NEGLIGENCE

- It is derived from Latin term '*Negligentia'* which means 'disregard'
- It can be characterized in three forms-

✓ **Nonfeasance**: It means the act of failure to do something which a person should have done. For example, failure to carry out the repairs of an old building when it should have been done.

✓ **Misfeasance**: It means the act of not doing an action properly when it should have been done properly. For example, doing the repairs of an old building but doing so by using very poor quality materials creating a major probability of a collapse which injures people.

✓ **Malfeasance**: It means the act of doing something which should not have been done in the first place itself. For example, using products that are not allowed and combustible to carry out the repairs of an old building, therefore, converting the building into a firetrap leading to an accident.

Theories of negligence

- There are two Rival theories about nature and definition of negligence. According to one theory negligence is **state of mind** but according to the other, it is a **type of conduct**. The former is called as subjective theory of negligence and the latter is called as objective theory of metals
- **Subjective theory**- According to **Austin** negligence is a faulty mental condition which is penalized by award of damages.
- **Salmond** says negligence is a culpable carelessness. Negligence essentially consists in the mental attitude of undue in difference with respect to one's conduct and its consequences.
- According to **Winfield** as a mental element in tortuous liability negligence usually signifies total or partial inadvertence of the defendant to his conduct and

for its consequences. In exceptional cases there may be full advertence to both conduct and the consequences. But in an event, there is no desire for the consequences and this is the Touchstone for distinguishing it from intention.

- **Objective theory** according to this theory negligence is not a particular state of mind or a form of Mens Rea at all but a particular kind of conduct.
- According to **Pollock**- is contrary of diligence and no one described diligence as a state of mind. Negligence is a breach of duty to take care and to take care means to take precautions against the harmful results of one's actions and to refrain from unreasonably dangerous kind of conduct.

  This is the objective meaning of negligence, which treats negligence as a separate or specific tort. The House of Lords in Donoghue v. Stevenson cleared that negligence, where there is a duty to take care, is also a specific tort in itself, and not simply an element in some other tort.

- **Donoghue v. Stevenson**- Mrs. Donoghue's friend bought her a ginger-beer from a café. She consumed about half of the bottle. This was made of dark opaque glass, later she found decomposed remains of a snail in the bottle which caused her shock and severe gastro-enteritis. Mrs Donoghue was not able to claim through breach of warranty of a contract because her friend bought the beer and therefore her friend was the party to contract and she was not. This case established several legal principles:
  - **Negligence is a tort in itself**- This case affirmed that negligence is a tort. Which means you can take civil action against someone if their negligence causes you injury etc.
  - **Duty of care**- This case Established that manufactures have a duty of care to the end consumers or users of their products. This precedent has evolved and now forms the **basis of consumer protection laws**.
  - **Lord Atkin** in this case developed the "neighbor principle" that extended the tort of negligence beyond the tortfeasor and the immediate party. It raised the question of exactly which people might be affected by negligent actions.
  - In Donghue's case, she had not purchased the ginger beer but had received it as a gift. She was a "neighbor" rather than a party to the contract.

Essentials of negligence

- There are three Essential elements of negligence:

1. **The defendant owed a duty of care towards plaintiff**
2. **The defendant made a breach of Duty**
3. **Plaintiff suffered damage as a consequence of such breach.**

1. **Duty to take care**

- Duty to take care means a legal duty. It should not be a mear moral or social duty. The duty may arise out of statute or otherwise. Duty is an obligation recognized by law to avoid unreasonable conduct resulting risk of damage.
- **Donoghue versus Stevenson** is a leading judgement on this point. The court held that a person must take reasonable care to avoid acts or omissions which he can reasonably foresee that it will injure the neighbor.
- This is also established the **Doctrine of Privity of contract** has no application in the cases of torts
- **Bourhill v. Young (1943)**
- Facts: A motor-cyclist had an accident and died instantly. After the body had been removed from the place of accident, the plaintiff visited the place and saw some blood which was left on the road and because of that she suffered a nervous shock and gave birth to a still-born child of 8 months because of which she sued the representatives of the deceased motorcyclist.
- Decision: It was held that the deceased had no duty of care towards the litigant and therefore she could not claim any damages from the deceased's representatives.

a) **Reasonably foreseeable injury**

- The duty to take care also depends on reasonable foresee ability of the injury. If the Injury to the plaintiff is not foreseeable then the defendant is not liable.
- In **Glasgow Corporation versus Muir,** defendant Corporation permitted a picnic party. Members of the picnic party were carrying gallons of tea through a passage their children were also playing. One of the members lost grip of the

gallon and few children were injured. It was held that the defendant was not liable because the injury was not foreseeable.

