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Recent developments relating to Duty of Care and Damages

by

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Duty of Care

The principles

1. It may seem odd that, 70 years after *Donoghue v Stevenson*, there continues to be a ceaseless flow of cases going to the Court of Appeal and House of Lords¹ on the question of whether, on a given set of facts, *A* owes a duty of care to *B* to safeguard the latter from injury or loss.
2. The reason is that, having established² that one party could, despite the absence of contract, recover damages from another for financial loss sustained by the latter and caused by the fault of the former, it soon became apparent that there had to be some more stringent criterion than

¹ And now to the European Court of Human Rights; cf. *Osman v UK* [1999] 1 FLR 193

² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

mere foreseeability to avoid the creation of duties owed for an indeterminate time to an indeterminate number of persons.

3. The criteria which were eventually worked out were laid down by the House of Lords in the landmark case of *Caparo Industries plc v Dickman*³, where Lord Bridge formulated them in the following frequently cited words:

A...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 on the one party for the benefit of the other.@

4. Of the three criteria there identified, Aforeseeability@ never causes any difficulty. AProximity@ and Afair, just and reasonable@ (and in particular the former) continue to do so. It is the elusiveness of the concept of Aproximity@ that generates so much litigation. The test of Aassumption of responsibility@(or Avoluntary assumption of responsibility@) is sometimes sought to be relied upon, particularly by defendants resisting actions based on negligent advice brought by persons other than their clients. Despite encouragement from Lord Goff in *Henderson v Merrett Syndicates*⁴ reliance on this test is usually unsuccessful, on the basis that it is understood to mean, not that the defendant has chosen to assume responsibility towards the claimant, but rather that

A...the circumstances are such that the law will deem the maker of the statement

³ [1990] 2 AC 605

⁴ [1995] 2 AC 145, at 180-181, 192-193

to have assumed responsibility to the person who acts upon the advice.⁵

⁵ Lord Griffiths in *Smith v Bush* [1990] 1 AC 831, at 862

5. Recent cases have, I fear, done little to refine the *Caparo* criteria, so as to enable parties to predict, with any confidence, when the court will hold a sufficient degree of proximity to exist between claimant and defendant to give rise to a duty of care owed by the latter to the former. Thus police officers answering a 999 call owe no duty of care to a shop owner whose premises are being burgled⁶; nor does a fire brigade to a householder whose house is on fire⁷, yet the ambulance service may owe a duty to a patient whose doctor has summoned an ambulance⁸.

6. There are two main categories of case; the first where the defendant is exercising some form of public, or quasi public, function, the claimant contending that he has suffered damage as a result of negligence in the manner of its exercise. The second class of case is one in which the defendant provides a service (usually the giving of advice) to a specific person - often pursuant to a contract - and is sued by a third party.

Public function cases

7. Professional negligence actions are usually within the second of the above categories, but may occasionally be of the first kind. Cases in the first category include those referred to in paragraph 5 above. In cases of this kind the courts incline against the imposition of a duty of care. A recent example is

⁶ *Alexandrou v Oxford* [1993] 4 All ER 328

⁷ *Capital and Counties plc v Hampshire County Council* [1997] QB 1004

⁸ *Kent v Griffiths* (1998) 47 BMLR 125

*N v Agrawal*⁹

The defendant, a forensic medical examiner, had examined the claimant, a lady who alleged that she had been raped and buggered by G. At G's subsequent trial the defendant failed to attend, having gone on holiday part way through the hearing. The judge refused an adjournment and the case collapsed, allegedly resulting in PTSD. The claimant alleged that the defendant owed her a duty of care to take all reasonable steps to provide evidence for the prosecution, and thereby safeguard her from further trauma.

Held by the Court of Appeal, that the claim would be struck out; (1) the defendant owed the claimant no duty to attend the trial; (2) there was no doctor-patient relationship between the parties; (3) the defendant had owed the claimant no duty of care to guard her against psychiatric harm.

10. In

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[1999] PNLR 939

*Blake & Brooks v LB Barking and Dagenham*¹⁰

the plaintiffs, who were local authority tenants qualified to buy their council flats, exercised their right under the Housing Act 1985 to require the local authority to state the price at which, in the opinion of the landlord the tenant is entitled to have the leave granted to him. Independent valuers instructed by the local authority placed substantial values on the properties (which proved in the event to be of little if any value). Notices to the tenants incorporating those valuations drew attention to the tenants' right to have the district valuer give an independent valuation. Neither plaintiff exercised this right.

Held, the local authority owed no duty of care to the tenants when stating its opinion of price.

10. On the other hand in

*Watson v British Boxing Board of Control*¹¹

the defendant Board was held liable, both by the trial judge and the Court of Appeal, for failing, in the exercise of its rule making function, to make rules to secure the provision of appropriate medical treatment at a boxing contest conducted under the Board's Rules.

This is believed to be the first case of a regulatory body in this country being held liable for negligence in the formulation of its Rules.

