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# Proximity Versus Liability: A Comparative Study

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***Abstract:*** ***The literal meaning of the verbal authority "Proximity" is "Closeness" or "Nearness" and this word is equivalent to foreseeability. Another meaning of "Proximity" is "Legally Adequate" or "Legal Adequacy". "Proximate Clause" also means "Remoteness of Damages". Proximity is assumption of responsibility. While the term "Liability" denotes "the state of being responsible" or the "Legally Responsible".***

In *Donoghue* v *Stevension*, Lord Atkin held that, Proximity be not confined to mere Physical Proximity. But it is intended to extend, to such close and direct relations, that the act complained by directly affected person whom, the person alleged to be bound, to take care, would know that this effect is result of his careless act. Proximity is the whole concept of necessary relationship between Plaintiff and Defendant and fluctuates from one situation to another situation.

The Proximity required a closer or more direct Nexus with Reference to some type of Conduct as well as Dangers. When the doer has directly caused Physical harm to any One or his Property, by an act, then a Duty of Care may readily be established by showing *foreseeability* and nothing else. A number of acts pollute the Rivers and thereby the Sea.

Here Question arises that, who is guilty of Negligence and Responsible for such acts of Pollution, thereby to Prevent, Reduce as well as to Control this Pollution and upon whom, the Cost in this respect be allocated. The Duty of Care in respect of willful wrongdoing cannot be denied or ignored. The fact is, whether there exist a Duty of Precaution, Prevention and of Control of the Negligent or willful acts, resulting into Pollution or not.

## I. FACTORS IN RESPECT OF IMPOSING LIABILITY

The imposition of Liability would be Just, Fair and Reasonable. Here Question arises that, Whether the Government Authorities are liable or the act doers are Responsible. The Government Authorities are the Law-Maker and their implementing Agencies only.

It is possible, that these Authorities may be Negligent in respect of observing the High-Risk acts, but this cannot create any Special Liability. Therefore no Special Relationship exist between these Legal Authorities and the committed wrongful acts. These Authorities may be liable for Negligence in granting, the Permission including Clearness Certificate to the wrongful act doers.

These Governmental Authorities has been closely involved in the Supervision of proper Implementation of Law, therefore their role is more fundamental, than the Society in this regard. In respect of Liability of these Governmental Authorities for Negligence in performance of Statutory Functions, two issues arises as under:

- ✓ Whether the Decision taken by the Government Authorities in performing their functions if Justiciable at all or not?
- ✓ Whether application of Classical Principles of *foreseeability of damage*, Proximity and Just, Fair and Reasonable impose any Duty of Care or not?

Both Government Authorities and wrongful act doers are under a Common Law of Duty of Care, to avoid harms. But without proper evidences ratio of their Liabilities cannot be evaluated in respect of harm. Three Factors should be taken into account during imposition of Duty and evaluating the harm. These factors read as under:

- ✓ What are the Effects of the imposition of Duty of Care upon and what is Just, Fair and Reasonable reason for imposing, such type of care?
- ✓ Whether injured or affected Entities, whether live or alive required remedies against the negligent action?
- ✓ Whether lake or absence of remedies may create Defects in the Law?

## II. RELATION AMONG PROXIMITY, RESPONSIBILITY, LIABILITY AND RELIANCE

Liability depends upon the Assumption of Responsibility based on Reliance. But no proper Principle, Measure or Test is available, which can be applied in this regard uniformly. Sometimes nothing more than, *foreseeability* of injury is required, while sometimes there must be a very close Relationship between the Claimant and the Person causing the loss.

In most of the Cases of Injury to person or personal property, Proximity seems to be an unnecessary Wheel-on-Coach. Application of the Principle of Proximity does not achieve anything, which has not already been accomplished by reasonable *foreseeability*. What should be the necessary Degree of Proximity, to a resultant and what action depends upon, what Conclusion is or what is Just, Fair and Reasonable, so that doer can be liable for resultant of any action beyond all doubts?

