the unqualified man. There may be recklessness in undertaking the treatment and recklessness in the conduct of it. It is no doubt, conceivable that a qualified man may be held liable for recklessly undertaking a case which he knew, or should have to known, to be beyond his powers, or for making his patient the subject of reckless experiment. Such cases are likely to be rare.

The duty of a medical practitioner arises from the fact that he does something to a human being that is likely to cause physical damage unless it is done with proper care and skill. There is no question of warranty of undertaking or profession of skill. The standard of care and skill to satisfy the duty in tort is that of the ordinary competent medical practitioner exercising the ordinary degree of professional skill. A defendant charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice. It is not required in discharge of his duty of care that he should use the highest degrees of skill since they may never be acquired. Even deviation from normal professional practice is not necessarily evidence of negligence.

75 Charlesworth on Negligence, 5th Edn. pp. 181-182.
Lord Denning, M.R. rightly pointed out in *Hucks v. Cole*\(^6\), as follows:

"A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was so grave so should the proof be clear. With the best will in the world, things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong. He was not liable for mischance or misadventure: or for an error of judgment. He was not liable for taking one choice out of two or for favouring one school rather than another. He was only liable when he fell below the standard of a reasonably competent practitioner: in his field so much so that his conduct might be deserving of censure of inexcusable."

Charlesworth on *Negligence*\(^77\), the law regarding the burden of proof on the plaintiff in an action for negligence is stated as follows generally:

"In an action for negligence, as in every other action the burden of proof falls upon the plaintiff alleging it. Hence it is for the plaintiff to give evidence of the facts on which he bases his claim to the redress which he seeks from the Court. His evidence may consist of facts proved or admitted and after it is concluded two questions arise-

(1) Whether on that evidence, negligence may be reasonably inferred, and
(2) Whether assuming it may be reasonably inferred, it is in fact inferred."

Further, it is stated that there is evidence of negligence if the facts proved and the inferences to be drawn from them are more consistent with negligence on the part of the defendant than with other causes. At page 583 it is stated that the plaintiff's evidence also must show that on the balance of probabilities the most likely cause of the damage was the defendant's negligence and not the negligence of any other person.\(^78\)

\(^6\) (1968) 118 New Law Journal 469

\(^77\) Charlesworth on Negligence, 5th Edn

\(^78\) Charlesworth on Negligence, 5th Edn pp.580-581.
In *Halsbury's Laws of England*\(^9\), the law is stated as under:

Negligence: duties owed to patient. A person who holds himself out ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not who is consulted by a patient owes him certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give, and duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient.

*Degree of skill and care required.* - The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: a person is not liable in negligence because someone else of better skill and knowledge would have prescribed different treatment or operated in a different way, nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, although a body of adverse opinion also existed among medical men."

The principles so stated by Halsbury were affirmed by the Supreme Court of India in *Dr. Laxman Balkrishna Joshi v. Dr. Taimbak Bapu Godbole*\(^80\).

"Doctors must be profoundly indebted to Lord Justice Denning for his summing up in the case of *Baicher v. Black*\(^81\). The details of the negligence alleged are of no importance to the, principles involved, but the generalization made in the Judge's summing up speech was vital to a fair and just appraisal of doctors responsibilities. He said 'In a hospital, when a person was ill and came in for treatment no matter what care was used, there was always a risk. and it would be wrong anti bad law to say that Simply because a mishap occurred in the hospital and doctor were

\(^{79}\) Vol. 26, at page 17
\(^{80}\) AIR1969SC128
\(^{81}\) *Taylor's Medical Jurisprudence*, [12th Edn] at page 55

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liable.....The injury must not, therefore, find him negligent simply because one of the risks inherent in an operation actually took place or because in a matter of opinion he made an error of judgment. They should find him guilty when he had fallen short of the standard of reasonable medical care, when he was deserving of censure. It is also necessary to bear in mind the following warning given to Courts by Goddard. L.J. as he then was in Mahon v. Osborne82:

"I would not for a moment attempt to define in vacuo the extent of a surgeon's duty in an operation beyond saying that he must use reasonable care, nor can I imagine anything. More disastrous to the community than to leave it to a jury or to a judge, if, sitting alone, to lay down what it is proper to do in any particular case without the guidance of witnesses who are qualified to speak on the subject."

Moreover, it is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule. In the law of negligence the test whether the consequences were reasonably foreseeable is a criterion alike of culpability and of compensation, as held by the Privy Council in Overseas Tankship (U.K.) Ltd. v. Moris Duck and Engineering Co. Ltd83 In Lord Nathan's Medical Negligence84, the following observation of Lord President Clyde in Hunter v. Hanley85 is relied upon at page 21:

"The true test for establishing negligence is diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of it acting with reasonable care."

