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NEGLIGENCE AND CONCEPT OF RULE OF LAST OPPORTUNITY

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ABSTRACT

Negligence is derived from the Latin word negligentia, which means 'failing to pick up'. In the general sense, the term negligence means the act of being careless and in the legal sense, Negligence means the breach of legal duty due to careless conduct which can be commission or omission.

Contributory negligence is when the plaintiff fails to exercise rational care for their safety. It is a universal rule that can block recovery or decrease the amount of compensation a plaintiff receives if their action increases the possibility that an incident often occurred when the defendants use contributory negligence as a defense. In the concept of the rule of the last opportunity when two people are negligent that one of them who had the later opportunity of avoiding the accident by taking care should be liable for the loss This research paper aims to understand negligence and the concept of the rule of last opportunity and to have a detailed study to know their importance in the law of torts

CHAPTER 1

INTRODUCTION

1.1 OVERVIEW

In everyday life, the word 'negligence' means nothing else but carelessness. Under the law the meaning of negligence means the failure of an act by the person due to the careless conduct which has harmed the other person. Negligence is one of many torts when the tort is done it is not considered as crime but is consider as a civil wrong.According to Winfield and Jolowicz "Negligence is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff."[1].

Contributory negligence is type of negligence where there is the contribution of the plaintiff with his negligence in the harm which is caused to him. Under contributory negligence there is concept of rule of last opportunity it is explained as the last opportunity to avoid an accident. Forexample, if the plaintiff and the defendant are in a situation where both of them are negligent on their part then whosoever had the last opportunity of preventing the accident under that situation fails to do so will be held liable for that accident solely. The rule of last opportunity is mostly used by the defendant under the situation where the plaintiff has contributory negligence

1.2 LITERATURE REVIEW

For the research, following books and articles have been mainly researched:

The Law of Torts: A Treatise On The Principles Of Obligations Arising From Civil Wrongs In The CommonLaw 1887 *bySir. Frederick Pollock*

This book which talks about the law of torts and has established the basic foundation of the knowledge of the maxim. The illustrations used and the case briefs that are discussed, helped a lot in creating a clarity regarding the topic.This book is written by well profound English jurist.

[1]R.K "Law of Torts"pg218

Torts: Cases and Context Volume One*by Eric E. Johnson*

Published in the year of 2015, this book discusses about Negligence in torts laws and also explain the concept of last opportunity. Tranquil language and comprehensive description, the book has helped the researchers in writing this research paper. The book is written by associate Professor of Law University of North Dakota School of Law

Proximate Cause in Negligence Law: History, Theory, and the and the Present Darkness*by Patrick J. Kelley*

This paper discourses about the amalgamation of the maxim in the Negligence. Thus, it facilitated the researchers to know how the maxim essentially works in real life and in the contractual proceedings.

Contributory Negligence*by ArchitaSatsangi*

The research paper on Contributory Negligencehas assisted the researchers to gather knowledge about the concept of Rule of last opportunity what is the significance under Contributory Negligence

1.3 OBJECTIVES

The objectives of the research paper are:

1. To have an in-depth knowledge about Negligence and its elements.
2. To understand the concept of the rule of last opportunity

1.4 STATEMENT OF PROBLEM

Tort is considered as civil wrong and negligence is a type of tort which means a breach of duty by one person which causes damages to another person. It is an act of negligence and unawareness on the part of the defendantwhich he is obligated to perform which a sensible and wise man would not do.There are many types of negligence one of the type is Contributory negligence. It is Contributory negligence when there is negligence done by both the plaintiff and the defendant. Under contributory negligence there is concept of last opportunity which means the last opportunity to avoid the accident which is mostly used by the defendant against the plaintiff. Hence, the statement of problem is "**What do mean by negligence? Explain the concept of rule of last opportunity.**

1.5 RESEARCH METHODOLOGY

This is a Doctrinal research method and thus, secondary research data is looked into and it is critically analysed. In the study titled, 'NEGLIGENCE AND CONCEPT OF RULE OF LAST OPPORTUNITY' the doctrinal method was judged to be most appropriate. Primary resources referred to in the course of study include books, journals, law reports and cases, most of them accessed from the library of *Alliance School of Law* and other open sources like articles, journals etc. those were accessed online.

The top-down method of research is applied in this wherein the end the hypothesis is verified and stated if it is right or not.

CHAPTER 2

Negligence

In law of torts, Negligence is explained as the careless conduct by the person which has caused harm to the other person it can be by an act or omission. According to Lord Wright "Negligence means more than headless or careless conduct, whether in commission or omission; it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owed."[2]. Negligence is referred as the breach of duty to take care and that breach of duty subsequent damage to the other party. For example a restaurant owner who mops the slippery floor and doesn't put up a "Wet Floor" sign and someone passing by falls and gets hurt then the owner will be could be considered negligent.as it was his duty to put up the sign so that people get aware about the wet floor and be more caution while walking on that. It is said to be a negligence when a person careless does an act or omits to do an act which he was bound to do.it is necessary to establish that a duty of care was owed by the defendant to the claimant, that the duty was breached, that the claimant's loss was caused by the breach of duty and that the loss fell within the defendant's

