Rajkot Municipal Corporation vs Manjulben Jayantilal Nakum & Ors on 17 January, 1997

Equivalent citations: AIRONLINE 1997 SC 183, (1997) 1 SCR 304, (1997) 1 SCALE 370, (1997) 67 DLT 413, (1997) 1 CUR CC 324, (1997) 1 PUN LR 785, 1997 (9) SCC 552, (1997) 1 GUJ LH 198, (1997) 2 TAC 461, (1997) 2 ACC 1, (1997) 2 SUPREME 294, (1997) 1 JT 580, (1997) ACJ 721, (1997) 1 SCR 304 (SC), (1997) 1 JT 580 (SC), (2006) 39 ALLINDCAS 882

Author: K. Ramaswamy

Bench: K. Ramaswamy

PETITIONER:
RAJKOT MUNICIPAL CORPORATION

Vs.

RESPONDENT:
MANJULBEN JAYANTILAL NAKUM & ORS.

DATE OF JUDGMENT: 17/01/1997

BENCH:
K. RAMASWAMY, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T K. Ramaswamy, J.

Leave granted.

This appeal by special leave arising from the judgment of the Division Bench of the Gujarat High Court, dated March 20, 1991 in First Appeal No.259 of 1980, gives rise to an important question of law of liability for negligence in causing the death of one Jayantilal, the husband of the respondent

No.1 and father of the respondents Nos. 2 to 4 due to sudden fall of a tree while he was passing on the road in Kothi compound of Collectorate on his way to attend to his duties as a Clerk in the office of the Director of Industries, Rajkot.

The admitted facts are that the deceased Jayantilal was residing in Padadhri. He used to daily come on a railway season ticket to Rajkot to attend to his office work. On March 25, 1975, while he was walking on footpath on way to his office, a road-side tree suddenly fell on him as a result of which he sustained injuries on his head and other parts of body and later died in the hospital. The respondents filed the suit for damages in a sum of Rs.1 lakh from the appellant-Corporation. The trial Court decreed the suit for a sum of Rs.45,000/- finding that the appellant had failed in its statutory duty to check the healthy condition of trees and to protect the deceased from the tree falling on him resulting in his death. On appeal, the Division Bench has held that the appellant has statutory duty to plant trees on the road-sides as also the corresponding duty to maintain trees in proper condition. While the tree was in still condition, it had suddenly fallen on the deceased Jayantilal who was passing on the footpath. The statutory duty gives rise to tortious liability on the State and as its agent, the appellant-Corporation being a statutory authority was guilty of negligence on its part in not taking care to protect the life of the deceased. The respondents cannot be called upon to prove that the tree had fallen due to appellant's negligence. Statutory obligation to maintain trees being absolute, and since the tree had fallen due to its decay, the appellant has failed to prove that the occurrence had taken place without negligence on its part. The appellant failed to make periodical inspection whether the trees were in good and healthy condition subjecting them to seasonal and periodical treatment and examination. Therefore, the appellant had not taken care to foresee the risk of the tree's falling and causing damage to the passers-by. Thus the appellant is liable to pay damages for the death of Jayantilal. The Division Bench accordingly confirmed the decree of the trial Court. Thus this appeal by special leave.

Shri T.U. Mehta, learned senior counsel for the Corporation, contended that the High Court is not right in its conclusion that the appellant is having unqualified and absolute duty to maintain the trees and was guilty to take reasonable care in maintaining the trees in healthy condition. The burden of proof is on the respondents to prove that there was breach of duty on its part that the occurrence had taken place for not taking reasonable care. In the nature of the things, it is difficult for the Corporation to inspect every tree to find out whether it is in a healthy or decaying condition. The standard of care is not as high as in the case of breach f a statutory duty as the case where by positive act, the Corporation created a thing which is dangerous and failed to prevent such danger which caused damage to others. It is not enough for the respondents to establish that the appellant was remises in its periodical treatment to the plants but was careless in the breach of specific legal duty of care towards the deceased Jayantilal. The Corporation could not foresee that a tree would fall all of a sudden when Jayantilal was passing on the footpath. There is no reasonable proximity between the duty of care and the doctrine of neighbourhood laid by the House of Lords in Donoghue v/s. Stevenson [(1932) AC 562]. The Common Law liability on the part of a statutory Corporation is now authoritatively settled in Murphy v/s. Brentwood District Council (1991) 1 AC 398] over-ruling the two tier test laid down in Anns. v/s. Merton London Burough Council [(1978) AC 728]. A breach of statutory duty, therefore, does not ipso facto entail Corporation's liability for its failure or of its staff to comply with the statutory duty to protect Jayantilal or class of persons to which the deceased

is a member. There is no liability for negligence unless a legal duty to take care exists towards the deceased Jayantilal or class of persons, i.e. pedestrians and that duty should be one which the Corporation owed to the plaintiff himself. This should be pleaded and proved which is lacking in the present case, Knowledge of harm likely to occur to the deceased is a pre- requisite of liability which must in some sense be foreseeable.

It was further contended that though Corporation has a statutory duty to plant trees, no action will lie against it for damages since the indemnity extends not merely to act itself but also to its necessary consequences. The High Court, it was argued, has also committed serious error in its conclusion that the statutory duty of the Corporation to maintain trees carries with it the duty to take care by regular examination of the health of the trees ad felling of decaying trees; it lost sight of the fact that it is only a discretionary duty. The legislature did not intend to confer any cause of action for breach of the statutory duty and none was provided for its breach. The conclusion of the High Court that because of the breach of absolute statutory duty the Corporation was negligent, is not correct proposition of law.

In determining the legislative intent, the Court is required to consider three factors, viz., the context and the object of the statute, the nature and precise scope of the relevant provisions and the damage suffered not of the kind to be guarded against. The object of the Act is to promote facilities of general benefit to the public as a whole in getting the trees planted on road-sides, the discharge of which is towards the public at large and not towards an individual, even though the individual may suffer some harm. The Act does not provide for any sanctions for omission to take action; i.e., planting trees or their periodical check up when planted. By process of interpretation, the Court would not readily infer creation of individual liability to a named person or cause of action to an individual, unless the Act expressly says so. While considering the question whether or not civil liability is imposed by a statute, the court is required to examine all the provisions to find out the precise purpose of the Act, scope and content of the duty and the consequential cause of action for omission thereof. Action for damages will not lie in the suit by an injured person if the damage suffered by him is not of the kind intended to be protected by the Act. Before issuing notice, this Court directed the appellant to deposit Rs.5,000/- towards the cost of the respondents to defend the action in this Court, since an important question of law of general importance arises in the case. Accordingly, the said sum came to be deposited. When notice was issued, the respondents sent a letter to the Registry stating that apart from the said sum of Rs.5,000/-, additional amount that was decreed by the lower Court, should also be directed to be deposited as a condition to defend the case and further costs. Under those circumstances, by order dated August 24, 1995 we observed that the stand taken be the respondents was unreasonable and not correct. Shri P.S. Narasimha, who was present on that day in this Court, was requested to assist the Court as amicus curiae and to receive the above sum of Rs.5,000/- towards his fee. We directed the counsel to submit their written arguments. Accordingly, the counsel have submitted their written arguments. Shri Narasimha, learned amicus curiae made thorough study on the subject and has given valuable assistance. We place on record our deep appreciation of the pains taken by him. According to the learned counsel, the liability in tort which arose in Common Law has been evolved by the courts in England but law has not been well developed in our jurisdiction. In Common Law, there existed duty of foreseeability, proximity, just and reasonable cause and policy. Attempts have been made to identify general theory of liability in

tort consistent with causation, fairness, reciprocity and justice, balancing conflicting interests as well as economic efficiency. The tortious liability falls into one of the three categories, viz., (a) some intentional wrong doing (b) negligence ad (c) strict liability. In this case, we are concerned with negligence on the part of the appellant-Corporation in maintaining the trees on the road-sides. The principle evolved by the courts in England is that a reasonable foresight of harm to persons whom it is foreseeable or is likely to harm by one's carelessness is essential. For the plaintiff to succeed in an action for negligence the plaintiff requires to prove that (i) the defendant is under a duty to take care; (ii) the burden of proof owed by the plaintiff has been discharged by the proof of breach of duty and (iii) the breach of the duty of care is the cause for damage suffered by the plaintiff. Breach of duty raises factual question whether the required standard of conduct has been reached. It is only relevant if a duty of care has been held to exist in law. Damage similarly is also confined to the enquire of facts. Duty of care, on the other hand, is far more crucial concept as it fixes the boundaries of tort of negligence. The regulation of duty of care envisaged in Donoghue's principle, in its widest terms, has a reasonable foresight of harm to persons whom it is foreseeable or is likely to be harmed by one's carelessness and has in turn made it easy to hold in subsequent cases that there should be liability for negligently inflicting damage in new situations not covered by previous case law because damage was foreseeable. If want of duty of care is established, there comes to exist foreseeability of the damage and sufficient proximate relationship between the parties and it must be just and reasonable to impose such a duty. The legal duty to prove proximity is not physical proximity. Proximity is used to describe a relationship between the parties by virtue of which the defendant can reasonably foresee that his action or omission is likely to cause damage to the plaintiff of the relevant type. The relationship refers to no more than the relevant situations of the parties as a consequence of which such foreseeability of damage may exist. The English principles of common law are approved and adopted by the courts in India on the principles of justice, equity and good conscience. In support thereof, he relied upon Gujarat Stat Road Transport Corporation v/s. Ramabhai Prabhatbhai ((1987) 3 SC 234 at 238].

Appellant-Corporation owes a duty of care in common law. The trees and streets vest in the Corporation. It was its responsibility, therefore, to maintain the trees. The Corporation should have the foresight that trees, if neglected to be maintained properly, could cause injury to passers-by. The findings recorded by the courts below that the appellant has committed breach of duty of care is a finding of fact. From the breach of the duty of care, the entitlement to damages arises to the respondents due to the death of Jayantilal. The learned counsel also relied upon K. Ramadas Shenoy v/s. The Chief Officer, Town Municipal Council, Udipi & Ors. [AIR 1974 SC 2177] and contended that answer to the question whether an individual] who is one of the class for whose benefit an obligation has been imposed, whether or not enforced in action for omission to perform the duty, depends upon the language used in the statute. The injury may be caused either by fulfillment of the duty or omission to carry it out or by negligence in its performance. In the light of the above principles, he submitted that though the duty of the appellant to plant trees is discretionary nonetheless it has a statutory duty to plant the trees and to maintain them under Section 66 of the Bombay Provincial Municipal Corporation Act, 1949 (for short, the "Act") and the discretion must be construed to be mandatory duty. By the omission to perform the duty to maintain the trees in healthy condition or to cut off the trees in decaying condition, the Corporation entails with liability to make good the loss/damages caused to the respondents. The High Court, therefore, has not

committed any error of law warranting interference.

