

Tort Law



Private Law Tutor Publishing

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Welcome/Introduction/Overview

This book provides you with basic information as a basis for you to form your own critical opinions on this area of law. Once you have mastered the basics, you will be inspired to question Tort principles you can apply them in your essays and apply them in mock client advisory scenarios. Again, for your convenience, we have published a Q&A book to help you with examples of how to answer such questions and how to apply your knowledge as effectively as possible to help you get the best possible marks.

This aid is a fully-fledged source of basic information, which tries to give the student comprehensive understanding for this module. However, it is recommended that you compliment it with the further reading suggestions provided at the end of each topic, as well as read the cases themselves for more in-depth information. This book provides an analysis of the basic principles of Tort Law. The following is a summary of the Book content:

- An introduction to Tort Law;
- What Tort Law in England seeks to achieve; and
- The legal-philosophical development of Tort Law.

The aim of this Book is to:

- Provide an introduction to anyone studying or interested in studying Law to the key principles and concepts that exist in the Law of Tort.
- To provide a framework to consider Tort Law within the context of examinations.
- Provide a detailed learning resource in order for legal written examination skills to be developed.
- Facilitate the development of written and independent critical thinking skills.
- Promote the practice of problem solving skills.
- To establish a platform for students to gain a solid understanding of the basic principles and concepts of Tort Law, this can then be expanded upon through confident independent learning.

Through this Book, students will be able to demonstrate the ability to:

- Demonstrate an awareness of the core principles of Tort Law.
- Critically assess challenging mock factual scenarios and be able to pick out legal issues in the various areas of Tort Law.
- Apply their knowledge when writing a formal assessment.
- Present a reasoned argument and make a judgment on competing viewpoints.
- Make use of technical legalistic vocabulary in the appropriate manner.
- Be responsible for their learning process and work in an adaptable and flexible way.

STUDYING TORT LAW

Tort is one of the seven core subjects that the Law Society and the Bar Council deem essential in a qualifying law degree. Therefore, it is vital that a student successfully pass this subject to become a lawyer. Additionally, a knowledge and understanding of Tort principles is needed in order to study other law subjects such as company, employment, international trade, commercial, or even family law.

The primary method by which your understanding of the law of Tort will develop is by understanding how to solve problem questions. You will also be given essay questions in your examinations. The methods by which these types of question should be approached are somewhat different.

TACKLING PROBLEMS AND ESSAY QUESTIONS

There are various ways of approaching problem questions and essay questions. We have provided students with an in-depth analysis with suggested questions and answers at the end of each chapter.

Chapter 1 - Introduction to Tort

DEFINITION

The best modern definition of Tort comes from Percy H Winfield in *The Province of the Law of Tort* (first published 1931, CUP 2013) 32:

‘Tortious liability arises from the *breach of a duty* primarily *fixed by the law*: such duty is towards *persons generally* and its breach is redressible by an action for *unliquidated damages*.’

Tort is a civil wrong for which the law provides a remedy in the form of damages. Not every wrongs lead to legal responsibility. It is the law of non-criminal wrongs. The term derives from the Latin word *tortus* meaning ‘tangled’ then transposed into the French meaning ‘wrong’. There are two parties involved: The Defendant, i.e. tortfeasor (who causes the wrongful act) and the Claimant i.e. the wronged party (who sustains the injury and is allowed by law to recover the loss). The wrong may be intentional or accidental and it may come from different circumstances where a general duty recognised by law is breached: i.e. a cricket ball breaks the window of a house; a pedestrian is injured by a car; or a newspaper publishes libellous details of the private life of a model.

GENERAL PRINCIPLE BEHIND TORT

The concept of ‘tort law’ as a separate body of provisions is relatively modern. In late 19th and 20th centuries damages related to civil wrongs began to be claimed. The main idea behind this body of law is that it is wrongful to cause harm to another individual in the absence of any particular justification accepted by the law. One of the most popular one is the tort of Negligence that required time to receive a proper definition and application at law. There are various types of torts that fall into this body of law. The feature that links them is the general idea that it is wrong to cause damage to another.

TORT AND OTHER AREAS OF LAW

Tort law covers a wide range of civil wrongs protecting individuals from physical and mental integrity, damages to properties, financial losses, use and enjoyment of lands, reputation and privacy. This is based on the idea that a person should not unreasonably interfere in the life of others. Tort awards compensation to those who suffer from undesired wrongs by someone that owes them a duty of care that is legally recognised.