[2]MadhavLoharuka "*Negligence in torts*" [2014]
https://www.coursehero.com/file/50842662/Negligencedocx/

scope of duty and was a foreseeable consequence of the breach of duty.[3]The tort of negligence protects the plaintiff against three different types of harm, i.e., personal injury, damage to property, and economic loss.Under tort of Negligence is there are five elements which a plaintiff must establish to prove the defendant is liable for his act. Which are:

Duty

Duty, obligation of one person to another, flows from millennia of social customs, philosophy, and religion. Serving as the glue of society, duty is the thread that binds humans to one another in community. Duty constrains and channels behavior in a socially responsible way before the fact, and it provides a basis for judging the propriety of behavior thereafter[4] In this element of negligenceit a legal duty to standard of due care where the plaintiff must prove that the defendant had a duty to perform under the standard of behavior for the protection of the plaintiff against unreasonable risk of injury.The duty of care only be determined by the appropriate standard of care and several factors can improve the standard of care depending upon the relationship between the parties such as whether the plaintiff was foreseeable or on the profession of the defendant, etc.

In *Donoghue v Stevenson*[5]case Mrs. Donoghue's with her friend went to Wellmeadow Caféand there her friend bought a ginger-beer from in Paisley. She consumed about half of the bottle, which was made of dark opaque glass, when the remainder of the contents was poured into a tumbler. At this point, the decomposed remains of a snail floated out causing her alleged shock and severe gastro-enteritis. Mrs Donoghue was not able to claim through breach of warranty of a contract: she was not party to any contract. Therefore, she issued proceedings against Stevenson, the manufacture, which snaked its way up to the House of Lords. The court held Stevenson liable as the case established that manufacturers owe a duty of care to the end consumers or users of their products

Breach

[3]THOMSON REUTERS "*Practical law*"
https://uk.practicallaw.thomsonreuters.com/0-107
6876?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1
[4]David G. Owen "*The Five Elements of Negligence*"[2007]
https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2282&context=
[5]*Donoghue v Stevenson* [1932]

A breach of the duty of care occurs when the defendant's actions do not meet the required level of applicable standard of care due to the plaintiff. Whether a breach of the duty of the applicable standard of care occurs is a question for the trier of fact. There are several ways a plaintiff demonstrates breach of the duty of care;[6].In a breach of duty of care include actions against the convention in an industry or violation of a statute. In this the plaintiff have the burden of proof which means the plaintiff have to prove if the defendant was negligent towards his duty or not.Breach of duty is not limited to person or professionals under written or oral contract; In this all members of society have a duty to practice reasonable care toward others and their property. If A person, who engages in activities that pose an unreasonable risk toward others and their property that actually results in harm it will be then be a breach their duty of reasonable care

In *Municipal Corporation of Delhi v. Subhagwanti*,[7] *case* a clock-tower in the heart of the Chandni Chowk, Delhi collapsed causing the death of a number of persons. The structure was 80 years old whereas its normal life was 40-45 years. The Municipal Corporation of Delhi having the control of the structure failed to take care and was therefore, liable.

Cause in fact

The rules of negligence next require that the actions in question caused the tort. In other words, did the alleged actions lead to the injury suffered by the victim. The plaintiff would be required to prove the injuries sustained by the defendant's negligent act caused the injuries leading to the legal action. Commonly the "But For" rule is used to establish [8]cause in fact. In this the plaintiff have to establish the act or omission of the defendant has cause the plaintiff damage. The court then analyze the issue that if the plaintiff injury would have happened but for the defendant action If an injury would have occurred independent of the defendant's conduct, cause in fact has not been established, and no tort has been committed. When multiple factors have led to a particular injury, the plaintiff must demonstrate that the defendant action played a considerable role in causing the injury.

[6]Charles Scholle" Elements of negligence"
https://www.schollelaw.com/files/pdf/elements_of_a_georgia_negligence_claim.pdf
[7]*Municipal Corporation of Delhi v. Subhagwanti*[1966]
[8]Charles Scholle" Elements of negligence"
https://www.schollelaw.com/files/pdf/elements_of_a_georgia_negligence_claim.pdf

In *Barnett v Chelsea & Kensington Hospital*[9]case Mr**.** Barnett went to hospital complaining of severe stomach pains and vomiting. He was seen by a nurse who telephoned the doctor on duty. The doctor told her to send him home and contact his GP in the morning. Mr. Barnett died five hours later from arsenic poisoning. Had the doctor examined Mr. Barnett at the time there wouldhavebeen nothing the doctor could have done to save him. It was held that The hospital was not liable as the doctor's failure to examine the patient did not cause his death.

Introduced the 'but for' test i.e. would the result have occurred but for the act or omission of the defendant? If yes, the defendant is not liable.

Proximate cause

The term proximatecause is generally referred to an element of foreseeability. Proximate cause limits the scope of liability to those injuries that tolerate some reasonable connection to the risk created by the defendant. If the defendant should have foreseen the tortious injury, he or she will be held liable for the resulting loss. If a given risk could not have been reasonably anticipated, proximate cause has not been established, and liability willnot be imposed[10].