The diverse contentions give rise to the questions:

> whether the appellant-Corporation owes a duty of care to maintain the trees as a statutory duty and whether the cause of death of Jayantilal has proximate relationship with the negligence giving rise to tortious liability, entailing payment of compensation to the respondents? The marginal note of Section 66 of the Act indicates "Matters which may be provided for by the Corporation at its discretion". It envisages that the Corporation may in its discretion, provide from time to time, wholly or partly for all or any of the following matters, viz, (viii) "the planting and maintenance of trees of road-sides and elsewhere". Under Section 202 of the Act, all streets within the city vest in the Corporation and are under the control of the Corporation. The Act does not provide machinery for enforcement of obligations cast under Section 66, nor in the event of failure to discharge those obligations any remedy is provided. By operation of Section 202 read with Section 66, since the trees vest in the Corporation, the Corporation is statutorily obligated to plant and maintain trees on the road-sides and elsewhere as a public amenity to ensure eco- friendly environment. An attempt had been made in 1965 to codify the law of tort in a statutory form. The Bill in that behalf, reintroduced in the Parliament in 1967, died as still born. Therefore, there is no statutory law in India, unlike in England, regulating damages for tortious liability. In the absence of statutory law or established principles of law laid by this Court or High Courts consistent with Indian conditions and circumstances, this Court selectedly applied the common law principles evolved by the courts in England on grounds of justice, equity and good conscience (vide Ramanbhai Prabhatbhai's case). Common law principles of tort evolved by the courts in England may be applied in India to the extent of suitability and applicability to the Indian conditions. Let us consider and evolve our principles in tune with the march of law in their jurisprudence of liability on tort. It is necessary to recapitulate the development of the principles and law of tort developed by evolutionary process by applying them from case to case and in some cases the statement of law laid by House of Lords, as guiding principles of law on tortious liability. In the formative stage of the development of tortious liability, the Corporation being a Corporation aggregate of persons, could not be held liable where liability involved some specific state of mind as was held in Stevens vs. Midland Counties Railway [1854 (10) Ex.352]. However, it is now well settled that a Corporation can be held liable and accordingly it may be sued for wrongs involving fraud, malice, as well as for wrong in which intention is immaterial as was held in Barwick vs. English Joint Stock Bank [(1867) LR 2 Ex.259]; Cornford vs. Carlton Bank [(1900) 1 Queen's Bench 22]; and Glasgow Corporation vs. Loremer [(1911) AC 209].
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> In Sir Percy Winfield's in his "Province of the Law of Tort" page 32 referred in "Clerk and Lindsell on Torts"

(Common Law Library Series No.3) (12th Edn.) Chapter I, page 1, page 1 it is stated that "tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages". Duty primarily is fixed by law which on violation, fastens liability to pay damages. It is personal to the injured. Tort and contract are distinguishable. In tort, liability is primarily fixed by law while in contract they are fixed by the parties themselves. In tort, the duty is towards the persons generally while in contract it is towards specific persons or persons. If the claim depends upon proof of proof of the contract, action does not lie in tort. If the claim arises, from the relationship between the parties, independent of the contract, an action would lie in tort at the election of the plaintiff, although the might alternatively have pleaded in contract. The law of tort prevents hurting one another. All torts consist of violation of a right in the plaintiff. Tort law, therefore, is primarily evolved to compensate the injured by compelling the wrong-doer to pay for the damage done. Since distributive losses are an inevitable by-product of modern living in allocating the risk, the law of tort makes less and less allowance to punishment, admonition and deterrence found in criminal law. The purpose of the law of tort is to adjust these losses and offer compensation for injuries by one person as a result of the conduct of another. The law could not attempt to compensate all losses. Such an aim would not only be over-ambitious but might conflict with basic notions of social policy. Society has no interest in mere shifting of loss between individuals for its own sake. The loss, by hypothesis, may have already occurred, and whatever benefit might be derived from repairing, the fortunes of one person is exactly offset by the harm caused through taking that amount away from another. The economic assets of the community do not increase and expense is incurred in the process of realisation, as stated by Oliver Lindel Holmes in his "Common Law" at page 96 (1881 Edn.). The security and stability are generally accepted as worthwhile social objects, but thee is no inherent reason for preferring the security and stability of plaintiffs to those of defendants. Hence, shifting of loss is justified only when there exists special reason for requiring the defendant to bear it rather than the plaintiff on whom it happens to have fallen. (vide "Common Law" of Holmes).

In "Blacks Law Dictionary" (6th Edn.) at page 1489, `tort' is defined as violation of duty imposed by general law or otherwise upon all persons occupying the relation to each other involved in a given transaction. There must always be a violation of some duty owed to plaintiff and generally such a duty must arise by operation of law and not by mere agreement of the parties. "A legal wrong is committed upon the person or property, independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual". Negligence is failure to use such care as a reasonable prudent and careful person would use, under similar circumstances. It is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence

> would have done under similar circumstances. Negligence also is an omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.
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> Negligence and tort have been viewed without elaborately embarking upon the definition of "tort"

applicable to varied circumstances and the scope of negligence in its wider perspective. Let us proceed to consider the meaning of "negligence" in the context of tort liability arising in this case. In every case giving rise to tortious liability, tort consists of injury and damage due to negligence. Claim for injury and damage may be founded on breach of contract or tort. We are concerned in this case with tort. The liability in tort may be strict liability, absolute liability or special liability. The degree of liability depends on degree of mental element. The elements of tort of negligence consist in - (a) duty of care; (b) duty is owed to the plaintiff; (c) the duty has been carelessly breached. Negligence does not entail liability unless the law exacts a duty in the given circumstances to observe care. Duty is an obligation recognised by law to avoid conduct fraught with unreasonable risk of damage to others. The question whether duty exists in a particular situation involves determination of law. Negligence would in such acts and omissions involve an unreasonable risk of harm to others. The breach of duty causes damage and how much is the damage should be comprehended by the defendant. Remoteness is relevant and compensation on proof thereof requires consideration. The element of carelessness in the breach of the duty and those duties towards the plaintiff are important components in the tort of negligence. Negligence would mean careless conduct in commission or omission of an act connoting duty, breach and the damage thereby suffered by the person to whom the plaintiff owes. Duty of care is, therefore, crucial to understand the nature and scope of the tort of negligence.

The question in each case is whether the defendant has been negligent. In determining duty of care, public policy involved in the statute requires detailed examination. Upon examination, they are required to further consider whether its extension elongates that public policy or retards its effectuation or frustrates its object and the inevitable effect thereof on the affected plaintiff as well as general public. No general or abstract principle is desirable to be laid. The careless breach of duty will vary from case to case and it should not be unduly extended or confined or limited to all situations. The attending circumstances require evaluation and application to particular set of facts of a given case. The standard of care also varies in a particular factual situation. Defendant must be under a duty of care not to create latent source of physical danger to the person or property of third party whom he ought to reasonably foresee as likely to be effected thereby. Thus the latent defect causing actual physical damage to the person or property gives the cause of action and them only the defendant is liable to pay the damages for tortious liability. It must, therefore, be an essential element to establish that there is a positive act or a duty and the defendant is under duty of care not to create/direct latent source of physical danger to the person or property of third party whom he ought to reasonably foresee as likely to be affected thereby.

Negligence has been viewed in three ways. Firstly involving a careless state of mind; secondly, a careless conduct; and thirdly, a tort in itself. Every case giving rise to tortious liability, consists of injury and damage may be found due to breach of contract or tort. We are concerned in this case with the injury and damage in tort. Therefore, it is necessary to dwell, in depth, on strict inability, absolute liability or special liability. In the present case, the omission alleged is to take care of periodical check-up of the condition of the trees. The degree of liability depends upon the degree of mental element. The elements of tort of negligence, therefore, consist in (a) duty of care (b) duty owed to the plaintiff and (c) it has been carelessly breached. Negligence does not give rise to liability unless the law fastens the duty of care in given circumstances. Duty is an obligation recognised by law to avoid conduct brought with unreasonable risk of damage to another. The question whether duty consists in a particular situation involves determination as a question of law.

Negligence would include both acts and omissions involving unreasonable risk of having done harm to another. The breach of duty must cause damage. How much of the damage to be compensated by the defendant should be attributed to his wailful conduct and how much to his willful negligence or careless conduct or remissness in performance of duty, are all relevant facts to be considered in a given act or omission in adjudging duty of care. The element of carelessness or the breach of duty and whether that duty is towards plaintiff or class of persons to which the plaintiff belongs are important components in tort of negligence. Negligence would, therefore, mean careless conduct in commission or omission of an act, whereby another to whom the plaintiff owed duty of care has suffered damage. The duty of care is crucial in understanding the nature and scope of tort of negligence. The question in each case is whether the defendant has been negligent in the performance of duty or omission thereof. Determination of duty of care also involves statutory action which requires detailed examination. Local authority, when it exercises its public law function, generally owes no private law duty of care. Duty of care must be owed to a person or class of persons to which the plaintiff belongs and must be to avoid causing particular type of injury or damage to his person or property. The Court requires to examine the scope of duty of care which the local authority owes to the plaintiff. The court is required to consider the object, scope and breach of the Act. Though the statute is of general character, since the Government or local authority is entrusted with the duty to implement the law, though at its discretion, and if damage is done in execution thereof, what requires to be examined is whether the aforestated elements of tort of negligence stand attracted. The Court is further required to consider whether extension of duty of care by the process of interpretation would elongate the public policy or retard its object or frustrate public policy behind the statute and the inevitable effect thereof on the affected plaintiff as well as the general public. No general principle of law is desirable to be laid down as an acid test.