Tort must be differentiated by other areas of law:

- Tort/Criminal: Tort is private law and it relates to the relationship between individuals with the purpose of providing compensation in the light of harm. Criminal law is public and it basis on the relationship between individual verses State. Its aim is to punish those who commit wrongs in the eyes of the State. The police will not investigate a private tort.
- Tort/Contract: Tort arises from a conduct imposed by law that a person should respect towards the general public. Contract law basis on a voluntarily undertaken agreement between the parties. In tort there is no relationship between parties and court have to somewhat infer one through the doctrine of proximity or neighbour. Where there is no contract, thus privity, tort is a possible head of claim. It is possible to have a course of action in contract and in tort. The contractual claim is always stronger.
- Tort/Land: Tort relates to the way individuals use land rather than properties themselves.

PURPOSES OF TORT LAW

As Glanville Williams points out in 'The Aims of the Law of Tort' (1951) 4 *Current Legal Problems* 137, it encompasses the following purposes:

- Appeasement
- Justice
- Deterrence

- Compensation

General Principle: The case below is often used as an example in Tort law textbooks. It shows the concept of “compensation culture” is the purpose behind all tort claims. It is the first case of negligence followed by fatal accident in mountain climbing. Explanation of the concept of duty of care that may be breached by the negligence of the Defendant causing a fatal accident.

Woodroffe-Hedley v Cuthbertson (Unreported, 20 June 1997)

Facts: The Defendant, an experienced alpine climber, was hired by Mr Hedley to guide him to the summit of the Tour Ronde. Because of the climate conditions he decided to use one single screw to faster reach the summit. A large sheet of ice broke down dragging Mr Hedley with it. He was killed while Mr Cuthbertson survived with injuries. Mr Hedley's son sued the Defendant for having caused a fatal accident due to his negligence. Evidence showed that good practice as experienced climber would have required the use of two screws instead of one. **Ratio:** **Beside the risk intentionally taken by the victim in climbing a mountain, the hired alpine guide owed a duty of care to the Claimant's father.** **Application:** The Defendant broke the duty of care owed to Mr Hedley in not following the good practice required by an experienced climber. He should have used two screws instead of one. The claimant was awarded £150,000.00 in damages. (This was reversed by the professional standards committee and found not liable).

Due to the costs of tort controversies, it is habit to resort to insurances or compensation scheme administered by the State.

INSURANCE

Most people are insured. Most of the real Defendants in a tort law cases are therefore insurance companies. There is no doubt that insurance profoundly influences the practical operation of the law of tort. Someone has to be found liable in order for an insurance company to pay out.

HUMAN RIGHTS

The Human Rights Act 1998 may exercise an influence on tort law. Section 6 of the HRA states ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ According to this provision courts have to sentence in accordance to the Act therefore in respect of individuals’ human rights stated in it. Tort law prevalently deal with rights and duties among individuals. In doing so it has to be compatible with the Human Rights Act 1998.

Example: Section 8 – Right to privacy

Before the incorporation of the European Convention of Human Rights into UK law, there was no cause of action for a person claiming respect of his privacy. Nowadays invasion of the Claimant privacy is an actionable wrong.

General Principle: Tort encompasses important elements: individual liberty, personal responsibility and ‘compensation culture’.

Tomlinson v Congelton Borough Council [2004] 1 AC 46

Facts: Tomlinson entered a country park owned by the local authority of Congelton. He dived into the lake. He struck his head due to the shallow water. Diving was prohibited and notices erected in proximity of the lake. He sued the Defendant on the ground that the local authority owed him a duty of care in relation to the serious personal injuries suffered from diving in the lake. He argued that the provisions undertaken by the authority were not significant. **Ratio:** *‘Does the law require that all trees be cut down because some youths may climb them? [T]he answer, of course, is no’* per Lord Hobhouse. **Whether the Claimant undertakes a prohibited activity he will carry the risk of it.** **Application:** The Claimant voluntarily chose to dive in the lake. The local authority cannot prohibit a person in dealing with his own freedom. There was no duty of care between the parties. The Defendant was held not liable.

