

## NEGLIGENCE – DUTY OF CARE

### EXISTENCE OF A DUTY

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Before 1932 there was no generalised duty of care in negligence. The tort did exist and was applied in particular situations where the courts had decided that a duty should be owed, eg, road accidents, bailments or dangerous goods. In *Donoghue v Stevenson* [1932] AC 562, Lord Atkin attempted to lay down a general principle which would cover all the circumstances where the courts had already held that there could be liability for negligence. He said:

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid 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 – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

This test has been criticised as being too wide but it made it easier for lawyers to argue that there should be liability for negligently causing harm in new situations, not previously covered by case law. In 1970, Lord Reid said that Lord Atkin’s *dictum* ought to apply unless there was some justification or valid explanation for its exclusion (*Home Office v Dorset Yacht Co* [1970] AC 1004).

In *Anns v Merton LBC* [1977] 2 All ER 492, the House of Lords confirmed this. Lord Wilberforce stated 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 a 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 there is 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 any 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.”

The appellate courts began applying this test but the House of Lords then began retreating from the implications of the Wilberforce test. Comments were made in the following cases: *Peabody Donation Fund v Sir Lindsay Parkinson* [1984] 3 All ER 529, per Lord Keith; *Leigh & Silavan Ltd v Aliakmon Shipping* [1986] 2 All ER 145, per Lord Brandon; *Curran v NI Co-ownership Housing* [1987] 2 All ER 13, per Lord Bridge; *Yuen Kun-yeu v AG of Hong Kong* [1987] 2 All ER 705, per Lord Keith.

In *Rowling v Takaro Properties* [1988] 1 All ER 163, Lord Keith explained that there was a fear that a too literal application of the Wilberforce test could produce a failure to have regard to, and to analyse and weigh, all the relevant

considerations when deciding whether to impose a duty of care. Indeed, Lord Templeman, in *CBS Songs v Amstrad* [1988] 2 All ER 484, commented that since *Anns* ‘put the floodgates on the jar, a fashionable plaintiff alleges negligence. The pleading assumes that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that for every mischance in an accident-prone world someone solvent must be liable in damages.’

Today, the requirements that must be satisfied before a duty of care is held to exist were laid down by Lord Bridge in *Caparo Industries v Dickman* [1990] 1 All ER 568:

“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

Therefore, there must be: (a) foreseeability of the damage; (b) a sufficiently ‘proximate’ relationship between the parties; and (c) it must be fair, just and reasonable to impose such a duty.

### ***Foreseeability and proximity***

‘Foreseeability’ means whether a hypothetical ‘reasonable person’ would have foreseen damage in the circumstances.

‘Proximity’ is shorthand for Lord Atkin’s neighbour principle. It means that there must be legal proximity, i.e. a legal relationship between the parties from which the law will attribute a duty of care.

Note that a duty of care may not be owed to a particular claimant, if the claimant was unforeseeable. See:

*Bourhill v Young* [1942] 2 All ER 396.

### ***The role of policy***

Policy is shorthand for ‘public policy considerations’. Policy considerations were recognised in the Wilberforce test and the test in *Caparo v Dickman*.

Arguments that an extension of liability for negligence would lead to a flood of litigation or to fraudulent claims were once granted greater credence than they are today. But other arguments, such as the possible commercial or financial consequences, the prospect of indeterminate liability, the possibility of risk-spreading (e.g., through insurance) and potential conflicts with rights in property or other social or moral values, are given due consideration. In recent years the courts have identified a wide range of factors that may be relevant to the denial of a duty of care. For example, a duty of care may not exist where:

- (a) The claimant is the author of his own misfortune (*Philcox v Civil Aviation Authority*, *The Times*, 8 June 1995).