- In **Balton versus stone,** the person on road was injured by a ball hit by a player on a cricket ground. The court held that the defendant was not negligent as the injury was not foreseeable

2. Breach of duty to take care

- Breach of Duty means not taking proper care which is required in a particular situation. The standard of care required is that of a reasonable man'. In **Blyth versus Birmingham waterworks company** the court held that law required caution which a prudent man would observe
- In **Latimer versus A.E.C limited** due to heavy rain, the factory was flooded with water which got mixed with oily substance and made the floor slippery. Defendant to all possible care and Fred sawdust. Still oily patches remained and the plaintiff suffered injuries. The court held that defendant was not liable as he took all possible care to avoid the harm
- The degree of care varies according to the magnitude of harm. The larger the harm the greater the care.

3. Damage- **The tort of negligence is not actionable per se**. Actual damage is one of the essential conditions of liability in negligence.

Res ipsa loquitur

- **Res ipsa loquitur** means things speak for itself. As a general rule the burden of proving negligence is on the plaintiff. But in certain cases inference of negligence is drawn from the facts and plaintiff need not prove it.
- In a situation where the accident or occurrence explains only one thing that the accident could not have happened unless the defendant was negligent, the plaintiff need not prove negligence. The burden shifts to the defendant to prove that he was not negligent. **The maxim is not a rule of law; it is a rule of evidence**.
- This Maxim applies when: -

1. The thing was under the exclusive control and management of defendant; and

2. The accident could not have happened in the ordinary course if the management applied proper care and caution.

- This doctrine arose out of the case of **Byrne vs. Boadle(1863)**- The plaintiff was walking by a warehouse on the road and suffered injuries from a falling barrel of flour which rolled out of a window from the second floor. At the trial, the plaintiff's attorney argued that the facts spoke for themselves and demonstrated the warehouse's negligence since no other explanation could account for the cause of the plaintiff's injuries.
- **Municipal Corporation Delhi versus subhagwanti 1966** clock tower situated in Chandni Chowk for Laughs. It belonged to Municipal Corporation Delhi and was under their control. A trial court and high court applied the maxim **res ipsa loquitur** and held that it was the duty of Municipal Corporation to carry out periodical examination and repair of the tower. The Supreme Court held that this Maxim is applied when the circumstances surrounding the thing which cause the damage was under the control and management of defendants and happening does not occur in normal course without negligence.
- **Defenses available in a suit for negligence**

✓ Contributory negligence by the plaintiff

✓ An Act of God

✓ Inevitable Accident

Contributory and composite negligence

Contributory negligence

- **Meaning:** when the plaintiff by his own negligence contributes to the damage caused by the negligence of the defendant it is called as a case of contributory negligence
- In **Municipal Corporation of Greater Bombay versus Lakshmi Iyyar 2003** Supreme Court held that where the accident is due to negligence of both parties, there would be contributory negligence and both will be blamed.
- In case of contributory negligence the liability depends upon whether either party could have avoided the consequence by exercise of reasonable care. Whichever party could have avoided would be liable for accident.
- The burden of proof lies over the defendant. In order to get the defence of contributory negligence, the defendant must prove that the plaintiff is as responsible as defendant, and ignored due diligence which could have avoided such consequences arising from the negligence of the defendant.
- In **Rural Transport Service Versus Bezulum Bibi**, the driver of an overcrowded bus allowed passengers to travel on the roof of the bus while driving. While driving he ignored this fact and drove negligently. As a result the passenger sitting on the roof fell down and died. The driver and the conductor were held responsible for the negligence although there was contributory negligence on the part of the passenger as well.
- **Harris versus Toronto transit Commission 1968** It was held that if a boy sitting in the bus projected his arm outside the bus in spite of the warning and was injured he is guilty of contributory negligence.
- **Butterfield versus Forrester 1809** the defendant wrongfully obstructed a highway by putting a pole across it. The plaintiff who was riding violently in the twilight on the road collided against the pole and was thrown from his horse and injured. If the plaintiff had been reasonably careful, he could have observed the obstruction from a distance and avoided the accident. It was held that the

plaintiff had no cause of action as he himself could have avoided the accident by exercising due care.