While considering whether an action would lie for breach of statutory duty, what requires to the established, among other things, is that the harm complained of is of the kind contemplated by the statute, as was held in Gorris vs. Scott [(1874) LR 9 Ex. 125] and Kinlgollon vs. W. Cooke & Co. Ltd. [(1956) WLR 527].

The degree of carelessness in breach f duty would, therefore, vary from case to case and it should not unduly be extended or confined or limited or circumscribed to all situations. The attending circumstances require evaluation and application to given set of facts in a case on hand. Defendant

must be under duty of care not to create latent source of physical danger/damage to the person or property of third party whom he ought to have reasonably foreseen as likely to be affected thereby. Those latent defects cause physical danger to the person or the property giving cause of action and the defendant then is liable to pay damage for tortious liability. It must, therefore, be the essential element to establish that there is positive act or duty and the defendant is under that duty. The Court is not to create, by process of interpretation, latent source of physical danger to the person or property of third party when the Act does not envisage that the defendant ought to have reasonably foreseen him as likely to be affected thereby. Negligence connotes inadvertence to the consequences of his conduct which can be a measure of behaviour where one person had been careless in that he did not behave as prudent man would have done whether by advertence or otherwise. The tort of negligence always requires some form of careless conduct which s usually, although not necessarily, the product of inadvertence. Not every careless conduct which causes damage, however, will give rise to an action in tort. The negligence lies in failure to take such steps as a reasonable prudent man would have taken in the given circumstances. What constitutes carelessness is the conduct and not the result of inadvertence. Thus negligence in this sense is a ground for liability in tort.

The question emerges: as to when would the breach of statutory duty under a particular enactment give rise to tortious liability? The statutory duty gives rise to civil action. The statutory negligence is surgeries and independent of any other form of tortious liability. It would, therefore, be of necessity to find out from the construction of each statutory duty whether the particular duty is general duty in public law or private law duty towards the plaintiff. The plaintiff must show that (a) the injury suffered is within the ambit of statute; (b) statutory duty imposes a liability for civil action; (c) the statutory duty was not fulfilled; and (d) the breach of duty has caused him injury. These essentials are required to be considered in each case. The action for breach of statutory duty may belong to the category of either strict or absolute inability which is required, therefore, to be considered in the nature of statutory duty the defendant owes to the plaintiff; whether or not the duty is absolute; and the public policy underlying the duty. In most cases, the statute may not give rise to cause of action unless it is breached and it has caused damage to the plaintiff, though occasionally the statute may make breach of duty actionable per se. The burden, therefore, is on the plaintiff to prove on balance of probabilities that the defendant owes that duty of care to the plaintiff or class of persons to whom he belongs, that defendant was negligent in the performance or omission of that duty and breach of duty caused or materially contributed to his injury and that duty of care is owed on the defendant. If the statute requires certain protection on the principle of volenti non fit injuria, the liability stands excluded. The breach of duty created by a statute, if it results in damage to an individual prima facie, is tort for which the action for damages will lie in the suit. On would often take the Act, as a whole, to find out the object f the law and to find out whether one has right and remedy provided for breach of duty. It would, therefore, be of necessity in every case to find the intention of legislature in creating duty and the resultant consequences suffered from the action or omission thereof, which are required to be considered. No action for damages lies if on proper construction of statute, the intention is that some other remedy is available. One of the tests in determining the intention of the statute is to ascertain whether the duty s owed primarily to the general public or community and only incidentally to an individual or primarily to the individual or class of individuals and only incidentally to the general public or the community. If the statute aims at duty to protection a particular citizen or particular class of citizens to which the plaintiff belongs, it prima facie creates at

the same time co-relative right vested in those citizens of which plaintiff is one; he has remedy for reenforcement, namely, the action for damages for any loss occasioned due to negligence or for failure of it. But this test is not always conclusive.

Duty may be of such paramount importance that it is owed to all the public. It would be wrong to think that on an action, the duty could be enforced by way of damages when duty is owed to a section of public and cannot be enforced if an individual sustains damages to whom the Corporation owes no duty and no private interest is infringed. Beach of statutory duty, therefore, requires to be examined in the context in which the duty is created not towards the individual, but has its effect on the right of individual vis-a-vis the society. Statutory duty generally is towards public at large ad not towards an individual or individuals and the co-relative right is vested in the public and not in private person, even though they may suffer damages. The duty in such a case is to be enforced by way of criminal prosecution or by way of injunction at the suit under Section 192 of CPC or with leave of Court under Order I, Rule 8, CPC by public spirited person or in any appropriate manner to enforce the right and not by way of private action for damages. In that situation, the legislature, while recognising the private right vested in injured individual, may intend that it shall be maintained solely by some special remedy provided for a particular case and not by ordinary method of an action for damages as penalty or compensation.

If the statute creates right and remedy, damages are recoverable by establishing the breach of statute as the sole remedy available under the statute. But where statute merely creates a duty without expressly providing any remedy for breach of it, appropriate remedy, prima facie, is punishment for misdemeanour in respect of the injury to the public and the action for damages in respect of any special damage suffered by an individual. Where special remedy is expressly provided prima facie that was intended to be the only remedy and by implication it excludes the resort to common law. But this is also by no means conclusive. The consideration would be whether the statute intends to award damages for breach of statutory duty. Though general rule is that where a statute creates an obligation and enforces performance in a specified manner, performance cannot be enforced in any other manner. It depends on the scope of the Act which creates the obligation and on consideration of the underlying policy of the statute, effect on the individuals is to be carefully examined and analysed as to what the statute has expressly laid down or probably what the statute aims to achieve. The action for damages will not lie if the damage suffered by him is not of the type intended to be guarded against.

If statute provides that a certain thing must be done, it s a question of interpretation whether the statute aims the thing to be done in all events or merely that person whom the duty is imposed is to use due care and diligence in the performance of duty or that if he fails to perform it, though for no fault of his, he should be free from liability. When a duty is created by the statute, breach of which is an actionable tort, the question would be whether the liability is absolute or dependent on wrongful intent or negligence. It seems to be contrary to statutory intendment to impose liability upon public body for a thing for which no reasonable care in the performance of the concerned act could be inferred from the language used in the statute; it ought not to be so construed as to inflict the liability on the public authority unless the purpose sought to be achieved has been wanting due to want of exercise of duty and reasonable care in the performance of duty imposed by the statute.

It is now well settled legal position by court pronouncements in England that a public authority may be subject to common law duty of care when it exercises a statutory power or when there exists a statutory duty. The principle is that when a statutory power is conferred, it must be exercised with reasonable care so that if those who exercise their power could, by reasonable precaution, prevent any injury which has been occasioned and was likely to be occasioned by their exercise and the damage for negligence may be recovered. The above principle has been applied mainly to private acts. To establish negligence, it is necessary to show that duty to take care existed and such duty was owed to the plaintiff in Bourhill vs. Young [1943 Appeal Cases 92]. The House of Lords laid the test to ascertain whether a duty was owed to the plaintiff to see whether an injury to the plaintiff was the foreseeable result of the defendant's conduct in given circumstances. In Bolton & Ors. vs. Stone [1951 Appeal Cases 850], the House of Lords held that the foreseeability must be of reasonable possibilities. It is not necessary to show that the person who suffered damage should have been within the tortfeasor's contemplation as an identified individual as was held in Farruquia vs. Great Western Railway [(1947) 2 ELR 565], As long as harm to any person was reasonably foreseeable, it may not matter whether the precise chain of events leading to it was not foreseen as was held in In re Polemis & Furness withy & Co. [1921 King's Bench 560].

However, it has been extended to statutory duties by public authorities and notably for public utilities; exercising the powers under public statutes. Cause of action in negligence arises under the principle of breach of duty of care existing in common law. Unless the statute manifests a contrary intention, public authority which enters upon in exercise of statutory power may place itself in a relationship to the members of the public which imposes a common law duty to take care. A breach of statutory duty may itself give rise to civil cause of action. Existence of a statutory cause of action is generally based on strict liability but it does not exclude liability for breach of common law duty of care unless a statute provides otherwise. Statutory duty and its breach itself may give rise to a separate causation or it may be evidence of negligence of common law. Therefore, a public authority is not liable at the suit of an individual for damages for breach of a statutory duty, unless the statute on its true construction manifests a contrary intention or confers a civil cause of action.

Generally, a public authority entrusted with no statutory obligation to exercise a power, does not come under common law duty of care to do so but by conduct the public authority may place itself in such a situation that it attracts the duty of care which calls for exercise of the power. Common illustration is provided by an action in which an authority in the exercise of its functions, if it had created a danger, thereby subjecting itself to a duty of care for the safety of others which must be discharged by an exercise of its statutory power or by giving necessary warnings. It is the conduct of the authority in creating the danger that attracts the duty of care as envisaged in Sheppard v/s. Glossop Corp. [(1921) 3 KB 132]. The statute does not by itself give rise to a civil action but it forms the formulation on which the common law can build a cause of action. If the public authority under a statutory duty places itself in such a position that others may rely on it to take care for their safety so that the authority comes under a duty of care calling for positive action, then such a relationship would arise where a person by present or past conduct, upon which other persons come to rely, creates a self-imposed duty to take positive action to protect the safety or interest of another or at least to warn him that the or his interest is at risk or in danger. Reliance by others, therefore, has been an important element in establishing the existence of duty of care. The liability in negligence is

based on the plaintiff's reliance on the defendant's taking care in circumstances where the defendant is aware or ought to be aware of that reliance. Reliance by the plaintiff, therefore, is an essential element in the action for failure to exercise the power especially when it is a power coupled with duty.

There is a distinction between failure to exercise a statutory power giving causation for damage by positive act of negligence by another and some accidental occurrence or by omission. When there is a duty to take precaution against damage occurring to others through the acts of third parties or through accident/omission of the duty, it may be regarded as materially causing or materially contributing to the damage should it occur, subject, of course, to the question whether performance of the duty would have averted the harm. Duty of care may also exist in relation to discretionary considerations which stand outside the policy of the statute and operational factors. In the operational factors, though the statute creates discretionary function, its omission or action may also give rise to causation to claim damages. The distinction between policy and operational factors is not easy to formulate but the dividing line between then has been recognised as a distinctive determining factor. Public authority is under a duty of care in relation to decisions which involve or are directed by financial, economic, social or political factors or constraints. in that behalf, the duty of care stands excluded or any action that is merely the product of administrative direction etc. may not provide causation for damages but when the performance of the duty, though couched with discretion, is enjoined on the statutory authority, the question whether the power, if exercised with due care, would have minimised, rather prevented or avoided the damage sustained by the plaintiff, requires to be examined.