- (b) A duty of care would lead to unduly defensive practices by defendants seeking to avoid claims for negligence with detrimental effects on their performance of some public duty (*Hill v CC of West Yorkshire* [1988] 2 All ER 238, and *X (minors) v Bedfordshire CC* [1995] 3 All ER 353).
- (c) Awards of damages against a public authority exercising a public function would have an impact upon the resources available to the authority to perform its duties, both in terms of the damages and costs, and in terms of the resources required to investigate and defend spurious claims (*X (minors) v Bedfordshire CC* [1995] 3 All ER 353).
- (d) A duty of care would cut across a complex statutory framework established by Parliament for regulating particular circumstances, such as the regulation of financial markets (*Yuen Kun-yeu v AG of Hong Kong* [1987] 2 All ER 705) or the protection of children at risk (*X (minors) v Bedfordshire CC* [1995] 3 All ER 353).
- (e) There is an alternative remedy available to an aggrieved claimant, such as a statutory right of appeal from the decision of a government officer or department, or judicial review, or another source of compensation, such as the criminal Injuries Compensation Scheme, or another cause of action, such as a claim for breach of contract, even where the action would be against a different defendant.
- (f) Where a duty of care would tend to undermine the requirements of other causes of action, particularly in the case of complex commercial contracts where the parties have had the opportunity to negotiate a detailed structure of contractual negotiations.

## ACTS AND OMISSIONS

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There are two types of omissions. Firstly, a person may fail to take appropriate precautions, which would be regarded as a negligent act. Secondly, it may refer to passive inaction where a person does not take any action. The general rule is that there is no duty on a person to take action in order to prevent harm befalling others. For example, see:

*Smith v Littlewoods Organisation Ltd* [1987] 1 All ER 710.

Lord Goff analysed the mere-omissions rule and then considered the exceptions to the rule. There are some circumstances where the courts have established duties of affirmative action. These may arise where:

- (a) there is an undertaking by the defendant;
- (b) there is a special relationship between claimant and defendant;
- (c) the defendant has control over a third party who causes damage to the claimant; or
- (d) the defendant has control over land or something likely to be dangerous if interfered with.

### ***Undertaking***

A person who undertakes to perform a task, even gratuitously, assumes a duty to act carefully in carrying it out. See, for example:

*Barrett v Ministry of Defence* [1995] 3 All ER 87.

### ***Relationship between claimant and defendant***

There are a number of relationships that give rise to an affirmative duty to prevent harm. These include employer and employee, parent and child, captain (or carrier) and passenger, referee and player in a colts rugby match (*Smoldon v Whitworth* [1997] PIQR P133, hotelier and patron, the organiser of a dangerous competition and a visibly drunken participant, and occupier and visitor.

### ***Control over third parties***

In some circumstances, a person may be in such a relationship with a third party as to have a duty to control the third party's conduct in order to prevent harm to the claimant. These include employer and employee, parent and child, gaoler and prisoner (*Home Office v Dorset Yacht Co* [1970] 2 All ER 294), mental hospital and patient and even car owner and an incompetent or drunken driver.

### ***Control of land or dangerous things***

An occupier's control of land may give rise to an affirmative duty in relation to the behaviour of visitors or even acts of nature. Where the defendant has control over some object which is likely to be particularly dangerous if interfered with by a third party he may be under a duty to prevent such an interference (*Dominion Natural Gas v Collins and Perkins* [1909] AC 640). This has been applied to the theft of a poisonous chemical by young children (*Holian v United Grain Growers* (1980) 112 DLR (3d) 611). Lord Goff cited the case of *Haynes v Harwood* [1935] 1 KB 146 (see below).

## **TYPES OF CLAIMANT**

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At common law the dependants of a deceased person had no claim in respect of the death, but this problem was dealt with long ago by the Fatal Accidents Acts.

Trespassers are owed a common duty of care by the occupiers of premises, now by virtue of the Occupiers' Liability Act 1984.

A duty of care is owed to an unborn child in respect of injuries inflicted whilst in the mother's womb (*B v Islington Health Authority* [1992] 3 All ER 833), although this only applies to births before 22 July 1976 when the Congenital Disabilities (Civil Liability) Act 1976 came into force. The Act, which replaces the common law for births after its commencement, grants a right of action to a child who is born alive and disabled in respect of the disability, if it is caused by an occurrence which affected the mother during pregnancy or the mother or child during labour, causing disabilities which would not otherwise have been present.

In some circumstances a participant in a crime may not be owed a duty of care by a fellow participant in the same crime. This is related to the illegality of the claimant's conduct, but it is submitted that this issue is probably better left to the defence of *ex turpi causa non oritur actio* (a right of action will not arise from a base cause). See also:

*Pitts v Hunt* [1990] 3 All ER 344

*Clunis v Camden Health Authority* [1998] 3 All ER 180

However, consider the somewhat remarkable decision in:

*Revill v Newbery* [1996] 1 All ER 291.