- In the case of contributory negligence the plaintiff need not have a duty of care to the other party. It is to be proved that the plaintiff did not take care of his own safety and as a result contributed to the damage.

Last opportunity rule:

- According to this rule the person who had the last opportunity to avoid the accident should be liable for the loss.
- **Davies vs. Mann (1842)**
  In the case, the defendant while driving a wagon killed the donkey of the plaintiff which was fettered at the side of the road. It was held that the defendant had the last opportunity to avoid the accident by taking appropriate measures.
- This rule was very unsatisfactory as a party, whose act of negligence was earlier, altogether escapes the responsibility and whose negligence was subsequent was made liable entirely even though the resulting damage was the product of negligence of both the parties and was therefore modified in England by **Law reform [contributory negligence act] 1945**. According to this provision whenever both parties are negligent and they have contributed to some damage then the damages will be appropriated between them.

Doctrine of apportionment in India

- Claim for damages by the plaintiff is reduced to the extent of his proportion of negligence.
- In India there is no such Central litigation. However Kerala legislature enacted the **Kerala Torts [Miscellaneous Provisions Act 1976].** This Act makes provisions for or apportionment of liability in case of contributory negligence

known as **doctrine of apportionment of damages**. It states that if the plaintiff is as much at fault as the defendant the compensation to which he would otherwise be entitled will be reduced by 50%. Later it was further modified that Claim for damages by the plaintiff would be reduced to the extent of his proportion of negligence.

Doctrine of alternative danger-

- This Doctrine is also referred as 'the dilemma principle', 'choice of Evils' or the agony of moment. The plaintiff is suddenly put in a position of imminent personal danger by the wrongful act of the defendant and he takes a reasonable decision to avoid the dangerous and act accordingly and suffers injury consequently, the defendant is liable. The law therefore permits the plaintiff to encounter an alternative danger to save him from danger created by the defendant if the course adopted by him results in some harm to himself, his action against the defendant will not fail.
- In **Jones versus Boyce 1816** the plaintiff was a passenger in defendants coach and coach was driven so negligently that the plaintiff was alarmed. With a view to save him from the danger created by the defendant he jumped off the coach and broke his leg. It was held that the plaintiff had acted reasonably under the circumstances and he was entitled to recover damages.

Composite negligence

- When negligence of two or more persons results in the damage to the third person then it is said to be composite negligence.
- In England such tortfeasors are classified into
  1. **Joint tortfeasor**
  2. **Independence tortfeasors**

- **Joint tortfeasors**: two or more persons are said to be joint tortfeasors when the wrongful act which resulted in single damage was done by them in **furtherance of common design.**
- **Independent tortfeasors**: when two or more persons acting independently cause a single damage then they are call independent tortfeasors
- In India there is **no such distinction between joint and independent tortfeasors**. In India when two or more persons are responsible for a common damage [whether acting jointly or independently] they are known as composite tortfeasors.

- **Difference between contributory negligence and composite negligence**

Contributory negligence	Composite negligence
when the plaintiff by his own negligence contributes to the damage caused by the negligence of the defendant it is called as contributory negligence	When negligence of two or more persons results in the damage to the third person then it is said to be composite negligence.
Both plaintiff and defendant are held responsible.	Wrongdoers [defendants are jointly] liable.
There is a proximate relation between the acts of the plaintiff and defendant.	There's no such relation between the plaintiff and the defendants.
Both the plaintiff and the defendant are liable to pay for the damages.	Wrongdoers are liable to pay for the injury sustained by the plaintiff.
Claim for damages by the plaintiff is reduced to the extent of his proportion of negligence.	Claim for damages is not reduced to an extent.