CHAPTER 7 - NEGLIGENCE

WHAT IS NEGLIGENCE

Negligence may be defined as –

- a breach of a duty, caused by the *omission to do something* which a reasonable man (guided by those considerations which ordinarily regulate the conduct of human affairs) would do - *or*
- *doing something* which a prudent and reasonable man would not do,

In other words, negligence may arise from *non-feasance* or from *misfeasance*.

It is a tort which can be committed with respect to both, the person and the property of another.

A suit for negligence proceeds upon the idea of *an obligation or duty on the part of the defendant to use care*, a breach whereof results in the plaintiff's injury.

It is *not necessary* that the duty neglected should have arisen out of a contract between the plaintiff and the defendant. Thus, the duty may arise under a statute or otherwise; and if it is neglected and it results in an injury to the plaintiff, he has a right to sue for damages.

There *cannot* be a liability for negligence *unless there is a breach of some duty*.

Thus, the idea of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which one is bound by law to exercise towards another.

Austin defines negligence thus: "In case of negligence, a party performs *not* an act to which he is obliged; he breaks a positive duty."

Actionable negligence consists in the neglect of the use of the ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

- As was once observed, "If a man is driving on Salisbury plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near him, immediately a duty arises *not* to drive in such a way as is likely to cause an injury to that other carriage."
- Thus, a man who walks across a crowd of people, carrying sharp-edged tools in his hand, is under a duty to ensure that he does no injury to those around him.

ESSENTIALS OF A SUIT FOR NEGLIGENCE

The burden of proving negligence is on the part of the plaintiff who alleges it. In order to succeed in an action for negligence, the plaintiff must prove the following *four* things:

1. That, the defendant was under a legal duty, to exercise due care and skill, as there *cannot* be any liability for negligence unless there is a breach of some legal duty.
2. That, the duty was towards the plaintiff.
3. That, in the circumstances of the case, the defendant committed a breach of such duty.
4. That, the breach of duty was the *causa causans,* that is, the direct and proximate cause, of the damage complained of and that, the damage was caused on account of this breach of duty.

1. DUTY OF CARE

A fundamental principle of the English law of negligence was affirmed by the House of Lords in a majority judgment in a leading case, **Donoghue v. Stevenson (The snail-in-the-bottle-case).**

- ***Donoghue v. Stevenson (The snail-in-the-bottle-case) –*** The plaintiff accompanied by a friend, went to a cafe in Paisley for refreshments. They ordered two slices of ice-cream and a bottle of ginger-beer. Each slab of ice-cream was placed in a tumbler, over which was then poured part of the contents of the ginger-beer. The ginger-beer was served in a stoppered bottle of dark opaque glass and had been manufactured by the defendant, Stevenson. After the plaintiff had finished some of the ice-cream, her friend attempted to replenish the glass by pouring into it the rest of the contents of the bottle. As she was doing this, the remains of a decomposed snail (which had apparently found its way into the bottle in the factory) floated out.

  It was the plaintiff's case that as a result of the nauseating sight of the snail and the impurities of the ginger-beer which she had already consumed, she suffered from shock and severe gastro-enteritis. A majority of the House of Lords *held* that Stevenson owed her a duty to take care that the bottle did *not* contain any noxious matter and that he would be *liable* if that duty was *not* performed.

In the course of judgment, ***Lord Atkin*** redefined the concept of duty of care, observing as follows:

"*You must take reasonable care to avoid acts or omissions which can reasonably be foreseen to be likely to injure your neighbour*. **Who, then, in law is my neighbour?** The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation, as being so affected when I am directing in minds to the acts or omissions which are called in question."

Lord Atkin's judgment in *Donoghue v. Stevenson* has laid down certain important principles, which have been followed in several subsequent cases.

➔ Whether the defendant owed a duty to the plaintiff or not ***depends on reasonable foreseeability of injury to the plaintiff.***

- ***Rural Transport Service v. Bezlum Bibi*** **-** If the conductor of an overcrowded bus invites passengers to travel on the roof of the bus and the driver swerves the bus to the right to

overtake a cart and a passenger on the roof is hit by the branch of a tree and falls down, as a consequence of which he suffers serious injuries and dies, there is *negligence* on the part of the conductor and the driver.