The final category of claimant is the injured rescuer. A duty of care is owed to a rescuer. "Danger invites rescue. The cry of distress is the summons to relief ... The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer" (*Wagner v International Railway* (1921) 133 NE 437, per Cardozo J). Relevant cases include:

*Haynes v Harwood* [1935] 1 KB 146

*Baker v Hopkins* [1959] 3 All ER 225

*Chadwick v BRB* [1967] 2 All ER 945

## ECONOMIC LOSS

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### CARELESS ACTS

Until the 1970s the rules on liability for economic loss as a result of negligent acts were simple to state: there was generally no liability in respect of 'pure' economic loss. There are two broad categories of case in which the claimant sustains economic loss as a result of a negligent act:

#### ***(a) As a consequence of physical damage to a third party's property***

Firstly, the damage may interrupt the claimant's ability to carry on his business, as in:

*Cattle v Stockton Waterworks* (1875) LR 10 QB 453

*Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569

The courts in this country have consistently refused to allow recovery for economic loss in these circumstances. However, the distinction between pure economic loss and economic loss consequent upon physical damage is illustrated by:

*Spartan Steel & Alloys v Martin* [1972] 3 All ER 557

Secondly, the claimant may have a contractual right to use the property for the purposes of his business, but no proprietary interest in it. Damage to the property may put him to the expense of repairing it (depending on the terms of the contract) and will interfere with his ability to use the property for profitable purposes. Such loss cannot be recovered:

*Candlewood Navigation v Mitsui* [1985] 2 All ER 935

Thirdly, the claimant may suffer loss as a result of damage to property belonging to a third party where the claimant is 'at risk' as to the loss at the time of the damage under a contract with the third party. Such financial loss cannot be recovered:

*Leigh v Aliakmon Shipping* [1986] 2 All ER 145

#### ***(b) As a consequence of acquiring a defective item of property***

In this category the claimant owns the property, but it is discovered after he has acquired it that the property has a defect and the claimant has to expend money in repairing or replacing it. It is this category of cases which has produced the most marked shifts of judicial attitudes in relation to claims for

economic loss, first in favour of allowing claimants to recover for such losses where the property consisted of a dangerously defective building, then allowing claimants to succeed for the loss where the defect could not be categorised as dangerous, and finally returning to a more orthodox approach in 1990, when the House of Lords held that the damage in both cases was purely economic and therefore irrecoverable. See:

*Dutton v Bognor Regis UDC* [1972] 1 QB 373  
*Anns v Merton LBC* [1977] 2 All ER 492  
*Murphy v Brentwood DC* [1990] 2 All ER 908.

The House of Lords attempted to establish a general duty of care in respect of pure economic loss resulting from a negligent act, based on the closeness of the relationship between the parties and reliance by the claimants on the defendants' skill and experience, in:

*Junior Books v Veitchi* [1982] 3 All ER 201

The courts began to retreat from the implications of *Junior Books* almost immediately. It has repeatedly been described as limited to its own facts. In *D & F Estates v Church Commissioners* [1988] 2 All ER 992, the House of Lords said that *Junior Books* was so far dependent on the 'unique' relationship between the claimant and the defendant that it cannot be regarded as laying down any general principle in the law of tort. *Junior Books* has been distinguished by the Court of Appeal on a number of occasions:

*Muirhead v Industrial Tank Specialities* [1985] 3 All ER 705  
*Simaan General Contracting v Pilkington Glass (No 2)* [1988] 1 All ER 791  
*Greater Nottingham Co-op Society v Cementation Piling & Foundations* [1988] 2 All ER 971.