SUMMARY

- There is no clear definition of a tort.
- The general principle behind tort law is the description of what is tort, and what the aims of Tort law are that you should not harm someone.
- General principle behind tort law is there are different torts, each with different rules and principles relating liability. Negligence is the main one but there are also other torts that can arise according to the different circumstances.
- The differences among tort and other areas of law have been explained.
- The relationship of tort and the Human Rights Act 1998 has been explained. Role of damages: usually compensatory this is a big area of law in Insurance.
- In summary tort law regulates individual liberty, personal responsibility and 'compensation culture'.

Chapter 2 - Duty of Care

BACKGROUND

The tort of negligence is what affects us the most in everyday life. It is based on the idea that a person owes a duty of care to another individual. The breach of this duty may give rise to liability. At the beginning the courts approached this tort on a case by case basis. The starting point was whether a duty should be imposed looking at the circumstances of the case in question. Later on the need of certainty in dealing with this type of wrong prevailed and the courts established authorities to be followed and incrementally applied to new situations.

DEFINITION

A legal duty to take care is where care should be taken to ensure a person not be exposed to “*liability in an indeterminate amount for an indeterminate time to an indeterminate class*” (Cardozo C. J. in **Ultramares Corporation v Touche** [1931] 174 N.E. 441).

EXISTENCE OF A DUTY OF CARE

General Principle: Before 1932 there was no general concept of duty of care. The law used to intervene in isolated circumstances on a case by case basis in accordance to the general idea that an individual owed a duty of care if intentionally agreed to do so (as under a contract).

Winterbottom v Wright [1842] 10 M&W 109

Facts: The Defendant contracted with the Postmaster General to keep the coaches in a safe and secure condition. The Claimant, a coach driver, was driving a coach serviced by the Defendant and was hurt when a latent defect caused the coach to break down, throwing him to the ground and injuring him. **Ratio:** **There must be privity between parties to an action in order for that action to be maintained.** **Application:** In absence of a contact there did not appear to be a course of action against anyone. Do I owe a duty of care to a man crossing the road outside my office window? There must be privity in order for the Claimant to sue the

Defendant for negligence. What if someone throws a stapler out the window injuring a man or causing an accident? Using the above authority there is no claim.

THE NEIGHBOUR TEST

The Neighbour test was developed by the courts and represents the first test applied in order to assess the presence of a duty of care.

General Principle: Judges started moving towards the formulation of a general principle of duty of care.

Heaven v Pender [1883] 11 QBD 503

Facts: A ship with ropes was supplied by the Defendant. The ropes were negligently burnt. While the Claimant was painting the hull of the ship, the staging held by the ropes fell down and the Claimant was injured. He sued the dry dock owner for negligence in providing defective ropes. **Ratio: Whenever one person is placed in such position that everyone of ordinary sense would recognise the necessity to use ordinary care and skill to avoid causing danger to someone, a duty to use ordinary care and skill arises.** **Application:** The dry dock owner failed in his duty of care to give reasonable attention to the state of the ropes and he was therefore held liable for negligence.

The landmark case of negligence in tort law is **Donoghue v Stevenson** [1932] AC 562. In this case the court developed the idea of a general duty of care from two important concepts: foreseeability and reasonableness. The Claimant needs to show that the harm suffered derives from the Defendant's breach of his duty. It must be reasonably foreseeable that a failure to take reasonable care in respect of the duty owed to the Claimant will cause damage. The consequence of the breach is the foreseeable harm the Claimant has suffered and that a reasonable person in the same position would have not caused.

General Principle: First legal formulation of duty of care to identify negligence: The Neighbour's test.

Donoghue v Stevenson [1932] AC 562 (old law)

Facts: Two friends went to a Café and one of the two bought a

bottle of ginger beer. Part of the drink was poured over the ice cream float that Mrs Donoghue consumed. The rest was poured into a glass by the friend who bought the beer. A decomposed snail came out of the bottle. Mrs Donoghue fell sick after consuming the drink and sued the manufacturer of the beer for shock and gastroenteritis. **Ratio: Neighbour's principle test:** *"You must love your neighbour. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". Your neighbour is someone "closely and directly affected by my act that I ought reasonably to have in contemplation as being so affected"* (per Lord Atkin). **Application:** The manufacturer owed a duty of care to the ultimate consumer. The absence of a contract between the parties did not exclude the presence of duty of care against the manufacturer.



THE EXPANSION

There was a significant development of the concept of duty of care, which stemmed from the Neighbour test.

General Principle: Introduction of the concept of duty of care in relation to economic loss caused by negligent misstatement.