➔ **No liability** will arise if the **harm is not foreseeable**

- In ***Cates v. Mongini Bros*.,** due to some latent defect in the suspension rod of a ceiling fan fixed in the defendant's restraint, it fell on the plaintiff and she was injured. It was held that since the defendants could not foresee the harm, they were not liable.

2. DUTY MUST BE OWED TO THE PLAINTIFF

In order to sustain an action for negligence, it must be shown that the defendant owed a duty of care to the plaintiff. If the defendant owes a duty to a person other than the plaintiff, the plaintiff cannot maintain an action for negligence. Even though he might have suffered an injury owing to the defendant's act.

- ***Bourhill v. Young:*** The plaintiff, a fishwife while getting out of a tramcar saw a speeding motor cyclist passing the other side of the tramcar. Immediately thereafter, the motorcyclist collided with a motor car and was killed. The fishwife did not see the motor cyclist or the accident but she only heard the noise of the accident. Later, after the motor cyclist's dead body had been removed, she approached the spot and saw the blood left there. In consequence, she sustained a nervous shock and gave birth to a still-born child. The plaintiff sued the executors of the motorcyclist. It was held that the defendant was not liable because the motor cyclist did not owe any duty of care towards the fishwife and he was not negligent towards her.

3. BREACH OF DUTY

Breach of duty means not taking due care which is required in a particular case. The **standard of care** by which one can determine whether a person has been guilty of negligence is the conduct of a prudent man in the particular situation. *The amount of care may vary to the greatest extent, while the standard itself remains the same.* The prudent man is the man who has acquired the skill to do the act which he undertakes. If a man *has not acquired* the skill to do a particular act he undertakes, then he is imprudent, however careful he may be and however great his skill may be in other things.

➔ The degree of care which a man is required to use in a particular situation varies with the

obviousness of the risk.

- If the danger of doing injury to the person or property of another by the pursuance of a certain line of conduct is great, more care is necessary.
- If the danger is slight, only a small amount of care is required. The care that will be required will be the care that an ordinary prudent man is bound to exercise.

But, persons who profess to have special skill or who have voluntarily undertaken a higher degree of duty are bound to exercise more care than an ordinary prudent man.

Standard of Care

➔ The law requires taking of three points into consideration to determine the **standard of care** required:

(a) The importance of the object to be attained – The law does not require greatest possible care but the care required is that of a reasonable man under the circumstances. The law permits taking chance of some reasonable measure of risk, so that in public interest various kinds of activities should go on.

- ***Latimer v A.E.C. Ltd*. -** Due to heavy rain a factory was flooded with water which got mixed up with some oily substance. After the water drained away, the floors in the factory became slippery as the oily film was left over it. The occupiers of the factory spread all the available sawdust but some oily patches still remained there. The plaintiff slipped on one of those patches and was injured. The plaintiff sued the defendants and contended that as a matter of precaution, the factory should have been closed down. The House of Lords held that the risk created was not so great as to justify the precaution. The defendants had acted reasonably and therefore they were not liable.

b) The magnitude of the risk – The degree of care varies according to the likelihood of harm and seriousness of injury. A person handling a loaded gun is expected to take more care than a person carrying an ordinary stick. When there is some apparent risk due to abnormal conditions, necessary care must be taken to prevent the harm.

- ***Nirmala v T. N. Electricity Board*** - Thus if a high tension wire snapped and resulted in the death of a person due to electrocution, the defendants, who were maintaining the said wire, were held liable. The fact that the wire snapped and also that it did not become dead after snapping, proved that the wire was not being maintained properly.

c) The amount of consideration for which services, etc. are offered:

The degree of care depends on the services offered and the consideration charged for it from the plaintiff. Seller of bottled mineral water, who charges higher price than a roadside seller of a glass of water, is supposed to take more care as higher standard of purity is expected from him. A luxury hospital has to offer a higher degree of care to its patients than a hospital admitting patient in the general ward.

4. DAMAGE TO THE PLAINTIFF

The defendant's negligent act or omission should have caused damage to the plaintiff and the damage so caused must be the direct and proximate cause of the defendant's negligence.