At page 22 of the said book, it is stated:

"The medical man must, therefore exercise reasonable skill and care, measured by the standard of what is reasonably to be expected from the

83 Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd [The Wagon Mound (No 1)] [1961] AC 388
84 Nathan's Medical Negligence, 1957 Edn
ordinarily competent practitioner of his class. If he does so he will have discharged his duty and cannot be held answerable even if the treatment has untoward results. For the medical man is not an insurer, he does not warrant that his treatment will succeed or that he will perform a cure. Naturally he will not be liable, i.e. by reason of some peculiarity in the frame or constitution of a patient which was not reasonably to be anticipated, a treatment which in ordinary circumstances would be sound has unforeseen results. But he will not even be liable for every slip or accident.

The standard of care which the law requires is not insurance against accidental slips. It is such a degree of care as a normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake which imports negligence.

"Thus in order to decide whether negligence is established in any particular case the act or omission or course of conduct complained of must be judged not by ideal standards nor in the abstract but against the background of the circumstances in which the treatment in question was given. This is not to say that the standard of skill and care required varies with the circumstances of each case. The standard is always the same, namely, the conduct of the ordinarily competent and careful practitioner, but the degree of care required to comply with that standard is conditioned by the actual circumstances of the case. It is the degree of care which varies not the standard."

At page 104 and 107 of the Taylor's *Medical Jurisprudence*, Lord Nathan has observed:

"This burden of proving negligence rests upon the person who asserts it. In medical negligence cases therefore it is for the patient to establish his claim against the medical man and not for the medical man to prove that he acted with sufficient care and skill. It is by means of evidence of course that the patient will seek to and indeed must establish his claim, but the evidence he adduces may take several different forms. The most important form ordinarily is oral evidence,
which may consist both of the sworn testimony of the patient himself and other persons upon matters of fact such as what was done and what was said upon the relevant occasions and of the sworn testimony of experts upon matters of opinion, such as the correct mode of treatment for a specific condition. But the patient is not confined to oral evidence he may also rely upon documentary evidence in order to establish the facts upon which he bases his claim of negligence."

"In all cases however the facts proved must be sufficiently compelling to give rise to an inference of negligence, a mere conjecture will be insufficient. Thus if the facts are such that the Judge or Jury fell able to say 'we are satisfied that on the balance of probabilities there was a breach of duty on the part of the defendant' the plaintiff is entitled to succeed. If on the other hand the facts proved leave the Judge or Jury in the position of being able to say no more than that a possible explanation is that the defendant failed in his duty but the materials before us do not enable us to say that this was a more probable cause of the mishap than any other then negligence has not been established, the case has not passed from the realm of conjecture to that of legal inference."

Regarding negligence in diagnosis, Lord Nathan has observed at page 43 of the above referred book:

"The diagnosis of ailment is normally the first matter with which the medical man is concerned. and there can be no doubt that he may find himself held liable in an action for negligence if he makes a wrong diagnosis and thereby causes injury or damage to his patient; as for example where the false diagnosis leads the medical man to apply a wrong treatment or to refrain from applying some treatment which if it had been applied at once, would have averted or cured the condition complained of. It follows, however, from what has already been said as to the standard of care required from the medical man that a mistaken diagnosis is not necessarily a negligent diagnosis. It was said forty years ago, and the principle still holds
good though allowance must, of course be made in any particular case for subsequent advances in technique that no human being is infallible and in the present state of science even the most eminent specialist may be at fault in detecting the true nature of a diseased condition. A practitioner can only be held liable in this respect if his diagnosis is so palpably wrong as to prove negligence that is to say, if his mistake is of such a nature as to imply an absence of reasonable skill and care on his part, regard being had to the ordinary level of skill in the profession."

In the same book, the learned author at page 44 states as per the following in so far as the attending a patient is concerned:

"A medical man may be guilty of negligence if he fails to attend to his patient with the regularity or promptitude which his patient's conditions demands. but he can only be held liable civilly if his lack of attention leads to an avoidable deterioration of the patient's condition, Whether the medical man has complied with his duty to be reasonably diligent in attendance can only be decided after the fullest consideration of the circumstances of the particular case for it is only in the light of those circumstances that it is possible to measure the extent of the duty. He may well be guilty of negligence, however. if for example, as seems to have happened in a Scottish case, he goes on holiday without informing his locum of the existence or condition of one of his patients with the result that the latter's finger remains poultered for an excessive time, eventually necessitating amputation."