For the requisite Proximity a Just, Fair and Reasonable relation between the results and the action rationally be attributed or established. A clear voluntary Assumption of Responsibility be required, to impose Duty of Care. The Court is more constrained, than the Legislature. The Court can however very substantionally Modify the Impacts. The Court must decide, whether there should be a Duty of Care in respects of any act or not and to which extent or limit.

The Court can further decide the Responsibility rather than Policy in those conditions, where reason and good sense will point the way. But the Court cannot enforce a Liability, which *prima facie* does not exist. The Court can Modify the Process, to assess the weight of Policy Factors.

## III. DUTY OF CARE AND RESPONSIBILITY

If the Law does not itself give rise to Liability, then it is Specifically assumpted that a failure will impose Liability. If the Hazard is apparent to the Eye of ordinary Vigilance, then the Orbit of the Danger as disclosed, to the Eye of reasonable Vigilance, would be the Orbit of Duty of Care. In respect of Physical Damage, caused by an act, two Questions handled the everything:

- ✓ Whether the Defendant behaved with Prudence of a Reasonable man or not?
- ✓ Whether the Damage was too Remote to Consequence of the Negligence?

The Duty of Care relates to the kind of loss suffered by the Claimant and not exist in the abstract. The existence of a Duty of Care, Breach of this Duty, Remoteness of Damages and Proximity to the results are regularly treated as separate Ingredients of the negligent actions, from the point of view of exposition.

If there is an established Duty of Care and proved Breach of this Duty, then the extent of the Liability to the resultants, be considered as a Matter of Proximity or Remoteness. If anyone is negligent at all, then he will be considered negligent towards the sufferers and liable for all effects as under:

- ✓ One part of the Law says that a Person, who undertakes some activity, shall take reasonable Care, in respect of Duty not to cause Damage to others.
- ✓ Another part of the Law says that Person, who is doing nothing in particular shall take steps, to prevent others from suffering harm from own acts.

But finally the Law requires, to consider the Safety of others from the actions, before imposition of Duty of Rescue or Protection. The Morality requires "why pick on me". A Duty to prevent harm to a large indeterminate class of people, who happen to be able to do something.

The Economic version requires that the activity should bear its own Costs, because every activity is cheaper than its reality. Therefore Liability to pay Compensation for loss caused by negligent conducts, as a deterrent against violations of Duty to Care is absolutely necessary.

## IV. REASONABLE STANDARDS

It is possible that, the Proposition of a good sense, which is applied in one Case, should not be regarded, thereafter as Proposition of Law. It may be possible that the System would Collapse under the weight of accumulated Precedents. But blind follow of the Precedents, creates *follow the crowd* situation. Therefore in each case a balance must be struck between the Magnitude of the Risk and Risk doers.

## V. ASSUMPTION OF RESPONSIBILITY IN RESPECT OF ECONOMIC LOSS FACTOR

In English Law, there might be Liability for merely financial loss in respect of negligent works. Where the "Economic Loss" Factor is involved, many controversies and difficulties arose in the imposition of Duty of Care and in the expounding the Law Absolutely and Universally. Because the issue of Economic loss frequently concedes with other Factors, which inhibit the imposition of Liability for Negligence.

## VI. RESPONSIBILITY AND RELIANCE

*Prima facie* the Duty of Care arises in the negligent actions as an owed. Assumption and Reliance are Flexible Concepts. Reliance is a Factor, to impose Duty of Care on the basis of Assumption of Responsibility. But Reliance is not necessary in the Case of where Special Relationship of the Fiduciary verities exists.

Why always Reliance is required and why New Categories of Special Relationships, should not be created by the Law, so that Reliance Factor can be avoided or ignored during the imposition of Duty of Care. Behind it there is no reason came out.

The Specific Relations for which Reliance is not required during the imposition of Duty to Care may be "Vicarious Liability", "Strict Liability", "Absolute Liability", "Liability to Pay Costs for Damage as well as for Repair", "Liability to take

Precaution", "To Assess the Impacts of Actions" and "Sustainable Development" etc.