BURDEN OF PROOF OF NEGLIGENCE

As a rule, the onus of proving negligence is on the *plaintiff.* He must *not merely* establish the facts of the defendant's negligence and of his own damage, but also must show that the one was the effect of the other.

However, under certain circumstances, the mere happening of an accident will afford *prima facie* evidence that it was the result of *not* taking due care; *Res ipsa loquitur;* The thing speaks for itself. This maxim requires the plaintiff to prove only two things, namely -

(i) That the injurious agency was under the management or control of the defendant; and
(ii) That the accident is such as, in the ordinary course of things, does *not* happen if those who have the management use proper care.

Thus in cases involving *res ipsa loquitur,* there is a *presumption of negligence* and it is for the *defendant* to rebut it.

RES IPSA LOQUITUR

The rule that in an action of negligence, the plaintiff must affirmatively prove negligence may cause hardship in cases where the plaintiff can prove the accident but *cannot* show how it happened, the fact being solely outside his knowledge and within the knowledge of the defendant who causes it.

In such cases, *it is sufficient for the plaintiff to prove the accident and nothing more,* for there is a **presumption of negligence** according to the maxim. "*Res ipsa loquitur"* (the thing speaks for itself). Such a presumption arises where the cause of the mischief was apparently under the control of the defendant or his servants.

The accident itself constitutes reasonable evidence of negligence in the particular circumstances.

- Thus, if a hammer falls out of a window, it could be a case of someone's negligence, or even mischief. But it is *not a case of res ipsa loquitur,* because it is *not unusual* for small things to fall out. But suppose a chair, or a cupboard or a table falls out of a window, surely such articles never fall, or should fall like that. This very fact is itself clear evidence of somebody's gross negligence: the fact speaks for itself: *Res ipsa loquitur.*
- ***Byrne v. Boadle*:** The plaintiff was passing along the street and when he came near the defendant's shop, was injured by the fall of a barrel of flour which rolled out of a window on the second floor. There was no evidence on the part of the plaintiff as to how the accident happened, beyond the facts that, while on the road, he was knocked down by a barrel, became unconscious and was injured. It was *held* that the accident alone was *prima facie* evidence of negligence.

  Pollock observed: "A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witness from the warehouse to prove negligence, seems to me preposterous. So in building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence." It is therefore, for the defendant to rebut the presumption of negligence.

The principal requirement for the application of the maxim is that the mere fact of the accident having happened should tell its own story and raise the inference of negligence, so as to establish a *prima facie* case against the defendant. The story must be clear and unambiguous, and if it tells one of half a dozen possible stories, the maxim *cannot* be applied.

Thus, the following are the three ***essential requirements*** of the application of the maxim:

i. The thing causing the damage must be under the control of the defendant or his servants,
ii. The accident must be such as would *not,* in the ordinary course of things, have happened without negligence,
iii. There must be no evidence of the actual cause of the accident.

This doctrine ***won't apply in two cases:***

i. Where all the facts relevant to the loss or injury are known, thus there is no room for assumption.
ii. If an object or operation is under the control of two or more persons as entrusted to two or

more persons not legally responsible for the acts of each other.

The maxim is not a rule of law but a rule of evidence, benefiting the plaintiff by raising the presumption of negligence against the defendant.

- ***Municipal Corporation of Delhi v. Subhagwanti*** - The clock tower belonging to the Municipal Corporation of Delhi, which was situated in the heart of the city, fell and caused the death of number of persons, including that of the Subhagwanti's husband. The SC held that there was a presumption of negligence in this case and since the defendants could not rebut the presumptions, they were held liable.
- ***Nirmala v.T.N. Electricity Board*** – A presumption was raised when a high tension electric wire snapped and it did not become dead on being snapped, as a consequence of which one person died of electrocution.
- ***Vishnu v. B.B.& C.I. Rly***. - *A* travels in a second class compartment of a train of a railway company. The compartment carriers a ladder, to reach to the upper berths. The ladder, when not in use is kept under one of the lower berths. On the occasion in question, someone folds the ladder and keeps it in a rack near the ceiling of the compartment. After an hour's journey, the ladder falls on *A's* head and causes him injury. *A* sues the railway company for damages. This is *not* a case of *res ipsa loquitur.* It *cannot* seriously be contended that it was the railway company's duty to see that there was no dangerous article in the rack when the train started.
- ***The National Small Industries v. Bishambhar Nath:*** The doctrine of *res ipsa loquitur* was applied in a case where combustible material was stored in rooms which were in the exclusive control and supervision of the defendants. It was also shown that only the workers of the defendants had access to those rooms and that they were in the habit of smoking cigarettes and bidis inside the premises during working hours. One day, a fire broke out, causing substantial damage to the building (which was a hundred years old). Applying the doctrine, the Court *held* that, having regard to the common course of natural events and human conduct, it could be presumed that the fire must have been caused because of some negligent act of the defendants or its employees.