The general rule is that the public authorities are liable for positive action (misfeasance) but not for omission (non-feasance). In considering the duty of public authority to avoid harm to those likely to be affected by the exercise of power or duty, the courts have evolved the relationship of proximity or neighbourhood nexus which are existing between the person who suffered damages and wrong-doer where there is allegation of wrong doing it has to be seen whether the latter ought reasonable to have foreseen that the carelessness on his part, is be likely to cause damage to the other, In other words, if it is a reasonable foreseeability that carelessness on the defendant's part will cause damage to the plaintiff, then the defendant is plaintiff's neighbour and prima facie owes towards the plaintiff a duty of care which may, however, be negatived on the ground of public policy or reasonable care taken at the operational stage.

The distinction between area of public policy and operational area is a logical and convenient one as has already been elaborated. Undoubtedly, a public authority is liable for the negligent acts of its servants or agents in carrying out their duties, or exercising their powers, within the operational area, although if the performance of their duties or the exercise of their power involves the exercise of discretion. An act will not be negligent, if it is done in good faith in the exercise of , and within the limits of, the discretion.

At the cost of repetition, we may reiterate that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The

defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. However, as a general rule, a failure to act is not negligent unless there is a duty to act. The duty may arise because of the conduct of the defendant himself or it may be created by statute. Therefore, ordinary principles of law of negligence apply to public authorities. They are liable for damage caused by a negligent failure to act when they are under a duty to act, or for a negligent failure to consider whether to exercise a power conferred on them with the intention that it should be exercised and if and when the public interest requires it. If a public authority has decided to exercise the power, and has done so negligently, a person who has acted by relying on what the public authority has done, may have no difficulty in proving that the damage which resulted from a negligent failure to act, there may not be greater difficulty in proving causation. But if the public authority omitted to exercise its discretionary power, there is greater difficulty to prove that causation has arisen. The basic difference, therefore, between causing something and failure to prevent it from happening must always be kept in view in deciding the liability for damages resulting from the failure to perform the statutory or common law duty. The common law would not impose a duty of care on a public authority in relation to failure to exercise its power when those powers are exercisable for the benefit of the public rather than for the benefit of individuals or a class of individuals.

Statutory power is not something like a statutory duty. Before the repository of a statutory power can be made liable for negligence for a failure to exercise it, the statute must (either expressly or by implication) impose a duty to exercise the power and confer a private right of action in damages for a breach of the duty so imposed. The question whether the Act confers a private right of action depends upon the interpretation of the provisions of the Act. But by process of statutory interpretation, the courts may not superimpose a general Common Law duty on a statutory authority in order to give effect to its presumed idea of policy or duty. Common Law does not super-impose such a duty on a mere statutory authority. The nature and scope of the Common Law duty of care owed by a public authority exercising statutory powers must be discerned carefully by reading the provisions of the Act, the object it seeks to achieve and other relevant considerations. The public authority is under a duty to take some action whether or not in exercise of its statutory power or not to prevent injury only if its antecedent acts, have created or increased a risk of injury of that kind. The normal duty of care cannot be a duty to exercise the statutory power to prevent injury to another or otherwise to act in such a way as to prevent injury to him unless the Act has imposed such a duty or unless the authority has itself created or increased the risk of injury of that kind. In the absence of such a statutory duty, a normal duty of exercise of care cannot arise unless the act actually done in exercise of a statutory power, creates or increases the risk of foreseeable injury to another and then the duty is to do those acts with reasonable care and to take reasonable precautions to prevent that injury from occurring. The duty of care, therefore, must have co-relationship to the kind of damage that the plaintiff has suffered and not to the plaintiff or a class of which the plaintiff is a member.

In "The Modern Law of Tort, Landon, Sweet & Maxwell (1994 Edn.), K.M. Stanton has discussed the breach of statutory duty, express or inferential. He has stated at page 42 that the statutory tort takes a number of different forms. A number of modern statutes expressly create a detailed scheme of

tortious liability. The conditions for the existence of a duty; the standard of conduct required and the available defences are all defined. The law created is part of the mainstream of tort liability. On inferential breach of statutory duty, he has stated that beach of statutory duty denotes a common law tortious liability created by courts to allow an individual to claim compensation for damages suffered as a result of another breaking the provisions of a statute which does not, on its face provide a remedy in tort. A tortious remedy is obviously available if a statute says that remedy may or may not be implied; if it is implied, it is said that the defendant is liable under the tort for breach of statutory duty. The most familiar example of this arises in relation to those areas of industrial safety legislation which have traditionally imposed criminal penalties upon an employer for breach of safety provisions, but have given no express tortious remedy to an employee injured by such a breach. Groves v. Lord Wilborne [(1884) 2 Q.B. 402] is a leading authority in support of that liability. At page 45, he has stated on "Inferring the tort of breach of statutory duty:

> presumptions and principles of construction" that breach of duty is of considerable practical importance in view of the volume of legislation made by Parliament and there are obvious advantages to be gained from any technique which assists in the prediction of results. The criticism of the presumptions must be set against the fact that they are of considerable antiquity and were approved in Lord Diplock's seminal speech in Lonrho Ltd. v. Shell Petroleum Co. Ltd. [(1982) AC 173].
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> That the words in the judgment cannot be construed as in the statute and the presumptions play only limited role. They will yield to competing evidence for the contrary result which is found in the statute. The use of presumption in relation to issues of breach of duty should not be surprising. The problem is not the normal one faced by those who have to construe statutes of attributing the particular meaning of form of wards. It is the more difficult one of discerning the intention of the legislature on a matter which has not been dealt with expressly. The use of presumptions is ideal in such a case. A presumption is, in effect, a judicial pronouncement that a particular result is to be assumed unless the contrary is stated with precision. At page 50, it is stated on the "Obligations imposed to protect a particular class of persons" that if a statutory obligation or prohibition was imposed for the benefit of protection of a particular class of persons a presumption will arise that the tort of breach of statutory duty is to be inferred. This presumption is an exception to the presumption of a non-actionability derived from positive act. It, therefore, only applies to a statute which provides its own enforcement machinery.
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> This presumption requires the statute to be interpreted to see whether it was intended to benefit the interests of the public as a whole or a defined group of members of the public. At page 51, he has stated that presumptions are not decisive. When it has been decided which presumption applies to the case, it will still be necessary for the court to review the statute in question in order to determine whether the prima facie result is to be upheld. The answer must depend upon a consideration of the whole Act and the circumstances including the pre-existing law in which it was enacted. In the conclusion, it is stated at page 54 that the most

> significant problems stem from the difficulty of deciding whether a sufficient alternative remedy exists to involve the presumption of non-actionability and in determining whether a defined class which is intended to have enforceable rights vested in it can be identified. Existing presumption allows sufficient freedom of manoieuvre for courts to ensure that sensible decisions are reached. If the courts were to regard statutes containing no enforcement machinery and all other duties over which they had any doubt as being passed in the public interest, rather than as intended to vest rights in a defined class of private individuals; were to regard the existence of standard common law and administrative law remedies as raising the presumption of non-actionability and were to keep Lord Diplock's concept of rights vested in the public for highly exceptional cases, the results would not be very different from those reached by the existing cases. However, the chance of a new area of breach of statutory duty appearing would be effectively eliminated. There are, of course, great practical problems in ensuring that the judiciary adopts a common approach of this kind. It could probably only be achieved as a result of an authoritative statement given by the House of Lords.
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> Michael A. Jones on Torts [Fourth Edition] 1995 [Lawman (India) Private Limited] in Chapter II states under the heading "Negligence: duty of care", that as a tort, negligence consists of a legal duty to take care and breach of that duty by the defendant causing damage to the plaintiff. Duty determines whether the type of loss suffered by the plaintiff in the particular way in which it occurred can ever be actionable. Breach of duty is concerned with the standard of care that ought to have been adopted in the circumstances, and whether the defendant's conduct fell below that standard, i.e., whether he was careless. The division of negligence into duty, breach and consequent damage is convenient for the purpose of exposition but it can be confusing because the issues will often overlap. He has elaborated the general principles, viz., the neighborhood principle as laid down in Donoghue v.

Stevension [(1932) AC 562] and has stated at page 27 that the result would seem to be that factors which formerly might have been considered at the second stage of Lord Wilberforce's test, policy considerations which ought to `negative, or to reduce or to limited the scope of the duty', should be taken into account at an earlier point when deciding whether a relationship of proximity between plaintiff and defendant exists. The second stage of the test will apply only rarely, i.e., in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability. This new approach represents a shift of emphasise rather than a new substantive test for the existence of a duty of care. In future, rather than starting from a prima facie assumption that where a defendant's carelessness causes foreseeable damage, a duty of care will exist, subject to policy considerations which may negative such a duty. The courts will determine the duty issues on a case by case basis, looking in particular at the nature of the relationship between parties to determine whether it is sufficiently proximate. That question is of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis. The following requirements must be satisfied before a duty of care is held to exist:

(i) foreseeability of the damage;

(ii) a sufficiently proximate relationship between the parties; and

(iii) even where (i) and (ii) are satisfied it must be just and reasonable to impose such a duty.

At page 30, he has stated relationship of "Foreseeability and proximity" thus: The concept of foreseeability, i.e., what a hypothetical reasonable man would have foreseen in the circumstances, is ubiquitous in the tort of negligence. It is the foundation of the neighbour principle, but it is also used as a test of breach of duty and remoteness of damage. The fact that particular consequences were unforeseeable may lead to the conclusion that the defendant's behaviour was not careless and even where negligence is patent, damage of an unforeseeable kind will be regarded as too remote and therefore not actionable. This is partly related to the notion of fault liability. It can hardly be said that someone is blameworthy if harm to others could not reasonably have been anticipated. (The other standard to fault liability is whether the conduct was reasonable in the face of foreseeable damage). It is important to realise, however, that a foreseeability is a very flexible concept. One man's reasonable foresight is another man's flight of fancy, and so the bounds of what is foreseeable can be stretched or narrowed as the case may be. The likelihood that a particular event may occur in a given set of circumstances may range from almost certainty t virtual impossibility, and in deciding whether it was foreseeable involves a choice. There is no fixed point on the graph at which the law requires people to take account of a possibility. It is not a totally unprincipled choice since the degree of foreseeability required may be varied with the kind and extent of the damage, and the nature of the relationship between the parties. The low must be reasonably foreseeable, which may mean that it must be foreseeable as a possibility or probable or more probable than not or likely or very likely. This scope for ambiguity allows the concept of foreseeability to be used as a control mechanism to admit or deny recovery of damages in certain types of cases. This becomes most apparent when the courts feel constrained, either by authority or reasons of policy, to deny liability and do so by relying on an absence of reasonable foreseeability which attributes to the reasonable man an abnormal degree of myopia.