In some Extra-Ordinary Cases, recovery is absolutely essential together with paying of Costs, such as Radioactive Accidents and Accidents of Hazardous Substances. These Cases are "Un-Compromising-Orthodoxy".

## VII. THE PRINCIPLE OF LIABILITY

To allocate the blame of any activity on any one could not be adjudged blindly. Principles of Proximity also helps in this respect. But the Principles of Proximity are based on Measurement of Probability of the relationship between the act and doers. These Principles are not certain.

There are some certain Principles for the adjudication of responsibility for any activity. These Principles are called Principles of Liability. These Principles are of four types as follows:

- ✓ The Strict Liability.
- ✓ The Absolute Liability.
- ✓ The Vicarious Liability. and
- ✓ Vicarious Liability of the State.

These Principles read as under:

### A. THE STRICT LIABILITY

Generally no one should be Compel against his will, to restrict his actions in order to create Benefits to others. But the National Tradition accepts that, no Right can be extended to harm others, in their Life, Health, Liability and Possessions. This Tradition covers all Humans, Animals, Plants and the Environment also, but there are so many Dangerous activities which left irreparable loss and damages to Animals, Plants, Humans as well as to Environment. The Law may deal with these activates in three ways as under:

- ✓ It may Prohibit them altogether.
- ✓ It may allow them, to be carried on for the sake of their Social Utility, in accordance with Statutory Provisions by obeying essential Safety Measures and Non-Compliance attracts Sanctions. and
- ✓ It may allow them, to be Tolerated on Condition that, they pay their way regardless of any fault. This last dealing is called as "Strict Liability".

#### *a. ORIGIN OF THE CONCEPT OF STRICT LIABILITY*

This Principle got its origin in the Case of *Rylands v Fletcher***.** In this Case, the Defendant wants to improve Water Supply of his own Mill, therefore he constructed a Reservoir by an Independent Contractors. During the construction of this Reservoir, some Disused-Mine-Shafts were seen, but the Workers of the Contractor, had not properly sealed these Disused-Mine-Shafts.

When this Reservoir was filled, the Water Flooded the Plaintiff's Coal-Mine, through these improperly sealed Disused-Mine-Shafts. In this Case there was no fault of the Defendant, because the Reservoir was constructed by the Independent Contractor.

BLACK BURN J. held that:

The Rule of Law is that the person, who for his own purpose, brings on his Land and collects and keeps there anything likely to do Mischief, if it escapes, must keep it in at his peril, and if he does not do so is, *prima facie* answerable for all the Damages, which is the Natural Consequences of its escapes.

BLACK BURN J. said that this Rule can be applied where, there was Non-Natural use of Land and such should result at escape of thing from the Land, which causes Damage.

According to him, if a Person brings and kept on his Land any such type of Dangerous Things, which is likely to do Mischief if it escapes, then he will be *prima facie* answerable for the Damage caused by this Escape, even though he had not been Negligent in keeping it there.

The Liability arises not because of any fault of Negligence on the part of that Person, but that Person be Liable for keeping such type of Dangerous Thing on his Land, and the same has escaped from there and caused Damage, therefore this Rule is called "Strict Liability" because the Liability arises even without any Fault or Negligence on the part of the Defendant.

#### *b. CONDITION FOR APPLICATION OF THIS RULE*

The essential Conditions for the applicability of this Rule of Strict Liability read as under:

*BRINGING AND KEEPING OF DANGEROUS THING*

First, Condition for the Application of this Rule of Strict Liability is that, any Person brought and kept some Dangerous Thing on his Land. Large Body of Water, Gases, Electricity, Vibrations, Poisonous Trees, Sewage, Flag Pole, Explosive, Noxious Fumes, Toxic Elements, Acidic Sludge, storage of Radioactive and Hazardous Elements and so many other things can be Mischievous or Dangerous.