If the defendant can rebut the presumption of negligence, his liability can be avoided.

- ***Nagamani v. Corp. of Madras:*** The fall of an iron column on a public road resulted in the death of a person. The defendant corporation could prove that due care was taken in installing them and periodic inspection had shown no defect in the iron columns, and its liability for negligence was not there.

DEFENCES AVAILABLE IN A SUIT FOR NEGLIGENCE

The following *three defences* are available in an action for negligence:

1. Vis major (Act of God)
2. Inevitable accident
3. Contributory negligence of the plaintiff.

1. *VIS MAJOR* (ACT OF GOD)

Vis major (act of God) is such a direct, violent, sudden, and irresistible act of nature as could not, by any amount of human foresight, have been foreseen, or, if foreseen, could not, by any amount of human care and skill, have been resisted.

Thus, acts which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause, will come under the category of acts of God, as for example, storm, tempest, lightning, extraordinary fall of rain, extraordinary high tide, extraordinary severe frost, etc.

- ***Nichols v. Marsland*** - The defendant had a series of artificial lakes on his land, in the construction or maintenance of which there had been no negligence. Owing to a most unusual fall of rain, so great that it could not have been reasonable anticipated, some of the reservoirs burst and carried away four country barges. It was held that the defendant was not liable, in as much as, the water escaped by an act of God.

2. INEVITABLE ACCIDENT

The second defence in an action for negligence is that of inevitable accident.

- Thus, *A* is lying drunk on a roadway. *B* drives a motor-car around a bend in a road, but just before he reaches the point at which, under ordinary circumstances, he would first see *A,* a sheet of newspaper is blown by the wind against his windscreen and materially obscures his view. He runs over *A,* and injures him. Here, *A cannot* succeed, it being a case of inevitable accident or misfortune.

3. CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF

The third defence to an action for negligence is that of contributory negligence of the plaintiff himself.

Definition:

Contributory negligence is *negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity were available to do so.*

It is the non-exercise by the plaintiff of such ordinary care, diligence, and skill as would have avoided the consequences of the defendant's negligence. The law takes into consideration any act or conduct of the party injured or wronged which may be immediately contributed to that result. Where such conduct can be proved, the party is considered in law to be the author of his own wrong, and it is fatal to any action on his part based on the injury. This doctrine is based on the maxims, ***volenti non fit injuria*** and ***in jure non remota causa sed proxima spectator****(In law not the remote but the proximate cause is looked at).*

- Thus, a man who keeps his hand outside the window of a railway coach or hangs perilously on the foot-board, knowing the risk in either case, is only inviting the injury and *cannot* claim damages against the Railway Company.

Principles of Contributory Negligence:

The principles of contributory negligence may be summarized as follows:

1. Wherever the *immediate, proximate* or *decisive* cause of the damage is the *plaintiff's own negligence* or want of care and caution, so that, but for such negligence or want of ordinary care and caution on his part, the misfortune could not have happened, he is not entitled to recover.
2. The plaintiff, however, is not disentitled to recover, unless it is shown
   (i) that one might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence; or

   (ii) that the defendant could not have avoided the consequence of the plaintiff's negligence by exercise of ordinary care.

   The question therefore will be: Which of the parties had it last in his power to avert the disaster?
3. If there has been as much want of reasonable care on the plaintiff's part as on the defendant's, the plaintiff cannot sue the defendant.