Hedley Byrne & Co. Ltd v Heller and Partners [1963] AC 46

Facts: The Claimant turned to the Defendant bankers to credit check the company they were going to contract with. On the basis of the Defendant's positive answer in relation to the trustworthiness of the company, Hedley Byrne & Co. Ltd proceeded in the deal. The company they did the job for subsequently went into liquidation and the Claimant lost £17,000.

Ratio: A person might be liable for negligent misstatement if specific conditions are met (special relationship of trust and confidence; voluntary assumption of responsibility in relation to the given advice; reasonable reliance on the advice by the injured party). **Application:** Notwithstanding all the specific conditions were met, the court nevertheless held the Defendant not liable for negligent misstatement thanks to a disclaimer that worked as exclusionary clause of liability.

General Principle: Introduction of the concept of duty of care in relation to tortious actions committed by a third party.

Home Office v Dorset Yacht Co. [1970] AC 1004

Facts: Ten borstals (young prisoners) were working in the harbour under the supervision of three officers. They managed to escape causing significant damage to boats and properties in the harbour. The owners of the Yacht sued the Defendant to recover damages.

Ratio: Lord Atkin's speech in *Donoghue v Stevenson* [1932] AC 562 has to be regarded as a statement of principle and it ought to apply unless there is a justification or valid explanation to exclude it. **Application:** The Home Office owed a duty of care through its officers (vicarious liability) in allowing the escape of the delinquents. The House of Lords held the Defendant liable in the tort of negligence.

General Principle: Modern reformulation of Lord Atkin's 'Neighbour principle' (later overruled by *Caparo Industries plc v Dickman* [1990] UKHL 2).

Anns v London Borough of Merton [1978] AC 728

Facts: A block of flats was built with inadequate foundations (two feet in depth instead of three feet). The Defendant was the one in charge of inspecting the foundations during their construction. Due to the foundations' depth, cracks in the walls and other defects

occurred in the building. **Ratio:** A two-stage test was reformulated:

- 1) **Between the parties involved there must be a sufficient relationship of proximity or neighbourhood that will likely cause damage to another person; and**
- 2) **Are there any policy reasons why no duty of care should be considered to be owed?** **Application:** The council owed a duty of care as the supervisor of the construction and it was therefore liable for the negligent inspection that caused the defects in the building to occur.

General Principle: The very close relationship between two parties may cause the presence of a quasi-contractual relationship that justifies the presence of duty of care.

Junior Books v Veitchi Co. Ltd [1983] 21 BLR 66

Facts: The Claimant was having a factory built. The Claimant suggested the main contractor carry out special works in cooperation with the Defendant (the sub-contractor). The main contractor did so. Unfortunately, what was supplied was not good and later on the Claimant suffered pure economic loss. Junior Books could not sue the main contractor that was not responsible and there was no contract between the sub-contractor. The Claimant sued Veitchi Co. Ltd in tort. **Ratio:** **Whether the relationship between the parties is close enough, it may be considered a quasi-contractual relationship.** **Application:** The House of Lords accepted the claim for pure economic loss of profit. The Defendant knew of the Claimant's reliance and their relationship was quasi-contractual.

General Principle: A better explanation was provided by the court on the element of 'proximity' to reduce the scope of duty of care and avoid floodgates.

Sutherland Shire Council v Heyman (1985) 60 ALR 1
(*Australian case*)

Facts: The Claimant owned a property constructed under the supervision of the local Council. It suffered damages to the property due to inadequate foundations and Heyman sued the council for failure in supervising and approving the construction. **Ratio:** Proximity definition was held to be physical closeness

between the parties and ‘casual’ closeness between the act of the Defendant and the loss suffered by the Claimant. **Application:** The court did not find the Council negligent. There was no evidence to show that the Council had acted in a negligent way when undertaking the inspection.

NARROWER APPLICATION

The court decided to adopt a narrower approach in order to avoid floodgates.

General Principle: A claim in negligence requires the person to be the legal owner or the possessor in title of the property at the time of the damage.

Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd [1986] AC 785

Facts: A cargo that needed to be shipped on the Defendant’s vessel was damaged. The Claimant was the person that contracted to buy it. **Ratio: Contractual rights in relation to a property are not enough to be eligible for a claim in negligence. At the time of the loss the Claimant needs to be the legal owner or the possessor in title of the property.** **Application:** The court rejected the appeal of the Claimant on the ground that it did not suffice for him merely to have contractual rights adversely affected by the damage. Since the Claimant buyers were under a contract of sale, they were neither legal owners nor did they have any possessory title they had no right to sue the ship owners in tort.