In *Palsgraf v Long Island Railroad Co*[11]case the plaintiff was standing on a station platform purchasing a ticket. Whilst she was doing so a train stopped in the station and two men ran to catch it. One of the men tripped and whilst attempting to help the fallen man, members of the railway staff caused a box of fireworks to fall and the fireworks to explode. The explosion caused a set of scales to fall at the other end of the platform which in turn injured the plaintiff the court at first instance found in favors of the plaintiff, and the judgment was affirmed on appeal. The defendant appealed to the Supreme Court. The court held that the defendant was not liable to the plaintiff as it was detained that a plaintiff must in order to bring a claim in negligence, demonstrate that there has been some violation of her personal rights.It was

[9]*Barnett v Chelsea & Kensington Hospital[1961]*
[10]Walker Morgon LLC "*Negligence: proximate cause*"
https://www.walkermorgan.com/negligence-proximate-cause/
[11]*Palsgraf v Long Island Railroad Co [*1928]

considered that if the defendant was held liable to the claimant in these circumstances, a defendant would be liable in any circumstance for almost any loss

Damage

In this element of negligence, A plaintiff in a negligence case must prove a legally recognized harm, usually in the form of physical injury to a person or to property, like a car in a car accident. It's not enough that the defendant failed to exercise reasonable care[12]. If there is fail in practicing reasonable care should result in actual damage to the person to whom the defendant had a duty to care and there is personal injury claim must be brought to court within the appropriate time frame

CHAPTER 3

Rule of Last of Opportunity

In Common Law under Contributory Negligence on the part of the plaintiff it was considered as a good defence and the plaintiff lost his action. The plaintiff's own negligence disentitled himto bring any action against the negligent defendant.in this plaintiff's negligence doesn't mean breach of duty towards the other party but then it means absence of due care on his part about hisown safety.This rule worked a great hardship particularly for the plaintiff because for aslight negligence on his part, he may lose his action against a defendant whose negligencemay have been the main cause of damage to the plaintiff. The courts modified the lawrelating to Contributory Negligence by introducing the so-called rule of 'Last Opportunity' or'Last Chance'[13] Under last opportunity it is explained that when there are two people are negligent and one of them is plaintiff and the other one is the defendant it will be consider who had the last opportunity to avoid the accident by taking ordinary care that person will be liable for the loss which means if the defendant was negligent and the plaintiff had the later opportunity to prevent the lossthe consequences of the negligence of the defendant doesn't observe ordinary care, he can't make defendant liable for that. Similarly, if

[12]FindLaw "*Element of a Negligence Case*" [2007] https://injury.findlaw.com/accident-injury-law/elements-of-a-negligence-case.html
[13]ArchitaSatsani" Contributory *Negligence"* [2019]

the last opportunity to avoid the accident is with the defendant, he will be liable for whole of the loss to the plaintiff.

The concept of rule of law is widely explained in of *Davies v. Mann*[14] where the plaintiff fettered the forefeetof his donkey and left it on a narrow highway and the defendant was driving his wagon drivenby horses too fast that it negligently ran over and killed the donkey. In spite of his ownnegligence, the plaintiff was held entitled to recover because the defendant had the 'lastopportunity' to avoid the accident. This maxim of "Last opportunity" was further defined under the case *British Columbia Electric Co. v. Loach*[15] where the driver of a wagon, in which the deceased was seated, negligently brought the wagon on the level crossing of defendant's tramline without trying tosee whether any tram was coming on the line. A tram, which was being driven too fast causedthe collision. It was found that the tram which caused the accident was allowed to go on theline with defective brakes and if the brakes were in order then, in spite of the negligence onthe part of the wagon's driver, the tram could have been stopped and the accident averted.The personal representatives of the deceased pleaded the defence of Contributory Negligence.It was held that they couldn't take the defence of Contributory Negligence because they hadthe last opportunity to avoid the accident which they had incapacitated themselves fromavailing because of their own negligence. The defendants were, therefore, held liable.

The rule of last opportunity was also very insufficient because the party, whose act ofnegligence was earlier, altogether escaped the responsibility and whose negligence wasconsequent was made solely liable even though the resulting damage was the product of thenegligence of both the parties[16]. After that the law reform (Contributory Negligence) Act, c1945was passed for negligence caused anywhere, and after that whenever both the parties arenegligent and they have contributed to some damage, the damages will be apportioned asbetween them according to the degree of their fault

Conclusion

Negligence is referred to as the breach of duty to take care and that breach of duty causing subsequent damage to the other party. Contributory negligence involves the negligence by

[14] Davies v. Mann
[15] *British Columbia Electric Co. v. Loach*
[16] ArchitaSatsani" Contributory *Negligence"* [2019]

both the plaintiff and the defendant. Contributory negligence is type of negligence where there is the contribution of the plaintiff with his negligence there is the harm caused to him.

of 'Last Opportunity' or 'Last Chance'[17] Under last opportunity it is explained that when there are two people are negligent and one of them is plaintiff and the other one is the defendant it will be consider who had the last opportunity to avoid the accident by taking ordinary care that person will be liable for the loss

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