Burden of proving contributory negligence:

The onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendant, and in absence of evidence tending to that conclusion, the plaintiff is not bound to prove its non-existence.

If the Court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed.

- ***Hansraj v. Tram co***. - *A,* in attempting to board a moving tram car of the Tramway Company, set his foot on the foot-board which was loose and not firmly fixed. *A's* foot slipped, and as he also failed to get a firm grip of the hand-bar, he fell down and sustained injuries. *A* sued the Company for damage for negligence.
  It was held that *A* could not recover any damages. If *A* had attempted to board the tram-car while not in motion, the condition of the foot-board would not have affected him. As the tram car was in motion, *A* could not get a firm grip of the hand-bar. It was his own negligent act in boarding a moving car which was the cause of the accident. Hence, the Tramway Company was *not liable*.
- ***The Municipal Board v. Brahm kishore*** - In this case, the plaintiff, while returning from his club on a bicycle, fell into a ditch at about 6:15 p.m. The municipality had dug this ditch for repairing a culvert, and there was no light or danger signal or barricade or other caution notice. In a suit filed by the plaintiff (who had sustained considerable injuries), the Municipality contended that it was not liable under the doctrine of contributory negligence as the plaintiff's cycle had no light on it. Rejecting this argument, it was held that the benefit of the defence of contributory negligence was not available to the Municipality, which had failed to carry out its statutory duties. Moreover, an ordinary bicycle lamp would not radiate enough light to any considerable distance. The benefit of the doctrine of contributory negligence was therefore, not available to the Municipality.

When the defence of contributory negligence is not available:

Contributory negligence is however, no defence in the following *four* cases:

1. Where rightful acts are assumed:

Contributory negligence is not a good defence in cases where the plaintiff is not bound to take such care as a defendant contends but has a right to assume that the defendant has done all things rightly and carefully.

- ***Butterfield v. Forrester*** - The defendant wrongfully obstructed a street by placing a pole across it. The plaintiff was riding home at dusk when there was sufficient light to notice the obstruction, but galloping at high speed, he came into collision with the pole and was injured. It was held that he had no cause of action. Notwithstanding the defendant's negligence, the plaintiff might have avoided the accident by the use of due care.

2. Where defendant had later opportunity:

Contributory negligence of the plaintiff is no defence if the defendant had a later opportunity than the plaintiff of avoiding the accident by taking reasonable care.

- ***Davis v. Mann*** - The plaintiff had negligently left his donkey with its legs tied in a narrow lane, and the defendant who came with his wagon at a fast pace negligently ran over the donkey. It was held that the plaintiff was entitled to his remedy, notwithstanding any negligence on his part, in as much as the accident might have been avoided by the exercise of ordinary care on the part of the driver, as for instance, by going at such a pace as would be likely to avoid the mischief.

3. Doctrine of alternative danger

The third exception to the rule of contributory negligence is, what is known as the "*doctrine of alternative danger".*

Where the defendant has placed the plaintiff in a situation of extreme peril, he cannot set up the defence of contributory negligence, merely because the plaintiff, acting under reasonable apprehension of danger and in a reasonable and prudent way, had adopted a perilous way of escape.

- ***Jones v. Boyce:*** the defendant, a coach driver, was held liable for injuries suffered by the plaintiff who jumped out of the coach when, by reason of the defendant's negligent driving an accident seemed imminent, for the defendant had placed the plaintiff "in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril."

- In such cases, it is immaterial whether the plaintiff has acted, not for his own preservation, but instinctively for the preservation of another, as for example, a wife for her husband: *Brandon v. Osborne, Garrett & Co.*
- ***Brandon v. Osborne*** - Owing to the negligence of defendant's workmen, broken glass fell on the plaintiff's husband. She was standing under cover, but immediately seized her husband and tried to pull him to safety. In so doing, she injured her leg. It was held that there was no contributory negligence on her part.