*ESCAPE OF THESE THINGS*

Second, Condition of Application of the Rule of Strict Liability is that, the so kept Mischievous or Dangerous Thing must escape and caused Damage, to the area outside the Occupation. Projection of the Branches of a Poisonous Tree on the neighbor's Land, be consider Escape of Tree and the Owner of that Poisonous Tree, will liable for Damage caused by the Leaf of this Tree to anyone.

*NON-NATURAL USE OF THE LAND*

Third, Condition to impose Liability on the Defendant under the Rule of Strict Liability is that, there must be Non-Natural use of the Land by the Defendant. There must be some Special use bringing with, and it increased Danger to others. Keeping Huge Quantity of Water, growing of Poisonous Tree, storage of Hazardous and Radioactive Elements, supply of Gas in Pipelines, storage of Explosives are some illustrations of the Non-Natural use of the Land.

*c. CONDITIONS IN WHICH THIS RULE CANNOT BE APPLIED*

Like other Principles, there are some Exceptions in which this Rule Strict Liability provide no relief. These Exceptions read as under:

*ACT OF GOD*

It is Universal truth that, the God is both Creator and Supreme Power of this Universe and no one can interfere in his acts. If the escape of the said Dangerous or Mischievous Things has been done because of the Super Natural Forces, without any Human Intervention, then this alleged Rule of Strict Liability cannot be applied.

*WRONGFUL ACT OF A THIRD PARTY*

If, the caused Damage is the result of the act of a stranger, who is neither the Servant of the Defendant nor the Defendant has any Control over him, then the Defendant is not liable for any harm or Damage caused, by the escaping of that thing.

*PLAINTIFF'S OWN DEFAULT*

If the damage caused to the Plaintiff is, due to by his own Intrusion into the Defendant's Property, then Plaintiff cannot take plea of the Provisions laid down by this Rule.

*CONSENT OF THE PLAINTIFF*

As same as the Tortuous Principle *volenti non fit injuria*, if the bring and keeping of those alleged Dangerous or Mischievous Thing, is done with the consent of the Plaintiff or for Common Benefit of Plaintiff and Defendant, then the Liability of the Defendant under this Rule cannot arise.

*STATUTORY AUTHORITY*

Act done under the Authority of Statute is not covered, by the Provisions laid down by the Rule of Strict Liability. If it be done without Negligence, although it does occasion Damage to anyone.

B. THE ABSOLUTE LIABILITY

Because in spite of harm or damage caused, by the escape of Dangerous or Mischievous Thing, the Defaulter could not be liable for the same due to the five Exceptions of the Rule of "Strict Liability" as established, by the "House of Lords" in *Rylands V. Fletcher (supra)* Case. A more stringent Rule of Liability than the Rule laid down in the Ryland's Case, has laid down by the Supreme Court of India in the Case of *M.C. Mehta V. Union of India*.

*a. ORIGIN OF THE CONCEPT OF ABSOLUTE LIABILITY*

This Rule had given birth by the Supreme Court of India in M.C. Mehta's (*supra*) case**.** In this Case, the main issue before the Court was that, whether the Defaulter can take Defense of Exceptions of the *Rylands V. Flether's (supra)* Case of Nineteenth Century or not?

*FACTS OF THE CASE*

In Delhi City on 4th to 6th December 1985 "Oleum" Gas was leaked, from the Units of "Sriram Foods and Fertilizer Industries" belonging to Delhi Cloth Mill Ltd (DCM). One practicing Advocate was died and several others were affected by this leakage.

The Apex Court held that due to the Development of high Scientific knowledge and Technology, where Hazardous or inherently Dangerous Industries were essential to be carried on as part of the Development Programs and Policies, perhaps the Rule of "Strict Liability" of Nineteenth Century could not deal, the Problems arising in a highly Industrialized era, therefore this said Rule of "Strict Liability" of Nineteenth Century should be revised. The Supreme Court laid down a more stringent Rule of Liability.