The proximity is usually used as shorthand for Lord Atkin's neighbour principle. This refers to legal not physical proximity. Physical proximity may be relevant in deciding whether the parties should be treated as neighbors in law, but it is not an essential requirement. On the "principle of duty and unforeseeable plaintiff, the word `duty' is used in, at least, three different senses. First, duty of care may signify the recognition of liability for careless conduct in the abstract - is this type of harm occurring in this kind of situation ever actionable? Where the courts deny liability by holding that there is no duty of care even though the neighbour principle appears to be satisfied they are setting the limits of actionability in negligence as a matter of policy. Foreseeability may be necessary but it is not a sufficient criterion of liability. Secondly, even where it is accepted that a particular type of loss is capable of giving rise to liability in negligence, the court may conclude that the defendant did not owe a duty of care to the particular plaintiff if the plaintiff was unforeseeable. The plaintiff cannot rely on a duty that the defendant may have owed to others. The third sense in which the word duty is sometimes used is in the context of breach of duty. Where the question is whether the

precautions against a particular risk taken by the defendant fall below the standard that a reasonable man would have undertaken, the court may ask whether the defendant who under a duty was to take further precautions? Here duty is superfluous, it merely signifies the obligation to be careful by adopting the standard of care of a reasonable man.

On the principle of "Policy and the function of duty", it is to remember that the concept of duty adds nothing to the tort of negligence. In some circumstances, a person is held liable for the negligent infliction of damage, and in other circumstances he is not. In the first set of circumstances it is said that a person owes a duty of care, and in the second set that there is no duty. Duty is merely the logical equivalent of actual legal liability for damage caused by negligence. Thus to say that a duty of care exists is to state as a conclusion that {not as a reason why} this damage ought to be actionable. It is circle to argue that there is no liability because there is no duty. Law has always drawn a distinction between the infliction of harm through some positive action and merely allowing harm to occur by failing to prevent it. This is the distinction between misfeasance ad non-feasance, but it is not always easy to make. In many cases an omission may simply be part and parcel of a course of conduct that constitutes a negligent way of acting.

In Clerk and Lindsell on Torts [The Common Law Library No.3] [Sixteenth Edition] - London, Sweet & Maxwell, 1989 it is stated in Chapter 4, Para 2 "Duty of Care Situation" at page 429 that no action lies in negligence unless there is damage. In case of personal injuries damage used to be understood to have been inflicted when injury was sustained by the plaintiff, whether he was aware of it or not. At page 430, he has stated that the tort of negligence is committed when the damage is sustained, however the date of damage is determined. There duty in negligence, therefore, is not simply a duty not to act carelessly; it is a duty not to inflict damage carelessly. Since damage is the gist of the action, what is meant by "duty of care situation's is that it has to be shown that the courts recognise as actionable the careless infliction of the kind of damage of which the plaintiff complains, on the type of person to which he belongs, and by the type of persons to which the defendant belongs. It is essential in English law that the duty should be established; the mere fact that a man is injured by another's act gives in itself no cause of action; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional so long as the other party is merely exercising a legal right; if the act involves a lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists. In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort. Whether there is liability in the given situation depends on there being careless behaviors by the defendant, causation of damage ad foreseeability of that kind of damage to the particular plaintiff. At page 436, on the doctrine of "Damage to the person", it is stated that there is an obvious form of recognised damage and requires no elaboration. Even while the law remained reluctant to recognise economic loss caused by careless false statements, it saw no difficulty in recognising liability for injury to the person caused by them.

There is a distinction between misfeasance (positive action) and non-feasance (omission). Misfeasance is willful, reckless or heedless conduct in commission of a positive act lawfully done but with improper conduct. Non-feasance means non-performance of some act which ought to be performed or omission to perform required duty or total neglect of duty. In the case of misfeasance,

t e defendant is the author of the source of danger to cause damage due to careless conduct, to the person/property of plaintiff. He has knowledge that the act may give rise to tort but in the case of non-feasance several factors require consideration for giving rise to actionable negligence. In "The Law of Torts"

> by John G. Fleming (8th Edn.) 1992, at page 435 on the Chapter of `Public Authorities', the author has stated that although public authorities enjoy no immunity as such from ordinary tort liability, a protective screen has long remained in the vestigial "non-feasance" rule that mere failure to provide a service or benefit pursuant to statutory authority would ordinarily confer no private cause of action on persons who thereby suffer loss. In an article "Affirmative Action in the law of Tort: The case of the Duty to Warn" published in [1989 (48) Camb. Law Journal] at pages 115-116 it is stated that the distinction between acts [misfeasance] and omissions [non-feasance] sometimes referred to as pure omissions, though a fundamental one, is not one which is easy to make. F.H. Bohlen suggested that "misfeasance differs from non-feasance in two respects: in the character of the conduct complained of, and second, in the nature of the detriment suffered in consequence thereof". The first aspect relates to the distinction between active misfeasance and passive inactivity; the second to the distinction between causing loss and simply failing to confer a benefit. A defendant who has inflicted a loss on the plaintiff by his negligent action will be liable for the misfeasance. On the other hand, if he has simply allowed harm to occur without preventing it, or failed to confer a benefit on the plaintiff, he will not be liable, as this is considered to be an omission or non-feasance. The conferment of such benefits lies in the province of contract, not tort. At page 117, he states that Tort law has developed in such a way as to allow the imposition of liability for injuries that are not easily described as "damage" of "loss". At page 119, it is further stated that there are, however, more practical arguments why misfeasance and non-feasance should be treated differently. Imposing liability in cases of non-feasance, it is argued, would be to create liability for an indeterminate class of persons. In situations where a warning could have been given or a rescue effected, there are often a number of people who could have taken the action but did not. There are difficulties in determining which of them should be liable. Moreover, it is unfair to pick out one person from a group of equally culpable wrongdoers. When harm is inflicted by a positive act, the wrongdoer is readily identifiable in most cases and there is no group of wrongdoers from which one person has been arbitrarily selected. AT page 120, it is stated that in all tort actions, one of the crucial tasks which a court has to perform is to determine whether the injury which was suffered by the plaintiff was or was not reasonably foreseeable by the defendant. While such assessment of risk may be more difficult in some cases of non-feasance than it is in cases of misfeasance, it would be no difference in substance. At page 131, it is stated that the circumstances in which liability can arise for an "omission" are therefore somewhat uncertain and open to widely differing interpretations, both broad and narrow. In addition, the outcome of cases in which an omission is at issue may well be the same whether one deals with under general principles or under special rules. It may be that by confining liability

for what are conceived of as omissions to specified circumstances, the courts have attempted to emphasise that such liability will only arise in a limited number of situations. But the decisions reached by the application of these special rules often seem artificial and unduly restrictive and the application of general principles does not necessarily mean that liability will arise in unlimited circumstances. It would still be necessary to show that there was sufficient proximity between the parties and a reasonably foreseeable danger before a duty of care could arise. In determining this question, the court could take into account a broad range of facts which were relevant and even if the facts suggested that such a duty did exist, it would still be permissible to consider whether considerations of policy dictate that the duty should not arise. Thus court would proceed with caution in areas of doubt or difficulty. In the conclusion, it is stated at page 137 that if cases dealing with a negligent failure to warn were dealt with by the principles applied in ordinary negligence actions rather than by special rules which depend on whether the failure was considered to be an act or an omission. At page 137, he concluded that the distinction between acts or omissions was developed at a time when the law of negligence was in a relatively primitive state and it was feared that the courts would be overwhelmed with actions alleging omissions. However, the law of negligence is now considerably more sophisticated and "floodgates" arguments are given much less credence than they used to be.

It could be seen that ordinarily principle of the law of negligence applies to public authorities also. They are liable to damages because by a negligent act or failure to act when they are under a duty to act or for a failure to consider whether to exercise a power conferred on them with the intention that it would be exercised if and when public interest requires it. Where the public authority has decided to exercise a power and has done it negligently a person who has acted in reliance on what the public authority has done, may have no difficulty in proving that the damages which he has suffered have been caused by the negligence. Where the damage has resulted from a negligent failure to act there may be greater difficulty in proving causation and requires examination in greater detail. The liability in tort is for the damage done, not for damage merely foreseeable or threatened or imminent. In Donoghue's case, the defendants were manufacturers of ginger-beer which they bottled. The pursuer had been given one of their bottles by a friend who had purchased it from the defendants. There was no relationship between pursuer and defendants except that arising from the fact that she consumed the ginger-beer they had made and bottled. The bottle was opaque, so that it was impossible to see that it contained the decomposed remains of a snail. It was sealed and stoppered so that it could not be tampered with until it was opened in order that the contents should be drunk. The House of Lords had held that these facts established in law a duty to take care as between the defendants and the pursuer. The principle laid is thus; "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the

preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care". There must be ad in some general conception of relations giving rise to a duty of care, of which the particular care found in that case is but an instance. The rule that you are to live with your neighbour becomes in law a duty that you must not injure your neighbour. You must take reasonable care to avoid by acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be parsons 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 my mind to the acts or omissions which are called in question. The defendant must be the author of the source of danger/damage to the person/property. He must of ex-necessitations having knowledge of hidden defect.

In Oversees Tankship (U.K.) Ltd. v. Morts Docks and Engineering Co. Ltd. [(1961) AC 388] Viscount Simonds, speaking for the Judicial Committee, had laid thus at page 425: "It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there could be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded for tort. It is vain to isolate the liability from its context and to say that B is or is not liable and then to ask for what damages he is liable. For his liability is in respect of that damage and no other. If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened - the damage in suit?"