Choice of evils

The doctrine of alternative danger or choice or risks is an exception to the rule that the contributory negligence of the plaintiff would debar him form recovering damages from the defendant. Though the plaintiff might have in fact contributed to the injury to himself, yet, if he had been placed in perilous situations by the defendant's negligence, and being so placed, he was obliged to choose between two apparent dangers and chose one, with the result that he was injured, the plaintiff would be entitled to recover. *The defendant can escape liability only by proving that the plaintiff had acted with less than average prudence and care.*

- ***Ridley v. Mobile rly. Co.*** - An engine belonging to a railway company was passing a level crossing without giving a whistle. B, seeing a child on the level crossing in imminent danger of being run over by the engine, rushed in and saved the child; but in doing so fell down and one of his legs was cut off.

  The Court held that the law allows a person some liberty of action to save another in a position of great peril, and fixes the responsibility for harm on the original wrong doer who caused the peril, as here, by passing a level crossing without giving a whistle. The law has so high a regard for human life, that it will not impute negligence, unless the act is clearly rash and negligent. Therefore, B can successfully claim damages from the railway company.

4. Children:

As the doctrine of contributory negligence *does not generally apply to children*, it is no defence to say that the child itself was negligent, for negligence is a state of mind, and children are not expected to have sufficient intelligence to judge as accurately or as quickly as an adult.

The rule as to contributory negligence will not inflexibly apply in cases where young children are concerned. The defence of contributory negligence is more difficult to make out against a child than against an adult. The plaintiff who is a child will not be disentitled to relief merely

because he or she has failed to show as much care as a person of mature age. Allowance must be made for lack of experience and infirmity of judgment in children. The rule seems to be that an infant can recover, although the infant's own conduct contributed to the injury, if the defendant is shown to have failed in his duty to the infant.

Of course, ***if the child is proved to have sufficient maturity of understanding, his own contributory negligence may go against him.***

- ***Lynch v. Nardin*** - The defendant left his cart and horse unattended in a street where some boys were playing. The plaintiff, a boy, was climbing into the cart, while another pulled the bridle, the horse moved on and the plaintiff fell down under the wheel of the cart and was injured. The Court held that the defendant was liable.
- ***Glasgow corporation v. Taylor*** - In this leading English case, the Corporation maintained a public garden wherein there were shrubs containing berries which looked luscious and attractive, but were in fact poisonous. The plaintiff's son, a child of seven, entered the garden and ate one of the fruits and died. The defendants were held liable as they placed an allurement within the reach of the child without any fencing or warning as to its poisonous character.
- ***Donovan v. Cartage Co.*** – A child of 7 years of age climbed an unattended horse van without a horse. In the process, he lost his balance, fell down and was injured. It was held that the defendant was not liable in this case as there was no horse to allure or attract the child.
- ***Yachuk v. Oliver*** - A boy aged nine years, who was accompanied by his brother aged seven, persuaded an employee of the defendant company to sell him a small quantity of petrol. The employee had doubts as to propriety of the sale, as before the two children had left he informed the assistant manager and asked him to confirm that he had acted rightly. The children wanted the petrol for use in a game in which they enacted a Red Indian scene they had witnessed in a film. In the result, the boy was seriously burnt.

  It was held that, in view of the fact that the boy's story was such as to arouse, rather than to allay, suspicion in the mind of a reasonable man, the fact that he told a lie to obtain the petrol, could not help the defendants. The Court also held that the defendants' employee having given an explosive substance to a boy who had limited knowledge of the likelihood of an explosion and its possible effect and the boy having done that which a child of his age might be expected to do, the defendants could not also avail themselves of the defence of contributory negligence.

The Court observed that the employee's negligence contributed to cause the injuries suffered by the boy and it was impossible to say that a new cause had intervened so as to relieve the defendants from all responsibility for the serious consequences which followed their wrongful act.

Doctrine of identification:

Where a child is in the actual custody of an adult at the time of the accident, the contributory negligence of the adult will disentitle the child from recovering damages, because the child is so identified with the adult so that his negligence would amount to the negligence of the child.

At one time, it was thought that the contributory negligence of an adult having actual custody of a child at the time of the accident would be a bar to an action by the child against the other party whose negligence helped to bring about the accident.

- ***Waite v. N.E. Rly.*** - A child of five under the control of its grandmother was injured by a train owing to the contributory negligence of the grandmother. It was held that the child had to be identified with its grandmother and thus had no right of action against the company.
  But the doctrine of identification laid down in the above case, had been *overruled* in the decision in *Mills v. Armstrong*.