General Principle: Rejection of the two-stage test in Anns v London Borough of Merton [1978] AC 728 to restrain the identification of duty of care.

Yuen Kun-Yeu v Attorney-General of Hong Kong [1987] 2 All ER 705

Facts: Hong Kong Council introduced the practice of registering companies. The Defendant had discretion in accepting or refusing those companies considered unfit for fraud or speculation. Feeling reassured by the registration, the Claimant entered into a contract with a company that subsequently went into liquidation and he lost all the money. The Claimant sued the Defendant for having being

negligent in accepting the registration of the company that evaluated as reliable. **Ratio: Foreseeability of harm is a necessary ingredient of a duty of care relationship. The Defendant must have reasonably foreseen the damage.** *"Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning".* **Application:** The Defendant had no control over the deposit-taker therefore there was no proximity to justify the presence of duty of care.

THE THREE-STAGE TEST

In order to avoid a floodgate of claims and to give structure to the identification of duty of care, the court moved away from the position in **Donoghue** and **Anns** whereby foreseeability of damage was enough to make a claim in negligence. They introduced the **Caparo** three-stage test.

General principle: Introduction of the Caparo-three stage test that represents the actual state of the law in identifying duty of care.

Caparo Industries plc v Dickman [1990] UKHL 2

Facts: Caparo Industries plc sued the Defendant for negligent misstatement. The Claimant relied on the incorrect statutory audited accounts of the Company drawn by Dickman to purchase additional shares. **Ratio: Three elements were needed to identify a duty of care:**

- 1) Foreseeability** – was the loss caused by the Defendant to the Claimant reasonably foreseeable?
- 2) Proximity** – Is there legal closeness between the parties at the time the Defendant was negligent?
- 3) Fair, just and reasonable** – Is it fair, just and reasonable to impose a duty to the Defendant? (Residual discretion left to the court in deciding the imposition of a duty). **Application:** Caparo Industries plc was entitled to rely on the accountant.

THE INCREMENTAL APPROACH

The 'incremental approach' represents the main theory applied in court to identify the existence of duty of care. According to the so-

called 'incremental approach', a duty of care exists in those situations that can be regarded as analogous to one in which a duty of care has already been recognised. In order to establish the presence of duty of care firstly, it has to be checked whether there is any existing legal authority for a duty of care in circumstances similar to the one under examination. If there is a duty recognised by earlier cases, then the court can follow them. If there is no existing legal authority, then all the three requirements set out in Caparo three-stage test should be used.

APPLICATION OF THE THREE-STAGE TEST

In order to succeed in a negligence claim, all the criteria established in **Caparo** must be satisfied.

General Principle: In order to establish the presence of duty of care all the three following requirements are necessary: i) foreseeability, ii) proximity and iii) fair, just and reasonable policy considerations.

Watson v British Boxing Board of Control Ltd [2001] QB 1134

Facts: A boxer during a match was knocked out. The match was supervised by BBBC who were supposed to provide medical care. Their assistance turned out to be inadequate and the Claimant spent 40 days in coma and 6 years on a wheelchair. **Ratio:** Acceptance of the match does not amount to acceptance of the inadequate medical assistance. There is sufficient nexus between the parties to create duty of care. **Application:** The court held the injury foreseeable. The relationship between the parties was close enough to justify the presence of a duty of care owed by BBBC, responsible for having provided inadequate medical care. It was fair, just and reasonable not to exclude responsibility.

General Principle: The law attributes a duty of care between employers and their employees.

Spring v Guardian Assurance plc & Others [1995] 2 AC 296

Facts: The Claimant was employed by the Defendant and subsequently fired. He asked for references when looking for a new job. The Defendant described him as dishonest and incompetent so that the Claimant was not hired by the new

company he applied for. **Ratio: A duty of care in providing accurate references is owed by an employer to his employees.** **Application:** The court found the Defendant guilty for having achieved the conclusions in relation to the employee in the wrong way so that the duty of care was breached.

General Principle: Identification of duty of care in the presence of a fiduciary relationship between the parties.