In the landmark case Indian Medical Association v V.P. Shantha\(^{37}\), the Supreme Court of India has summarized the Indian legal position pertaining to medical negligence, as under:

a) In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure
depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties (Para 23)

b) Medical practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable skill and care. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected. (Para 23 & 24)

c) It is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical practitioner, but this would not be so in all complaints about deficiency in rendering services by a medical practitioner. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the Agencies under the Act. In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief (Para 38).

d) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medical and surgical, would fall within the ambit of 'service' as defined in Section 2 (1) (o) of the Consumer Protection Act, 1986 (Herein after referred as Act) (Para 56).
e) 'Contract of personal service' has to be distinguished from a 'contract for personal services'. In the absence of a relationship of master and servant between the patient and the medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service under a 'contract of personal service'. Such service is service rendered under a 'contract for personal services' and is not covered by exclusionary clause of the definition of 'service' contained in the Act. (Para 56).

f) The expression 'contract of personal service' would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under a contract of employment would be outside the purview of 'service' (Para 56).

g) Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer employed in a hospital/nursing home where such services are rendered free of charge to everybody would not be 'service'. The payment of a token amount for registration purposes only at the hospital/nursing home would not alter the position (Para 56).

h) Service rendered at a non-Government hospital/nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service is outside the purview of the expression 'service'. (Para 56).

i) Service rendered at a non-Government hospital/nursing home where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service'. Service rendered at a non-Government hospital/nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' irrespective of the fact that the service is rendered free of charge to the persons who are not in a position to pay for such services. (Para 56).
j) Service rendered at a Government hospital/health center/dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service is outside the purview of the expression 'service'. Service rendered at a Government hospital/health center/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services would fall within the ambit of the expression 'service' irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. (Para 56).

k) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service'. (Para 56).

l) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent upon him, the services rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service'. (Para 56)

Another major issue is the attribution of criminality to medical negligence i.e. criminal negligence. The criminal law invariably placed the medical professionals in a different pedestal from ordinary mortals. The Indian Penal Code, 1860 has provided for protection of a medical professional under Sec.88, 92 and 93.However under Sec.304A of the Indian Penal Code, 1860, a medical practitioner can be prosecuted for negligence. A physician may be charged with culpable homicide when a patient dies from the effects of anaesthesia, an operation or any kind of treatment, if it may be proved but the death was the result of gross negligence. Prior to the administration of anaesthesia or performance of an operation, the medical man is expected to follow some precautions. The Indian Penal Code, 1860, Sec. 304-A, states that whoever causes the death of a person by
a rash or negligent act not amounting to culpable homicide will be punished with imprisonment for a term of two years, or with a fine, or with both it is used to frame charges against medical practitioners in India. While dealing with Indian Penal Code, 1860, Sec. 304-A, Sir Lawrence Jetkins in *Emperor v. Omkar Rampratap* stated ‘to impose criminal liability under Indian Penal Code, 1860, Sec. 304-A, it is necessary that the death must have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient with out the intervention of other’s negligence, it must be “causa causans”'. On 9 September 2004, Justices Arijit Pasayat and CK Thakker J referred the question of medical negligence to a larger bench of the Supreme Court of India. They observed that words such as ‘gross’, ‘reckless’, ‘competence’, and ‘indifference’ did not occur anywhere in the definition of ‘negligence’ under Indian Penal Code, 1860, Sec. 304-A and hence they may not agree with the judgment delivered in the case of Dr. Suresh Gupta. The issue was decided in the Supreme Court in the case of *Jacob Mathew vs. State of Punjab*. The court directed the Central Government to frame guidelines to save doctors from unnecessary harassment and undue pressure in performing their duties. It ruled that until the Central Government framed such guidelines, the following guidelines would prevail: A private complaint of rashness or negligence against a doctor may not be entertained without prima facie evidence in the form of a credible opinion of another competent doctor supporting the charge. In addition, the investigating officer must give an independent opinion, preferably of a government doctor. Finally, a doctor may be arrested only if the investigating officer believes that she/he would not be available for prosecution unless arrested. Indian Penal Code, 1860, Sec. (s) 80 and 88, contains defenses for doctors accused of criminal liability. Under Indian Penal Code, 1860, Sec. 80 (accident in doing a lawful act) nothing is an offence that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. According to Indian Penal code, 1860, Sec. 88, a person cannot be accused of an offence if she/he performs an act in good faith for the other’s benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.