- ***Mills v. Armstrong*** - An infant, four years old, was crossing a road under the care of his grandfather. He was struck by a motor omnibus and received permanent injuries to his left hand. The infant sued the Omnibus Company for damages sustained by him through the negligent driving of the omnibus belonging to the company. The jury found that the accident occurred through the negligence of the driver of the omnibus and the contributory negligence of the grandfather. Nevertheless, the infant could recover damages.
  In short, where a child is in t*he actual custody of an adult at the time of the accident,* the contributory negligence of the adult will not disentitle the child from recovering damages.

NERVOUS SHOCK

Nervous shock literally means shock of the nerves and the brain structures of the body. Nervous Shock has emerged as a new branch of Negligence. The tort of negligence is wide enough to cover not only the injury caused by direct physical contact, but also the injury caused by a

mental act, i.e. an injury sustained due to what the plaintiff saw or heard. If the defendant's words or actions cause such a fright to the plaintiff that he suffered a nervous shock resulting in sickness, death or any other physical disability a Tort of Negligence would lie. It may be the result of an immediate bodily fear induced by some accident due to the defendant's negligence or of a false statement wilfully made or of intimidation. In such a case, the question is whether the shock or illness are in fact the natural and direct consequences of the wrongful act or default.

HISTORY OF LAW ON NERVOUS SHOCK

- Till 1888, in ***Victorian Rly Commissioner v. Coultas***, the Court did not recognise the injury caused by shock sustained through medium of eye or ear or without direct contact. The Court held that an action could not be sustained unless there was a physical injury.
- For the first time, the concept of *nervous shock* was introduced in the law of torts in 1897 when in the ***Wilkinson v. Downton*** the Court held the defendant liable when the plaintiff suffered a nervous shock and got seriously ill on being falsely told as a practical joke that her husband had broken both his legs in an accident.
- ***Wilkinson v. Downton (1897)*** - The defendant, by way of a practical joke, falsely represented to the plaintiff that her husband had met with a serious accident, whereby both his legs were broken. By reason of his misrepresentation, the plaintiff suffered a violent shock, her hair turned white and her life was for some time in great danger. The Court held that the damage was not too remote and that damages for the illness could be recovered in an action for fraudulent misrepresentation.
- ***Dulieu v. White & sons (1901)*** - The Court held the defendant's servant liable where the servant negligently drove a horse-van into a public house and the plaintiff a pregnant woman, suffered a nervous shock as a result of which she got seriously ill and gave birth to a still-born child.

  J. Kennedy laid down the limitation that the defendant will be liable only when there will be fear of personal injury to the plaintiff and not to any third person. In the words of Kennedy J. – *"the shock must be such as arises from reasonable fear of immediate personal injury to oneself".*

However, this ***Kennedy Limitation*** was removed by Lord Atkin in the case of Hambrook V. Stokes.

- ***Hambrook v. Strokes (1925)*** - The defendant's servant left a motor lorry at the top of a steep street unattended, with the engine running. The lorry started off by itself and ran violently

down the incline. The plaintiff's wife, who was walking up the street with her children, had just parted with them a little below a point where the street made a bend, when she saw the lorry rushing round the bend towards her; she became very frightened for the safety of her children, who by that time were out of sight round the bend. She was immediately informed by the bystanders that a child answering the description of one of her's had been injured. In consequence of her fright and anxiety, she suffered a nervous shock which eventually caused her death. In an action by her husband under the Fatal Accidents Act, it was held that, on the assumption that the shock was caused by what the woman saw with her own eyes, the plaintiff was entitled to recover, notwithstanding that the shock was brought about by fear for her children's safety and not by fear for her own.

- ***King v. Phillips*** - A taxi-driver backed his taxi (without looking behind) and ran into a child who was on the tricycle behind the taxi, causing a minor injury to the child. The child's mother, who was in the house several yards away, heard the scream, and saw from her window that a taxi had backed into the tricycle. In an action by her for shock suffered, the Court held that the taxi-driver was not liable for the shock suffered because he could not reasonably have known that he might cause such injury to the mother of the child.