White v Jones [1995] 2 AC 207

Facts: The father of two daughters initially cut them out of his will. He changed his mind asking the solicitor to include the two daughters in the will. The solicitor did not re-write the will in time. The father died and the two daughters could not get anything. **Ratio: Whether pure economic loss arises (which not usually recoverable) liability may arise from a breach of fiduciary duty. Thus the claim for breach of duty of care may be successful.** **Application:** Generally speaking, pure economic loss is not recoverable. Nevertheless, the court allowed the claim even if based on the recovery of pure economic loss on the ground that the solicitor's negligence caused the two daughters not to be able to claim the inheritance.

General Principle: Even if the damage is foreseeable and there is proximity between the parties, the imposition of duty of care must be fair, just and reasonable.

Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H) [1996] AC 211

Facts: A vessel on which a cargo was shipped needed repairs to proceed in its voyage. The surveyor, acting on behalf of the classification society, recommended the repairs. Nevertheless, the cargo was later lost in the sea. The cargo owner sued the classification society. There was no contract between them. **Ratio: The issue for the court was whether there were policy reasons to justify the imposition or not of a duty of care between the parties.** **Application:** The court held there was no duty of care to cargo owners in respect of a damage survey performed on the vessel. Allowing the claim would have caused severe consequences in terms of marine insurance and costs. The Defendant was not liable since it would have not been fair, just and

reasonable to disturb the contractual allocation of risks between the cargo-owner and the ship-owner.

- **FORESEEABILITY**

General Principle: Application of the Caparo three-stage test to mental illnesses. Psychiatric injuries must be reasonably foreseeable in a person of ordinary fortitude.

Bourhill v Young [1943] AC 92

Facts: A pregnant woman witnessed a car accident. She did not see it, but she heard it and later she saw blood at the scene of the accident. She suffered psychological harms and her child was stillborn a month after the episode. **Ratio: Injuries must be foreseeable in a person of ordinary fortitude who is in physical danger.** **Application:** The claim was rejected. The Defendant did not owe a duty of care to the Claimant. It was not reasonably foreseeable that the accident would have caused her to suffer such injuries.

General Principle: Duty of care is owed to those reasonably expected to be put under danger due to the Defendant's behaviour.

Haley v London Electricity Board [1965] AC 778

Facts: The employers of the Defendant were working in the street. They were digging trench in the pavement. They went on lunch leaving a hammer as warning to pedestrians of the works carried out. The Claimant was a blind man that tripped over the hammer, falling down and becoming deaf. **Ratio: The Defendant owes a duty of care towards reasonably foreseeable people that may be affected by their actions.** **Application:** The court included a blind pedestrian in those reasonably foreseeable people walking the pavement and they therefore found the Defendant liable for breach of duty of care.

General Principle: A reasonable employer should take into consideration specific precautions in the light of foreseeable damages his employees may suffer.

Paris v Stepney Borough Council [1951] AC 367

Facts: The Claimant, already blind in one of his eyes, completely lost the sight due to a piece of metal fallen into his eye, while he was working. He sued the employer for negligence in failing to provide safety goggles. **Ratio: The seriousness of the consequences of a potential accident has to be taken into consideration by a reasonable employer.** **Application:** The court held in favour of the Claimant because of the gravity of the injury and the precautions not taken by the employer. The employer should have taken extra precautions providing goggles to the Claimant, considering the disability the employee was already suffering from.

General Principle: Children are liable only if they fall below a very high degree of reasonable standard of care.

Orchard v Lee [2009] EWCA Civ 295

Facts: Due to a game between two 13-year-old boys, the Claimant (a dinner lady) was injured. They bumped into her. **Ratio: No prudent and reasonable child would have reasonably foreseen the risk of injury.** **Application:** The court held that the Defendant did not fall below the standard of care expected by a child of his age.

General Principle: There cannot be duty of care without foreseeability.

Maguire v Harland & Wolff Plc [2005] EWCA Civ 1

Facts: The Claimant's wife developed mesothelioma and died. The wife contracted the illness through contact with the husband's clothes who had been by his employers to asbestos dust. The Defendant contended that it was not reasonably foreseeable that the wife was at risk. At first instance the judge found in favour of the Claimant. The Defendant appealed. **Ratio: The court focused on the issue whether at the time of the employment the state of knowledge in relation to asbestos was apparent.** **Application:** The Court of Appeal allowed the appeal on the ground that the risk of disease due to secondary exposure to asbestos was not reasonably foreseeable.