87 4 Bom L.R. 679
88 AIR 2005 SC 3180
Medical negligence is there from time immemorial, but has gained actionable primacy due to the recent development in consumerism and human rights. Consumer laws have also provided necessary impetuous in this direction.

(f) Inadvertence: Negligence is usually accompanied by inadvertence, but it is not the same thing, and this coincidence is not Invariable. Carelessness as to possible consequences very often results in a failure to bring those consequences to mind i.e. inadvertence. Commonly, therefore the careless person not only does not intend the consequence but does not even advert to it; its possibility or probability does not occur to his mind. But it is not always so, for there is such a thing as willful i.e. conscious and advertent negligence. The wrongdoer may not desire or intend the consequence but may yet be perfectly conscious of the risk of it. He does not intentionally cause the harm but he intentionally and consciously exposes others to the risk of it. In Hudston v. Viney, Eve. J. has described it as "an attitude of mental indifference to obvious risks."

(h) Culpable Negligence. - In Arumugham Pillal v. Gnanasoundara Pandian culpable negligence has been enumerated as acting without consciousness that the illegal and mischievous effect will follow but in the circumstances which show that the actor had not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. However culpable negligence, coupled with delinquency, amounts to gross negligence.

(i) Criminal Negligence.- Kenny has pointed out that for criminal liability for negligence there must be something more than blameworthy inadvertence. A higher degree of negligence is necessary to render a person guilty of manslaughter than to establish civil liability against him. Mere carelessness is not enough. The finding of Criminal Court is not binding in torts to award

89 Hicks v British Transport Commission. (1958) 1 W.L.R. 493 at p. 503
90 Sungravure Ltd. v. Measle. (1964) 110 C.L.R. 24 at p. 32.
91 (1921) 1 Ch. 98 at Page 104
92 (1958) 65 A.C.J. 242 (Mad.);
93 Turner, J.W. Cecil, Kenny's Outlines of Criminal Law, The Syndics of the Cambridge University Press, 1958, at page 29,
damages in case of negligence\(^{95}\). In India criminal negligence is actionable under the Indian Penal Code, 1860.

(j) **Contributory Negligence.** - Contributory negligence relates to conduct of person who has a duty to perform, and the duty performed falls below the standard to which he is required to conform. Here the degree of care, carelessness and conduct of person is very important. While considering the degree of care, the reasonable conduct of a person is more essential than normal standard of care. Despite that if the person acting with utmost care still damage results, it would not be said to be ‘contributory negligence\(^{96}\).

(k) **Constructive Negligence**: Constructive negligence occurs when the person who owes duty deploys another to carry out the work at his instance. In the course of the carrying out of work, either due to want of skill or inexperience or for whatever reason, the latter causes negligence that is under control of the former person who actually owes duty. For example, assume X is engaged to do some professional work, and Y is X’s assistant. In turn, X instructs Y to carry out some work. Because of carelessness of Y, X is held negligent. This is termed ‘constructive negligence’.

(l) **Gross Negligence**: The dictionary meaning of gross refers to ‘total’, complete, blatant. The gross negligence in the discharge of duties partake shades of delinquency (AIR 1957 SC 1011). When there is absolute dereliction of duty, with an attitude of ‘don’t care’ it amounts to gross negligence. When there is complete and absolute disregard to duty owed, it is said to be gross negligence.

It is not mere negligence but highest degree of negligence. Gross negligence plays a dominant role in determining whether a person is guilty of negligence and also awarding of punishment. The Chartered Accountants Act 1949, Clause 7 of the Second Schedule Part I uses the term ‘gross negligence’. A Chartered Accountant shall be guilty of professional misconduct if he is grossly negligent in the conduct of his professional duties.


Gross negligence normally partake the character of willful or intentional act. Because of this inherent nature, this kind of negligence is amenable for civil proceedings and criminal proceedings. Whereas negligence does not have a motive with purpose, design or intent; it occurs due to carelessness. Mere negligence, without any intent or purpose to deceive, cannot be considered as gross negligence.

To establish gross negligence, it is necessary to look into the motive. The Supreme Court has observed in *An Advocate*[^97], that the Disciplinary Committee did not consider the question as to whether the facts established that the appellant was acting with an oblique motive, with bonafide or mala-fide or dishonest motive. This presupposes mens rea. By this it establishes whether it is negligence or amounting to culpable negligence. In *Kumaravellu v. Bar Council of India*,[^98] the Supreme Court observed that the negligence on the part of an Advocate was without moral turpitude or delinquency and, therefore, he was not held guilty of professional misconduct.