This Rule reads as below:

Where an Enterprise is engaged in a Hazardous or inherently Dangerous activity, then the alleged Enterprise will be "Strictly" and "Absolutely" liable, to Compensate all those, who are affected by the Accident done in the Operation of such Hazardous or inherently Dangerous activities, and such Liability would not be covered by the Exception of the Rule of "Strict Liability" of *Rylands v Fletcher's* Case (supra).

*b. LOGIC BEHIND THE CONCEPT OF THE ABSOLUTE LIABILITY*

Chief Justice PREM NARAYAN BHAGWATI J., held that, there are two reasons behind evolution of this concept:

- ✓ If an Enterprise is permitted to carry on a Hazardous or inherently Dangerous activity for its own profit, then the Law must presume that the Enterprise be liable, to Compensate the Sufferers of the Accidents, committed during the Operation of these Hazardous or inherently Dangerous things in their Enterprises.
- ✓ Only the Enterprise has the Resource, to discover and guard against Hazards or Dangers and, to provide warning against Potential Hazardous.
- ✓ He further held that that, this new Principle is absolutely Strict and subject to no Exception. In this Rule the fact, whether the activity of Hazardous or inherently Dangerous carried on carefully or not? Have no means.

C. THE VICARIOUS LIABILITY

The Phrase "Vicarious Liability" means, the Liability of one Person for the wrongful acts of the another, in which he take no part. According to Common Law, Principal was liable for his Agent's wrongful acts committed under his Authority, either express or implied.

While a Person can be liable for his own wrongful acts and not for the acts done by others. To hold a Person liable by Ratification of another's act, it is essential that the latter should have purported, to do it on behalf of the former, and the former have full knowledge of the nature of the act, that he

Ratified.

*a. DEVELOPMENT OF THE PRINCIPLE*

As same as the other Laws, Laws regarding the adjudication of responsibly for any activity were developed in all Countries according to their Region, Situation and Necessities of the than Time.

Development of the Principle of Vicarious Liability in several Countries read as under:

- ✓ In England, the King was under "God and Law", therefore he can do no wrong and cannot Authorize for doing wrong. Therefore no action could be brought in Torts against the Crown.
- ✓ In United States, Justice HOLMES J., defended the Sovereign Immunity on the ground that, there could be no Legal Right arise against the State, because the State makes the Law. But for the Un-Authorize acts, Officers of the Government were Personally liable.
- ✓ In France, before the Declaration of the "Rights of Man 1789", the State can denied any Responsibility under the Theory of "Absolute Monarchy". The Code of Napoleon made the State liable, for the whole Damage caused, due to fault of Service of an Officer.
- ✓ In India, the Concept of the Divine Personality of the King was not seen entirely in the Ancient Era. The King, their relatives and ordinary Citizens were amenable, to ordinary Court and were liable to equal Punishment.

In India from the long past period the Supremacy of the "Rule of Law" was binding on both the Rulers and the ruled also, they can be sued in the ordinary Court of Law equally. But Vicarious Tortuous Liability was unknown to Hindu Jurisprudence.

Muslim Rulers were regarded as Servant of the God. Although they were not the Masters of the Peoples, yet they hold an Office in Trust for Supreme being. However they were unknown regarding the Vicarious Liability as same as the Hindu Kings were unknown.

*b. KINDS OF VICARIOUS LIABILITY*

Vicarious Liability is of three kinds as follows:

*LIABILITY OF THE PRINCIPAL FOR HIS AGENT*

Liability of a Principal for the wrongful acts of his Agent, is based on Latin Maxim *Qui facit per alium facit per se*. Which means that, the act of an Agent is the act of the Principal. The Liability of Principal arises for those wrongful acts, which were committed in Course of Performance of the Duty as an Agent. Principal be liable Vicariously on the basis of Principal-Agent-Relationship, between the two. Such type of Liability be Joint and Several, therefore they can be sued Separately or Jointly.

*LIABILITY OF PARTNERS FOR EACH OTHER*

When the wrongful act is done, by one Partner in the ordinary Course of the Business of the Firm, all the other Partners are Vicariously liable for the same. There Liability is also Joint and Several.