- **PROXIMITY**

General Principle: There must be proximity between the parties to identify the presence of duty of care.

Hill v Chief Constable of West Yorkshire [1989] AC 53

Facts: The Claimant is the mother of a girl killed by a serial killer. She sued the police alleging that they failed in catching the murderer earlier than what they actually did. **Ratio: Proximity between the police and the victim is necessary in order to establish duty of care.** **Application:** The police could not know who or where the next victim was likely to be therefore the Defendant was held not liable for negligence.

Yuen Kun-Yeu v Attorney-General of Hong Kong [1987] 2 All ER 705

Facts: Hong Kong Council introduced the registration of companies where the Defendant had discretion in accepting or refusing those companies considered unfit for fraud or speculation. On the base of the registration the Claimant went into a contract with a registered company that subsequently went into liquidation. The Claimant lost all the money. The Claimant sued the Defendant for having being negligent in accepting the registration of the company in question. **Ratio: Foreseeability of harm is a necessary ingredient of a duty of care relationship.** *"Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning".* **Application:** The Defendant had no control over the deposit-taker therefore there was no proximity to justify the presence of duty of care.

General Principle: There is no liability without proximity. Foreseeability and proximity can be painted as two sides of the same coin.

Harrison v Technical Sign Co Ltd [2014] PNL R 15

Facts: The sign of a shop in Putney fell onto the pavement. It caused serious injuries to the Claimants passing by. They brought proceedings against four different Defendants: the owner of the shop, Technical Sign Company Limited (which had supplied and fitted the shop sign), Active Commercial Interiors Ltd (which had carried out a remodeling of the shop front) and the firm of

surveyors, Cluttons (who inspected the awning over the shop window at the request of Maison Blanc). At first instance, the judge held that Active and Clutton were both liable (89% and 11%) towards the Claimants. Clutton appealed alleging that they had not duty of care to the company that supplied the sign. **Ratio: Foreseeability itself is not sufficient to create a relationship of proximity between the parties. A relationship of proximity is required to establish duty of care.** **Application:** The court allowed the appeal on the ground that at first instance the judge had mistakenly interpreted two points:

- 1) The role of the firm of surveyors was simply to see whether the shopfront had sustained damage. Its duty had nothing to do with the safety of passers-by. Therefore, there was not sufficient degree of proximity between the firm and the Claimant to justify the presence of duty of care.
- 2) The nature of the relationship between the Appellant and the shop owner was inconsistent with an assumption of responsibility by the Appellant.

General Principle: Litigation regarding the scope of ‘combat immunity’. To what extent should soldiers be in a position to claim damages for injuries sustained by inadequate equipment?

Smith v Ministry of Defence [2013] UKSC 41

Facts: British armed forces were deployed in Iraq. The Claimants were relatives of British soldiers. Three of them had been killed due to the explosion of devices close to their vehicles. One was killed and two injured by their tank had come under fire from another British tank. The relatives brought a claim against the Ministry of Defence alleging:

- 1) breach to safeguard the soldiers’ right of life protected by art 2 of the ECHR,
 - 2) negligence in providing suitable equipment,
 - 3) negligence in protecting soldiers against the risk of friendly fire.
- The MOD sought to strike out all of the claims on the basis of combat immunity and that it would not be fair, just and reasonable to impose a duty of care in the circumstances of the case. The Defendant argued that the soldiers were not under the British jurisdiction and that for this reason they did not owe them a duty of

care in relation to Article 2. **Ratio:** There is jurisdiction whenever the State through its agents exercises control and authority over an individual. **Application:** The Supreme Court held that the deceased soldiers were within the UK's jurisdiction for the purposes of Article 2 of the ECHR at the time of their deaths. The claims brought by their relatives could proceed to trial. The claims fell within the scope of Article 2 of ECHR.

- **FAIR, JUST AND REASONABLE**

General Principle: The imposition of duty of care to public bodies must be supported by fair, just and reasonable considerations of policy.

Brooks v Metropolitan Police [2005] 1 WLR 1495

Facts: The Claimant was attacked alongside the racist killing of his friend. He suffered post-traumatic stress disorder. He sued the police for having failed in providing him with adequate protection and assistance as victim of an attack, as witness of a crime and in treating his statement with reasonable care. **Ratio:** The Police's primary duty is to investigate and to suppress crime for the benefit of the public in general. The treatment required by the Claimant would have eaten up valuable time and resources that would have diverted the police from its first function. **Application:** The court held there was no ground for a claim because there was no duty of care. Nevertheless, they remarked the importance that victims and witnesses are treated seriously.