The word negligence is associated in the section with the word ‘misconduct’ and involves some element of moral culpability. Here imprudence is not enough; want of judgment is not enough and grave error of judgment is also not enough.[^99] In the majority of the court judgments, in dealing with the cases of Advocates under Advocates Act, 1935, courts have held that mere negligence or error of judgment on the part of the Advocate would not amount to professional misconduct. Because, error of judgment cannot be completely eliminated in all human affairs and mere negligence may not necessarily show that the advocate was guilty of it.[^100] The courts were inclined to examine and to test whether gross negligence involves moral turpitude or delinquency. Whenever conduct proved against an advocate is contrary to good morals or is unethical, it may be safely held that it involves moral turpitude. The expression moral turpitude or delinquency is not to be construed in a restricted sense. Therefore, according to the Supreme Court of India, mere negligence or error of

[^97]: AIR 1989 SC 245
[^98]: AIR 1997 SC 1014
[^100]: AIR 1926 MAD 568.
judgment on the part of the advocate would not amount to professional misconduct. In *Registrar of Companies v. K.B. Madan*\(^{101}\) the issue of professional misconduct came up. Further the question cropped up that whether the same yardstick applicable for advocates should apply to chartered accountants. The Disciplinary Committee has observed that there is "no reason why the same yardstick should not be applied to the profession of accountancy".

In *Registrar of Companies v. S.A. Sundaram*\(^{102}\), where the Committee observed on the evidence and other tests having been carried out by the respondent in respect of receipt and payments of the cash book, on allegation of omission, the Council held that this omission amounted to worst negligence but not gross negligence on the part of the respondent.

In *Ganeshan v. A.K. Joscelyne*\(^{103}\), the Calcutta High court observed,

"The charge is not one of inefficiency, but of misconduct and an allegation of misconduct, an imputation of a certain mental condition is always involved. I think it would be impossible for any professional man to exercise his profession, if he was to be guilty of misconduct, simply because he had not in a given case been able to do all that was required in the circumstances or that had misconceived his duty or failed to perform a part of it. I think the test must always be whether in addition to the failure to do the duty, partial or entire, which had happened there had also been a failure to act honestly and reasonably".

But different views were held in *Registrar of Companies, Bombay v. V.P. Bagdad*\(^{104}\). To arrive at gross negligence, it is necessary to draw a distinction between negligence and gross negligence, tolerable negligence and culpable negligence. In culpable negligence an attempt will be made to believe the other person that everything is all right which is otherwise not. In such circumstances, it amounts to gross negligence.

\(^{101}\) VOL I p 144- the Chartered Accountant-Oct.2006
\(^{102}\) VOL I p 144 -the Chartered Accountant-Oct.2006
\(^{103}\) AIR1957 Cal.33
\(^{104}\) 227 vol. IV of Disciplinary Cases, as quoted in the Chartered Accountant-Oct.2006.
(m) **Willful Negligence**: Willful negligence occurs where there is a deliberate or willful or intentional act of a person. There is deliberate act either directly or indirectly. Willful negligence squarely falls under Clause 7, of Part I of Second Schedule to the Chartered Accountants Act, 1949.

This categorization is indicative only. With the ever expanding frontiers of technology, interaction among members of human society is ever increasing. Therefore the class/category of negligence will never be constant. However the basic tenets of negligence will remain the same.

**Negligence: A Conceptual Dynamics**

As stated earlier, Tort Law is a socio-legal mechanism which mediates the relationships between citizens in conflict and between those citizens and the state and negligence formulates the genesis of liability under tort. Such societal relationship among human beings is directly related to the overwhelming influence of science and technology on behavioral pattern. Emergence of Information Technology, Intellectual Property, Transnational Business Congregations and other scientific developments have brought human beings closer and shrunk the world. Human inter-action has reached unimaginable proportions and so is the abuse or infringement of rights of human beings. The liability for negligent interference with an individual's life, person and property, recognised from the *Donoghue vs. Stevenson* Case in 1932 may find itself enamored in new challenges. Such challenges are different, as one of the victims might be in one jurisdiction and the wrong-doer may be in another jurisdiction. Then the question, which arises, is that whether a Court of one legal jurisdiction will agree with the conception of negligence enunciated by the Court of a different jurisdiction. The challenge for Indian judiciary in Bhopal Gas tragedy is well documented. It is an indication of the challenges facing the traditional conceptual perspectives of negligence. This thesis is an attempt to search for a logical genesis of the conflicting perspective of negligence, in view of new challenges as well as formulating a doctrinal notion of the concept of negligence, with special emphasis on Indian scenario.