## STATEMENTS

In *Hedley Byrne v Heller* [1963] 2 All ER 575, the House of Lords held that in the appropriate circumstances there could be a duty to take reasonable care in giving information. There appeared to be three requirements: (a) the claimant relied on the defendant's skill and judgment or his ability to make careful enquiry; (b) the defendant knew, or ought reasonably to have known, that the claimant was relying on him; and (c) it was reasonable in the circumstances for the claimant to rely on the defendant. Relevant cases include:

*Smith v Eric Bush* [1989] 2 All ER 514  
*Caparo Industries v Dickman* [1990] 1 All ER 568

In some circumstances a negligent statement made by A to B and acted upon by causes financial loss to C. The classic example is a reference given by A to B about C, normally for employment purposes. See:

*Spring v Guardian Assurance* [1994] 3 All ER 129

The concept of voluntary assumption of responsibility, which is now treated as the broad principle underpinning *Hedley Byrne*, has also been used to explain the liability of a solicitor to a beneficiary under a will who has lost a legacy due to the solicitor's negligence in carrying out the testator's instructions. See:

*Ross v Caunters* [1979] 3 All ER 580  
*White v Jones* [1995] 1 All ER 691.

## NERVOUS SHOCK

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The term 'nervous shock' is used by lawyers to signify a medically recognised psychiatric illness or disorder. 'Psychiatric damage' encompasses all relevant forms of mental illness, neurosis and personality change. This is distinguished from emotional distress or grief which normal individuals may suffer when someone else is injured or killed, though the distinction may sometimes be difficult to draw. There can be no claim for emotional distress, anguish or grief unless this leads to a positive psychiatric illness, such as an anxiety neurosis or reactive depression, or physical illness, such as a heart attack.

### *Primary victims*

The House of Lords held that in the case of a 'primary victim' (ie, where the claimant was involved either mediately or immediately as a participant in the events) if personal injury of some kind to the claimant was foreseeable the defendant would be liable for psychiatric injury sustained as a result of the defendant's negligence, irrespective of whether psychiatric injury was foreseeable:

*Page v Smith* [1995] 2 All ER 736.

The courts have been extremely cautious about admitting claims for psychiatric harm which were not the result of physical injury to the claimant. The first response was to deny any action for psychiatric harm which was not the product of some form of physical impact with the claimant. Then claims succeeded in:

*Dulieu v White* [1901] 2 KB 669

*Hambrook v Stokes Bros* [1925] 1 KB 141

*Chadwick v BRB* [1967] 2 All ER 945 (above)

However, the several limiting factors have emerged: (a) The psychiatric injury must have been the product of what the claimant perceived with his or her own unaided senses. (b) The nature of the relationship between the accident victim and the person who suffered the psychiatric injury is important. (c) The test of liability for shock is foreseeability of injury by shock, thus separating psychiatric damage from other forms of personal injury. (d) When applying the test of foreseeability of injury by shock it has to be demonstrated that the claimant is a person of reasonable fortitude and is not unduly susceptible to some form of psychiatric reaction.

### *Secondary victims*

A person may be a 'secondary victim' (a person who suffers psychiatric damage as a result of harm done to another). Such a claim was considered by the House of Lords in:

*McLoughlin v O'Brian* [1982] 2 All ER 298

In such cases, there must be: (a) reasonable foreseeability of psychiatric illness arising from the close relationship of love and affection between the claimant and the primary victim of the defendant's negligence; (b) proximity in terms of physical and temporal connection between the claimant and the accident caused by the defendant; (c) the psychiatric harm must come through the claimant's own sight or hearing of the event or its immediate aftermath. See:

*Alcock v Chief Constable of South Yorkshire* [1991] 4 All ER 907  
*McFarlane v EE Caldeonia Ltd* [1994] 2 All ER 1  
*Vernon v Bosley (No 1)* [1997] 1 All ER 577  
*Greatorex v Greatorex and Others* [2000] Times Law Report May 5.

For the claims of the police officers present at the Hillsborough disaster, see the decision of the House of Lords in:

*Frost v Chief Constable of South Yorkshire* [1999] 1 All ER 1.

For proposals for reform, see the Law Commission Report 249 (10 March 1998), Liability for Psychiatric Illness (with accompanying Draft Bill).

### ***Employees***

Employers may be responsible for psychiatric injury caused to employees. Relevant cases include:

*Dooley v Cammell Laird* [1951] 1 Lloyd's Rep 271  
*Walker v Northumberland CC* [1995] 1 All ER 737  
*Young v Charles Church Ltd* [1997] Times Law Report May 1  
*Hunter v British Coal* [1998] 2 All ER 97.