The duty of care must, therefore, be with reference to the kind of damage that the plaintiff has suffered and in deference to the plaintiff or class to which the plaintiff is a member. These cases relate to private law tort.

The proper approach, therefore, is to consider whether a duty of care situation exists in public law tort which the law ought to recognise and whether in that situation the defendant's conduct was such that he should have foreseen the damage that would be inflicted on the plaintiff. As a general rule of law, one man is under no duty to control another so as to prevent the latter from doing damage to a third. The first question to be considered is: whether the plaintiff has established necessary relationship giving rise to the duty of care? The next question is whether there is any negligence at the time when the act in question was committed? The act complained of must have rational relationship to the damage caused. The tort of negligence does not depend simply on the question of foreseeability. Foreseeability is not the sole criteria nor does the fact that the damage is foreseeable creates any onus. What the court would ask or look at is the operational structure of the Act. Is this a situation where a duty does exist towards the plaintiff or class of persons to which he belongs keeping in mind the nature of the functions and the interest of the community. The further question would be: whether the damage to the plaintiff is so foreseeable? In that behalf it must be further seen whether there was sufficiently proximate relationship between the plaintiff and the

defendant. In Hedley v. Baxendale [(1854) 9 Ex. 341], the celebrated judgment, the accident can be said to have been the natural and probable result of the breach of duty. That principle was accepted in Haynes v. Harwood [(1935 1 K.B. 146] wherein Greer, L.J. had laid thus: "If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, Hadley v. Baxendala [(1854) 9 Ex. 341], the accident can be said to be the `natural and probable result' of the breach of duty". This principle was further approved by House of Lords in Dorset Yacht Co. v. Home Office [(1970) AC 1004 at 1028]. The facts there were that seven Borstal boys were taken by the officers, in charge of the hostel to an island under the control and supervision of three officers. The boys left the island at night and boarded, cast adrift and damaged the plaintiffs' yacht which was moored offshore. The respondents brought action for damages against the Home Office alleging negligence on the part of the officers incharge. The defence was that the officers had no control over the boys. There was no carelessness on their part and that the damage was too remote. Lord Reid while negativing the defence had held that where negligence is involved the Donoghue principle laid down by Lord Atkin generally applied. Therein the question was of remoteness of causation between the three agencies involved, viz., the controlling officers, the boys who caused the damage and the plaintiff who suffered the damage. The argument of the Attorney General on behalf of the Home Office was that the officers had no control over the boys. In dealing with that question, Lord Reid in his speech had held at page 1027 that "there is an obvious difference between a case where all the links between the carelessness and the damage are inanimate so that, looking back after the event, it can be seen that the damage was in fact the inevitable result of the careless act of omission and a case where one of the links is some human action. In the former case, the damage was in fact caused by the careless conduct, however unforeseeable it might have been at the time that anything like that would happen. At one time the law was that unforeseeability was no defence...But the law now is that there is no liability unless the damage was of a kind which was foreseeable. On the other hand, if human action (other than an instinctive reaction) is one of the links in the chain, it cannot be said that, looking back, the damage was the inevitable result of the careless conduct. No one in practice accepts the possible philosophic view that everything that happens was predetermined. yet it has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness. The convenient phrase novus actus interveniens denotes those cases where such action is regarded as breaking the chain and preventing the damage from being held to be caused by the careless conduct. But every day there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty in holding that the defendant's conduct caused the plaintiff loss. At page 1030, Lord Reid held that "...I would agree, but there is very good authority for the proposition that if a person performs a statutory duty carelessly so that the causes damage to a member of the public which would not have happened, if he had performed his duty properly he may be liable". Accordingly it was held that Home office was liable for damages on account of negligence of the officers.

In Geddis v. Proprietors of Bann Reservoir [91978) 3 App. Cas. 430] Lord Blackburn said, at pp. 455-456:

> "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently."

The reason for this we think, is that legislature deems it to be in the public interest that things, otherwise justifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But legislature cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage. Where legislature confers a discretion the position is not the same. Then there may, and almost certainly will, be errors of judgment in exercising such a discretion and legislature cannot be imputed to have intended that members of the public should be entitled to sue in respect of such errors. But there may be case when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which legislature has conferred, the person purporting to exercise his discretion has acted in abuse or excess of his power. Legislature cannot be supposed to have granted immunity to persons who do that.

In Bourhill v. Young [(1943) AC 92 at 981 Lord Wright had laid that the "oblige in such duty must be a person or a class definitely ascertained, and so related by the circumstances to the obliger that the obliger is bound, in the exercise of ordinary sense, to regard his interest and his safety. Only the relation must be not too remote, for remoteness must be held as a general limitation of the doctrine". The learned law Lord further elaborated that "I doubt whether in view of the variations of circumstances which may exist it is possible for profitable to lay down any hard and fast principle beyond the test of remoteness as applied to the particular case".

In Geddis's case [supra], Lord Hatherley had stated at page 449 that "We are not bound, nor entitled, to suppose that they will willfully do injury by the exercise of the legislative powers which have been given to them; but it appears to me clearly and plainly that they should use every precaution, by the exercise either of their powers created by the Act of Parliament itself, or of their common law powers, to prevent damage and injury being done to others through whose property the works or operations are carried on...".

On the law of negligence of economic laws in Anns v. Merton London Borough [(1978) AC 728] Lord Wilberforce's dictum of two test theory which had contributed for the development of law of negligence was elaborated and held at page 751 thus: Through the trilogy of cases in this House, Donoghue v. Stevenson [(1932) AC 562, Hedley Byrne & Co. Ltd. v. Heller & Partnrs Ltd. [(1964) AC 465] and Dorset Yacht Co. v. Home Office [(1970) AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, is there a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether

there are nay considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise". That two stage test theories now stand overruled by a seven-member House in Murphy v. Brentwood District Council [(1991) 1 AC 398]. Lord Keith of Kinkel held at page 461 stated thus: "I observe at this point that the two-stage test has not been accepted as stating a universal applicable principle. Reservations about it were expressed by myself in Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [(1985) AC 210, 240], by Lord Brandon of Oakbrook in Leight and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. [(1986) AC 785, 815 and by Lord Bridge of Harwich in Curran v. Northern Ireland Co-ownership Housing Association Ltd. [(1987) AC 718. In Council of the Shire of Sutherland v. Heymand [(1985) 157 CLR 424] where the High Court of Australia declined to follow Anns and Yuen Kun Yeu v. Attorney General of Hong Kong [(1988) AC 175, 191]. Accordingly, it was overruled by separate speeches of the learned Law Lords. Lord Bridge of Harwich at page 480 held that "a second difficulty will arise where the latent defect is not discovered until it causes the sudden and total collapse of the building, which occurs when the building is temporarily unoccupied and causes no damage to property except to the building itself. The building is now no longer capable of occupation and hence cannot be a danger to health or safety. It seems a very strange result that the building owner should be without remedy in this situation if he would have been able to recover from the local authority the full cost of repairing the building if only the defect had been discovered before the building fell down."

In Coparo Industries Plc. v. Dickman & Ors. [(1990) 2 AC 605 at 632] where the facts were that plaintiff which was a public limited company and had accomplished the take over of FPCC. It brought an action against its Directors alleging fraudulent misrepresentation against its auditors claiming that they were negligent in carrying out audit and in making the report which they were required to do within the terms of Section 236 and 237 of the Companies Act. The plaintiff company relied upon the audit report and suffered loss. In that behalf, it was held by Lord Oliver of Aylmerton that "The question is, In think, one of some importance when one comes to consider the existence of that essential relationship between the appellants and the respondent to which, in any discussion of the ingredients of the tort of negligent, there is accorded the description "proximity,"

> for it is now clear from a series of decisions in this House that, at least so far as concerns the law of the United Kingdom, the duty of care in tort depends not solely upon the existence of the essential ingradient of the foreseeability of damage to the plaintiff but upon its coincidence with a further ingredient to which has been attached the label "proximity" and which was described by Lord Atkin in the course of his speech in Donoghue v. Stevenson [(1932) AC 562, 581] as: "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

At page 633, it was further stated that "...the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of what has been called a

"relationship of proximity" between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be "just and reasonable". But although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible.

> "Proximity" is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmetically, the courts conclude that a duty of care exists."

In Hill v. Chief Constable of West Yorkshire [(1989) a AC 191], the plaintiff's 20 year old daughter was attacked at night in a city street of the police area of which the defendant's was chief constable and died from her injuries. Her attacker who was convicted of her murder was alleged to have committed series of offences of murder and attempted murder against young women in the area. Action was laid by the appellant-mother claiming damages for the negligence in apprehending the accused and for the faulty investigation. The trial Court quashed the action on the ground of lack of cause of action and in appeal it was confirmed. Lord Keith of Kinkel speaking for the House, had held that "where an individual member of the police force in the course of carrying out their functions of controlling and keeping down the incidence of crime owed a duty of care to individual members of the public who may suffer injury of person or property through the activities of criminals such as to result in liability for damages on the ground of negligence to anyone who suffers such injury by reason of the breach of that duty. Having posed that question, the House held that the general sense of public duty which motivates police forces is unlikely to be appreciably a reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavors to the performance of it. In some instances, the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward types of failure - for example that a police officer negligently tripped and fell while pursuing a burglar - others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do."