*LIABILITY OF THE MASTER FOR HIS SERVANT*

It is a well known fact that a Master takes Credits and Benefits for the good acts done by the his Servant, therefore he bears outcomes of wrongful acts of his Servant. This Vicarious Liability of the Master is based on the maxim *Respondent Superior*, which means "Let the Principal be liable" for the arising of the of the Liability the following two conditions must be fulfilled:

- ✓ First, the wrongful act was committed by the Servant. and
- ✓ Second, this wrongful act was committed in the Course of his Employment.

*c. WHO IS SERVANT*

A Person employed by another, to do work under the Directions and Control of his Master and Manner of the Work done may not be fact in issue.

*d. COURSE OF EMPLOYMENT*

An act is deemed to be done in the Course of Employment, if it is either:

- ✓ A wrongful act Authorized by the Master. or
- ✓ A wrongful and unauthorized Mode of doing some act, Authorized by the Master.

The Master and Servant relationship depends upon the fact, whether the Master have Control or Authority on the Servant or not? And for the purpose of Vicarious Liability, long-term Master-Servant-Relationship is not necessary, it may be causal Delegation of Authority.

D. VICARIOUS LIABILITY OF THE STATE

In England, at Common Law Crown could not be sued in Torts, and the Head of the Department or other Superior Officials, for the acts of their Subordinates could not be sued, But the Individual Wronger was Personally liable, and could not take the Defense of Orders of the Crown or State necessity. The result was that the ordinary Master was Vicariously liable, but the Government was not liable for the Tort committed by it's Servant. The Crown Proceeding Act 1947, has made liable the Crown for the Tort committed by its Servants.

In India, Article 300, of the Constitution of India, provides for Suits and Proceedings against the State. The contents of Article 300 read as under:

- ✓ The Government of India may sue and be sued by the Name of Union of India, and as same as the State Government by the Name of State concerned.
- ✓ In pending Proceedings, Union of India or Name of the corresponding State shall be deemed, to be Substituted for the Dominion of India or for the Province, or for the Indian State according to the situation.

Thus the Article 300, provides, that the Union of India and the States are Juristic or Legal Persons, for the purpose of Suit or Proceedings. But they can sue and be sued in the manner as same as present, before the enactment of the Constitution of India.

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In spite of empowered by the Article 300, of the Constitution of India. Neither the Parliament nor any State Legislature, has try to change the Scenario of the Pre-Constitution days. There was no Provision regarding the Circumstances of the Government's Liability in The Government of India Act 1935. Section 65, of the Government of India Act 1858. provides that in India, position of Litigation was as same as in England.

Section 65, of the Government of India Act 1858, provides as follows:

The Secretary of State in Council shall and may be sue and be sued as well in India as in England by the name of Secretary of State in Council as a Body Corporate and all Persons and Bodies Politic shall and may have and take the same Suits, Remedies and Proceedings, Legal action could have done against the East India Company.

In *Peninsular and Oriental Steam Navigation Company V. Secretary of State for India*

It was held, that the East India Company would be liable, for the acts done in the Exercise of Non-Sovereign Functions only, and would not be liable for the acts done in the Exercise of Sovereign Functions. Chief Justice PEACOCK J. held that, the East India Company had duel character:

First, it performed Commercial Function. and

Second, it got the Administrative Powers as the Representative of British Crown.

Because in England, it was believe that, neither King can do wrong, nor can he Authorize for the same, therefore as same as condition be applied in India for the Representative's Function. It was held, that act done under the Non-Sovereign Functions includes those acts, which would have been performed by a Private Individual without any Delegation of Power, by the Government and those acts which cannot be Lawfully done, except by a Sovereign or by any Private Individual, which be Delegated by a Sovereign to Exercise them.

## VIII. CONCLUSION

From the above noted cooperative study is concluded that both "Proximity" and "Liability" correlates each other, but Liability came into force after arisen of Proximity.

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