Osman v Ferguson [1993] 4 All ER 344

Facts: The Osman family was harassed by a stalker teacher that shot the child and killed the father. The family reported to the police about the attacks the teacher did before the last tragedy but they did not keep records of the complaints. **Ratio:** It would be against public policy to impose a duty of care to public bodies that would result in the significant diversion of police resources from its primary function. **Application:** The court held there was no ground for a claim in negligence.

Osman v UK [1998] EHRR 101

Facts: The Osman family asked the European Court of Human Rights to rule on violations of Articles 2 (right to life), 6 (right to a

fair trial), 8 (right to private, home and family life) and 13 (right to an effective remedy). **Ratio:** The issues were whether the State was in breach of its obligation to take preventive measures to protect an individual whose life was at risk. **Application:** The court held that there had been no violation of articles 2 and 8 of the Human Rights Act. The court found breach of article 6 on the ground that UK should not confer immunity to the police. The Osman had a fair greater degree of proximity to the police than in the case of **Hill v Chief Constable of West Yorkshire** [1989] AC 53

General Principle: The issue is whether police officers owe a duty of care to passers-by when attempting to apprehend a criminal.

Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ 15

Facts: Mrs Robinson was walking down a street. In the same street Police officers were detaining a suspected drug dealer. The suspect put up resistance and moved up the street. The Claimant was knocked to the ground and injured. **Ratio:** Not fair, just and reasonable to impose a duty of care. The interest of the public may outweigh the interests of the single individual. **Application:** The court held that there was no breach of duty of care. The Court of Appeal dismissed the Claimant's arguments. It had not been fair, just and reasonable to impose a duty of care.

Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4

Facts: The same case as above was appealed to the Supreme Court.

Ratio: The Supreme Court made significant inroads into the principle that the police cannot be sued in negligence save in exceptional circumstances as a result of alleged failures in their core operational duties. The Court stressed that there is no single definitive test that should be used to assess whether a duty of care will arise in any particular case. Rather, what is required is: "*[A]n approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities*". **Application:** Now, where a third party such as a pedestrian is injured as a result of a

negligent arrest on the street by a police officer, the police are liable in negligence where that injury was a reasonably foreseeable consequence of the police's actions.

DEVELOPMENTS

General Principle: Expansion of the application of duty of care in a new area, job references.

Spring v Guardian Assurance plc & Others [1995] 2 AC 296

Facts: The Claimant was employed by the Defendant and subsequently fired. He asked for references when looking for a new job. The Defendant described him as dishonest and incompetent so that the Claimant was not hired by the new company. **Ratio: A duty of care in providing accurate references is owed by an employer to his employees.** **Application:** The court found the Defendant guilty for having achieved the conclusions in relation to the employee in the wrong way so that the duty of care was breached.

General Principle: Application of duty of care to fiduciary relationships such as the one between solicitors and clients.

White v Jones [1995] 2 AC 207

Facts: A father initially cut two daughters out of his will. He changed his mind asking the solicitor to include the two daughters in the will. The solicitor did not re-write the will in time. The father died and the two daughters could not get anything. **Ratio: Pure economic loss is not normally recoverable but can be recoverable from a breach fiduciary duty.** **Application:** The court allowed the claim even if based on the recovery of pure economic loss.

SUMMARY

- Tort law bases on the idea that a person owes a duty of care to another individual. The breach of this duty may give rise to liability.
- A legal duty to take care is where care should be taken to ensure a person should not be exposed to "*liability in an*

indeterminate amount for an indeterminate time to an indeterminate class”.

- First, you have to prove the existence of a duty of care.
- The Neighbour test represents the first test applied in order to assess the presence of a duty of care.
- There was a significant development of the concept of duty of care, stemmed from the Neighbour test.
- The court decided to adopt a narrower approach due to the avoidance of floodgates.
- In order to avoid a flood of claims and to give structure to the identification of duty of care, the court introduced the **Caparo** three-stage test.
- According to the so-called ‘incremental approach’ a duty of care will exist in a situation which can be regarded as analogous to one in which a duty of care has already been found.

Endnote

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