Smith & Ors. v. Littlewoods Organisation Ltd. [(1987) AC 141] is a case of omission in a private law tort relating to economic laws. The defendants purchased a cinema building with the intention of

demolishing it and replacing by a super-market. The cinema after doing some work remained omitted and unattended. Security of the building was from time to time overcome by children and young persons and vandalism took place in and around it including an attempt to set fire to some old films in an adjoining close and an attempt to light a fire in the cinema itself. On July 5, 1976, a fire was deliberately started in the cinema by children or teenagers, as a result of which the cinema burned down and an adjacent cafe ad billiard saloon and a nearby church belonging to the users were seriously damaged. An action was brought against the defendants for damages claiming that the damages to the property was caused due to defendants' negligence in not driving off the children causing the damage. The House rejecting the claim, speaking through Lord Brandon of Oakbrook had held that there should be "careless breach of duty" and that "I am of opinion that the occurrence of the behaviour in question was not reasonably foreseeable by Littlewoods. I conclude, therefore, that the general duty of care owed by Littlewoods to the appellants did not encompass the specific duty referred to above. Lord Griffiths, while concurring at page 251 in his speech held that "Common-sense view should be taken". Lord Mackay of Cashfern, approving Lord Macmillan's speech in Bourchill v. Young [(1943) AC 92 104] quoted at page 260 that "the duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable injury to others, and the duty is owned to those whom injury may reasonably and probably be anticipated if the duty is not observed". As to the negligence, approving Lord Romer, the learned law-Lord, held that "In my opinion, the appellants can only be fixed with liability if it can be shown that there materialised a risk that ought to have been within the appellants" reasonable contemplation". At page 272, it was further stated that " We are therefore thrown back to the duty of care. But one thing is clear, and that is that liability in negligent for harm caused by the deliberate wrong doing of others cannot be founded simply upon foreseeability that the pursuer will suffer loss or damage by reason of such wrongdoing. There is no such general principle. We have, therefore, to identify the circumstances in which such liability the circumstances in which such liability may be imposed". "There was no evidence that Littlewoods (the defenders) knew of these matters" (i.e. Of the various intrusions by vandals preceding the one when the fire was started). "Unless they had a duty to inspect there is no basis on which it can be alleged that ought to have known of them" It was further observed that "... the question whether, in all the circumstances described in the evidence, a reasonable person in the position of Littlewoods was bound to anticipate as probable, if he took no action to keep these premises lockfast, that, in a comparatively short time before the premises were demolished, they would be set on fire with consequent risk to the neighboring properties is a matter for the judge of fact to determine." At page 279, it was concluded thus: "I wish to emphasise that I circumstances which enabled the defendants to claim that the highway authority came under the duty of care.

In Burton vs. West Suffolk Country Council [(1960) 2 WLR 745], a highway authority carried out certain drainage work on a road to improved its conditions since it was inadequate to prevent flooding when the road was subjected to heavy rain. It was the practice of the roadman to put red flags by day and put off red lights by night whenever there was flooding which could be dangerous to vehicles. In December 1954, after heavy rain and flooding, after the water had subsided, a patch of ice formed on that part of the road which tended to keep damp because of inadequate drainage. The red flags and red lights were put off by the roadman when the water had subsided. The plaintiff was driving his car along the road when it ran on to the patch of ice causing it to skid and crash into a

tree. The plaintiff was injured and the car was damaged. In an action for damages though the trial Court granted the decree, on appeal, it was held that failure to provide adequate drainage by not doing sufficient work was an act of non- feasance for which the highway authority was not liable, but if the work was done negligently performed and created a new danger, the Corporation was liable. It was held that there was no duty on the defendant to warn the plaintiff of the danger of ice being on the road, and, therefore, the claim of the plaintiff for damages failed. The principle laid down in Sheppard vs. Mayor, Aldermen and Burgesses of the Borough of Glossop [(1921) 3 King's Bench 132] was approved and applied.

In Sheppard's case (supra), a street was vested in an urban authority under the Public authority Act, 1875, on December 25, 1918 at 11.30 p.m., the plaintiff was going home by the street missed his way, without negligence strayed on to the private land, and fell over the retaining well into the street and was injured. In an action against the authority for negligence in the performance of an alleged duty to light the street sufficiently under Section 161 of the Public Health Act, 1875, it was held that the authority have a discretion and the Act imposes them no obligation to light the streets in their districts. Consequently, the defendant who had begun were not bound to continue to light the street and that having done upto 9 p.m., they have done nothing to make the street dangerous. They were under no obligation whether by lighting or otherwise to give warning of the danger. It was, therefore, held that the defendants were not liable. For damages. In Bolton's case (supra), a cricket ground was enclosed on the side by a seven feet fence. When the play was on in the cricket ground abutting the highway, a person being on a side road of residential house was passing that way. The ball hit by a player of the cricket ground went upto 70 yards from the fence and 100 yards from the pace where injury occurred. In a suit for damages, the House of Lords held that the club was not liable in damages to the injured person, whether on the ground of negligence or nuisance. Lord Porter at page 858 had held that undoubtedly, one would know that hitting of a cricket ball out of the ground was an event which might occur and, therefore, there was a conceivable possibility that someone would be hit by it. But so extreme an obligation of care cannot be imposed in all cases. If it were no one could safety drive a motor car since the possibility of an accident could not be overlooked and if it occurred some stranger might well be injured, however careful the driver might be. Dictum of Lord Thankerton in Bourhill's case, namely, "such reasonable care a will "avoid the risk of injury to such person as he can reasonably foresee might be injured by failure to exercise such reasonable care" was applied and held that in the circumstances it would not possible to foresee the injury to the person passing on the highway. Lord Porter had held that it is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient provability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been as it must be, taken. Lord Normand held at page 860 that it is not the law that precautions must be taken against every peril that can be foreseen by the timorous. The Standards of care is that a person is bound to foresee only the reasonable and probable consequences of the failure to take care judged by the standard of the ordinary reasonable man. It is, therefore, not enough for the plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road, she must go further and say that they ought, as reasonable men, to have

foreseen the probability of such an occurrence, Lord Reid at page 865 has held that the definition of negligence laid by Alderson B. in Blyth vs. Birmingham Waterworks Co. [(1856) 11 Ex. 781 at 784] that "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do". "I think that reasonable men do in fact take into account the degree of risk and do not act on a bare possibility as they would if the risk were more substantial. Lord Macmillan's dictum in Bourhill's case (supra) that "The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owned to those to whom injury may reasonably and probably be anticipated, if the duty is not observed". It was held that the Court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to given undue weight to the fact that a distressing accident has happened. The learned law Lord also approved the dictum of Lord Dunedin in Fardon vs. Harcourt-Revington [(1932) 146 L.T. 391 at 392] that "there is such an extremely unlikely extent that I do not think any reasonable man could be convicted of negligence if he did not take into account the possibility of such an occurrence and provide against it", At page 667, it was further held that "what a man must not do and what, I think, a careful man tries not to do is to create a risk which is substantial. Of course, there are numerous cases where special circumstances require that a higher standard shall be observed and where that is recognised by the law. But I do not think that his case comes within any such special category. It was argued that this case comes within the principle in Rylands vs. Fletcher [(1869) LR 3 HL 330], but I agree which your Lordships that there is no substance in this argument. In my judgment, the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellant, considering the matter from the point of view of safety, would have thought in right to refrain from taking steps to prevent the danger." It was accordingly held that the cricket Board was not liable for damages.

In Baxter vs. Stockton-on-tees Corporation [(1959) 1 Queen's Bench Division 441], the plaintiff's husband was killed when a motor-cycle which he was riding at night on a highway collided with the kerb of an approach island adjacent to a roundabout. In a suit for damages for the death of her husband against the statutory highway authority for its failure to provide lighting at the approach road, Court of Appeal held that the defendants were in consisting exclusively of non-feasance and that accordingly if the defendant were to be held liable it could only be by virtue of some express words in the Act under which the road became vested in them. But nothing was found in Section 32 of the Local Government Act, 1929 to impose on an urban authority taking over a county road any special obligation as to the maintenance of the road so as to exclude the ordinary immunity from civil action in respect of mere non-feasance. Therefore, the action of the plaintiff must necessarily fail. In Wilson vs. Kingston-Upon-Thames Corporation [(1949) 1 ELR 699], a hole in a asphalt roadway was temporarily repaired by the highway authority by filing it with tar- macadam. The road again became in need of repair, but it was not done. A cyclist riding over the hole was thrown from his cycle and injured. He laid the suit for damages, it was held by the Court of Appeal that the condition of the road was due to non-feasance and not due to misfeasance in repairing the road negligently and, therefore, the highway authority was not liable for damages.

Let us consider the cases relating to duty of care in planting and maintenance of the trees. In England, every owner of a house or the Corporation, has statutory duty to plant trees and of their upkeep. In that behalf the case law is as under:

> In Noble vs. Harrison [(1926) 2 King's Bench Division 332], a branch of a beech tree growing on the defendant's land overhung a highway at a height of 30 feet above the ground. In fine whether the branch suddenly broke, fell upon the plaintiff's vehicle, and damaged it. In an action by the plaintiff claiming in respect of damage to his vehicle, the county court found that neither the defendant nor his servants knew that the branch was dangerous on that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. Reversing the judgment of the country court, it was held that the Ryland's case, principle had not application inasmuch as a tree was not in itself a dangerous thing and to grow trees was one of the natural uses of the soil. Mere fact that the branch overhung the tree passage of the highway and although the branch proved to be a danger the defendant was not liable, inasmuch as he had not created the danger and had no knowledge, actual or imputed, of its existence. The principle laid down in Barket vs. Herbert [(1911) 2 K.B. 633] was applied. At page 338, Rowlatt J. held that I see no ground for holding that the owner is to become an insurer of nature, or that default is to be imputed to him until it appears, or would appear upon proper inspection, that nature can no longer be relied upon. In Cunliffe vs. Bankes [(1945) 1 All E.L.R. 459], a tree growing on the defendant's estate fell, owing to its diseased condition, across a highway running besides the estate. The plaintiff's husband was ridding a motor-cycle along the highway when without any negligence on his part, he collided with the tree and died of his injuries. The plaintiff's action based on negligence was brought under the Fatal Accidents Act, 1846 and the Law Reform (Miscellaneous Provisions) Act, 1934. The trial Judge found the defendant liable. On appeal, reversing the judgment, the court of Appeal, House of Lords held that a person is not liable for nuisance constituted by the state of his property unless (a) he caused it or by the neglect o some duly he allows it to arise or when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he became or ought to have become aware of it. Therefore, the defendant was not liable. In Gaminer & Anr vs. Northern & London Investment Trust, Ltd. [(1950) 2 ALL ELR 486], the respondents were lessees of a block of flats in London street which they were occupied by the tenants. In the forecourt of the flats, there was a row of elm trees. On April 7, 1947, the appellants were driving past the flats when one of the trees fell on their car, wrecking it and injuring the appellants. The tree that was fallen was proved to have been due to a disease of the roots, which as of long standing but the disease had not taken a normal course and there was no indication from the condition of the tree above ground that it was affected by the disease. The tree was about 130 years old and according to the evidence it was of the middle age. It was never lopped, topped or pollarded. The action was laid for damages for omission to take proper care of the trees. The House of Lords, after a detailed examination of the evidence, held that when there has no evidence that the tree was affected with a disease mere possibility of the taking

protection was not sufficient as spoken by the expert witnesses. It was, therefore, held that the respondents were not liable for damages. Lord Normand at page 494 held that what would a reasonable and prudent landlord have done about the tree? There is more than enough evidence of what scientific experts would have thought or done, but there is a paucity of evidence about what a reasonable and prudent landlord would have done. It was held that there was no evidence to conclude that a reasonable prudent landlord would inspect or cause to be inspected any good sized tree growing in a place where unsuspecting person may lawfully approach it and to take any protection since there is no external evidence of any injury. Lord Radcliffe at page 501 had held that the accepted test that liability only begins when there is apparent in the tree a sign of danger has the advantage that it seems to ignore, or to a large extent to ignore, the distinction between the spot that is much and the spot that it little frequented but, on the other hand, I think that it does end by making the standard of the expert the test of liability. Even anyone can own a tree, there is no qualifying examination, but to how many people in this country can be credited as much as general knowledge as will warn them that a tree's top is unusually large, or that it is, in fact, diseased, dangerously or otherwise?"

It would thus be seen that each case requires to be examined in the light of the special circumstances, viz., whether the defendant owed a duty of care to the plaintiff, whether the plaintiff is a person or a class of persons to which the defendant owed a duty of care, whether the defendant was negligent in performing that duty or omitted to take such reasonable care in the performance of the duty, whether damage must have resulted from that particular duty of care which the defendant owed to the particular plaintiff or class of persons. Public authorities discharge public obligations to the public at large. Therefore, it owes duty of care at common law to avoid causing present or imminent danger to the safety of the plaintiff or a class of persons to which the plaintiff belongs. It is a statutory duty of care under common law which could give rise to actionable claim in the suit of the individual and it is capable of co-existence along side a statutory duty. The duty of care imposed on a local authority by law may not be put beyond what the statute expects of the local authority or Corporation to perform the duty. The tort of insuperable negligence would emerge from imminent danger created by positive act. But the duty of care imposed on local authority by law may be gauged from the circumstances in which and the conditions subject to which the duty of care has been imposed on the statutory authority. The imminent danger theory must be viewed keeping at the back of mind the act or conduct creating the danger to the plaintiff or the class of persons to which he belongs and that by negligent conduct the defendant causes damage to the property or person of the plaintiff, though the defendant is not in know of the danger. The defendant also in given circumstances, must owe special responsibility or proximity imposing foreseeable duty to care, to safeguard the plaintiff from the danger or to prevent it from happening.

But when the defendant was not in know of the discoverable defect or danger and it caused the damage by accident like sudden fall of the tree, it would be difficult to visualise that the defendant had knowledge of the danger and he omitted to perform the duty of care to prevent its fault. There would be no special relationship between the statutory authority and the plaintiff who is a remote user of the foot-path or the street by the side of which the trees were planted, unless the defendant is aware of the condition of the tree that it is likely to fall on the footpath on which the plaintiff/class of persons to which he belongs frequents it. The defendant by his non-feasance is not responsible for the accident or cause of the death since admittedly there was no visible sign that the tree was affected by decease. It had fallen in a still condition of weather.

Therefore, there must exist some proximity of relationship, foreseeability of danger and duty of care to be performed by the defendant to avoid the accident or to prevent danger to person of the deceased Jayantilal. The requisite degree of proximity requires to be established by the plaintiff in the circumstances in which the plaintiff was injured. The plaintiff would not succeed by establishing that the accident had occurred due to negligence, i. ., the defendant's failure to take reasonable care as ordinary prudent man, under the circumstances, would have taken and the liability in tort to pay damages had arisen. If the defendant had become aware of the decayed condition or that the tree was affected by decease and taken no action to prevent the accident, it would be actionable, though for non-feasance. Here appearance of danger gives rise to no liability. Actual damage had occurred before tortious liability for negligence arose. When the defendant is under statutory duty to take care not to create latent source of physical danger to the property or the person who in the circumstances is considered to be reasonably foreseeable as likely to be affected thereby, the defendant would be liable for tort of negligence. If the latent defect causes actual physical damages to the person, the defendant is liable to damages for tortious liability. The negligent act or omission of the statutory authority must be examined with reference to the statutory provisions, creating the duty and the resultant consequences. The negligent act or omission must be specifically directed to safeguard the public or some sections of the public to which the plaintiff was a member, from the particular danger which has resulted.

The exercise of power/omission must have been such that duty of care had arisen to avoid danger. Foreseeability of the danger or injury alone is not sufficient to conclude that duty of care exists. The fact that one could foresee that a failure of the authority to exercise a reasonable care would cause loss to the passers-by itself does not mean that such a duty of care should be imposed on the statutory authority. The statutory authority exercises its public law duty or function. It would be wrong to think that the local authority always owes responsibility and continues to have the same state of affairs. It would be an intolerable burden of duty of care on the authority; otherwise it would detract the authority from performing its normal duties. If he were to gauge the risk of litigation, he would avoid doing public duty of planting and nurturing the

trees thinking that it would be a have burden on the local authority. It would always cause heavy financial burden on the statutory authority. If the duty of maintaining constant vigil or verifying or testing the healthy condition of trees at public places with so many other functions to be performed, is cast on it, the effect would be that the authority would omit to perform statutory duty. Duty of care, therefore, must be carefully examined and the foreseeability of damage or danger to the person or property must be co-related to the public duty of care to infer that the omission/non-feasance gives rise to actionable claim for damages against the defendant.

It is seen that when a person uses a road or highway, under common law one has a right to passage over the public way. When the defendant creates by positive action any danger and no signal or warnings are given and consequently damage is done, the proximate relationship gets established between the plaintiff and the defendant and the causation is not too remote. Equally, when the defendant omits to perform a particular duty enjoined by the statute or does that duty carelessly, there is proximity between the plaintiff-injured person and the defendant in performance of the duty and when injury occurs or damage is suffered to person or property, cause of action arises to enable the plaintiff to claim damages from the defendant. But when the causation is too remote, it is difficult to anticipate with any reasonable certainty as ordinary reasonable prudent man, to foresee damage or injury to the plaintiff due to causation or omission on the part of the defendant in the performance or negligence in the performance of the duty.

The question, therefore, is: whether the respondents in the present case have established the three essential ingredients? Statute enjoins a power to plant trees on the roadsides or in public places. There is no statutory sanction for negligence in that behalf. But the question is: whether the statutory function to plant trees gives rise to duty of maintaining the trees? In a developing society it is but obligatory on every householder, when he constructs house and equally for a public authority to plant trees and properly nurture them up in a healthy condition so as to protect and maintain the eco-friendly environment. But the question is: whether the public authority owes a statutory duty toward that class of person who frequent and pass and repass on the public highway or road or the public places? If the local authority/statutory body has neglected to perform the duty of maintaining trees in a healthy condition and when damage, due to fall of the tree occurs, the question emerges whether the neighbor relationship and proximity of the causation and negligence and the duty of care towards the plaintiff have been satisfactorily proved to have existed so as to fasten the defendant with the liability due to tort of negligence. It depends on a variety of facts and circumstances. It is difficult to lay down any set standards for proof thereof. Take for instance, where a hanging branch of a tree/tree is gradually falling on the ground. The statutory/local authority fails to take timely action to have it cut and removed and one of the passers-by dies when the branch/tree falls on him. Though the injured or the deceased has contributed to the negligence for the injury or death, the local authority etc. is equally liable for its

negligence/omission in the performance of the duty because the proximity is anticipated. Suppose a boy not suspecting the danger climbs or reaches the falling tree and gets hurt, the defendant would be liable for tort of negligent. The defect is apparent. Negligence is obvious, proximity and neighborhood anticipated and lack of duty of care stands established. The plaintiff, in common law action, is entitled to sue for tort of negligence. The authority will be liable to pay the damages for omission or negligence in the performance of the duty. Take another instance, where while `A' is passing on the road, there is sudden lightning and thunder and `A' takes shelter under a tree and the lighting falls on the tree and consequently `A' dies. In this illustration, there is no corresponding obligation or a duty of care on the part of the Corporation or the statutory authority to warn that `A' should not take shelter under the tree to avoid harm to him. Take yet another instance, where road is being laid and there is no warning or signal and a cyclist or a most cyclist during night falls in the ditch, i.e. place of repair due to negligence on the part of the defendant. The injury is caused to the victim/vehicle. The plaintiff is entitled to lay suit for tort of negligence. But in a situation like the present one where the victim being not aware of the decease/decay, the tree suddenly falls in a still weather condition, no one can anticipate and its is difficult to foresee that a tree would fall suddenly and thereby a person who would be passing by on the road-side, would suffer injury or would die in consequence. The Corporation or the authority is not liable to be sued for tort of negligence since the causation is too remote. Novus actus inconveniences snaps the link and, therefore, it is difficult to establish lack of care resulting in damage and foreseeability of the damage. The case in hand falls in this category. Jayantilal was admittedly passing on the roadside to attend to his office duty. The tree suddenly fell and he sustained injury and consequently died. It was difficult to foresee that a tree would fall on him.

The conditions in India have not developed to such an extent that a Corporation can keep constant vigil by testing the healthy condition of the trees in the public places, road-side, highway frequented by passers-by. There is no duty to maintain regular supervision thereof, though the local authority/other authority/owner of a property is under a duty to plant and maintain the tree. The causation for accident is too remote. Consequently, there would be no Common Law right to file suit for tort of negligence. It would not be just and proper to fasten duty of care and liability for omission thereof. It would be difficult for the local authority etc. to foresee such an occurrence. Under these circumstances, it would be difficult to conclude that the appellant has been negligent in the maintenance of the tees planted by it on the road-sides.

The appeal, therefore, succeeds and is allowed accordingly. Judgment and decree of the trial Court, as affirmed by the High Court, stands set aside. In the facts of the case, we direct that the amount of Rs. 45,000/- may not be recovered from the respondents though they are not entitled in law to the same, since they are to poor and the amount must have already been spent out. In view of the trouble taken by Shri Narasimha as amicus curiae, we direct the Corporation to pay him a further sum

of Rs. 5,000/- [Rupees five thousand only] within a period of two months from the receipt of this order.