Third party cases

¹⁰ [1999] PNLR 171

¹¹ Court of Appeal, 19.12.00

11. It is with this category of case that professional negligence actions are more often concerned. There have been interesting recent applications of the *Caparo* principles. In *Pangood Ltd v Barclay Brown (Bradstock Blunt & Thompson, third party)*¹²

the plaintiff night club owners instructed the defendant insurance brokers to insure their premises against fire. The defendants in turn instructed the third parties, Lloyd's brokers, who obtained a quotation for cover, which included a warranty to the effect that at the end of each night all used smoking materials would be placed in suitable metal receptacles. The defendants accepted the quotation, but failed to warn the plaintiffs of the existence of this warranty. When the premises burned down the underwriters refused indemnity. The defendants issued a third party notice against BBT, alleging that they would, if sued, have been held liable to the plaintiffs.

Held by the Court of Appeal, the notice would be struck out. Although it was possible for a sub-agent to owe a duty of care to an ultimate principal, in the present case there had been no assumption of responsibility capable of giving rise to a duty. Moreover on the evidence the plaintiffs had relied solely on the defendants and not on BBT.

¹² [1999] PNLR 678

12. In *Barex Brokers Ltd v Morris Dean & Co*¹³

Hutchinson LJ, in refusing permission to appeal, held that valuers providing a valuation for mortgage purposes in contemplation of a loan by a specific mortgagee, owed no duty of care to an assignee of the charge.

13. The general rule is that the auditors of a company owe no duty to anyone but the company appointing them.¹⁴ Nevertheless, in exceptional circumstances a duty may be found to exist to third parties, such as shareholders or guarantors of the company's liabilities. Thus in

*Siddell v Smith Cooper & Partners*¹⁵

the Court of Appeal refused to strike out a claim against auditors for allegedly failing to observe financial irregularities while drawing up and/or auditing a company's accounts, notwithstanding that the claim was made not by the company but by the plaintiffs, who were shareholders and guarantors of the company's liabilities. The reasoning behind the decision seems to have been, first that the defendants were retained as accountants as well as auditors, and secondly that they were also retained by the plaintiffs as their own accountants.

¹³ [1999] PNLR 344

¹⁴ *Caparo plc v Dickman* [1990] 2 AC 605

¹⁵ [1999] PNLR 511

14. While proximity will more readily be found in cases of personal injury, as opposed to financial loss,¹⁶ the general principle that failure to apprehend, or properly to treat, criminals does not give rise to an action at the suit of a victim of those criminals¹⁷ was applied in

*Palmer v Tees Health Authority*¹⁸

resulting in the striking out of an action by the mother of a murdered child, victim of a murderer, based on the defendant health authority's alleged failure to treat him appropriately so as to reduce the risks of such offences and/or to detain him in hospital.

Personal liability of employees or agents

15. The usual question which arises in professional negligence actions by non-contracting parties is 'to whom is the duty owed?' However there is an associated question of 'who owes the duty?' which may arise in cases where the party contracted to perform the service, or provide the advice, relied upon by the claimant, performs its contract through an employee or agent. Does that employee or agent owe a duty personally to the claimant? The question is of no significance where, as will usually be the case, he is covered by his employer's insurance policy. However in

¹⁶ A point much relied upon in *Watson v British Boxing Board of Control* (above)

¹⁷ *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Osman v United Kingdom* (above)

¹⁸ [2000] PNLR 87

*Merrett v Babb*¹⁹

the question arose in an acute form. Mr Babb was a valuer employed by a firm of surveyors (in fact a sole principal). The firm contracted with a building society to provide a survey and valuation of a house that Miss Merrett intended to (and ultimately did) purchase. His employer required Mr Babb to perform the survey and provide the valuation. He failed to notice structural cracking. The sole principal subsequently became bankrupt and his trustee in bankruptcy disclaimed the policy of insurance, notwithstanding that the principal was required, under the Professional Indemnity Insurance Regulations of the RICS, to maintain run-off cover for a period of 6 years following cessation of practice. Mr Babb knew nothing of all this. The principal being thus worthless, Miss Merrett sued Mr Babb, having discovered his identity as the individual who had produced the report upon which she had relied. Mr Babb denied that he had personally assumed any responsibility to Miss Babb, or that she had relied upon any such assumption of responsibility by him.

¹⁹ Court of Appeal, 15. 2.01

Held by the Court of Appeal (Aldous LJ dissenting), that he was personally liable.²⁰

Extent of the duty

16. Associated with the questions (a) to whom is the duty owed, and (b) who owes the duty, there is the further question of what is the scope, or extent, of the duty which the defendant owes to the claimant.

17. Where the claimant is the defendant's client (the context in which the question usually arises) the question depends upon the express or implied terms of the retainer. The problem seems to arise most often in relation to solicitors. A recent decision of the Court of Appeal illustrates the kind of difficulty that may arise.

18. In

*Thomson Snell & Passmore v Rose*²¹

the defendant retained the claimants to bring an action against *CY* for some , 3,000. This they did and judgment against *CY* was duly obtained. However *CY* had ceased trading and the judgment was therefore valueless. When the claimants sued for their fees the defendant counterclaimed, alleging that they had been negligent in failing to investigate the financial standing of *CY* before commencing the proceedings.

²⁰ *Smith v Bush* applied and Lord Griffiths' approach to assumption of responsibility (para. 4 above) endorsed

²¹ [2000] PNLR 378

Held, the counterclaim failed; there was no general duty on solicitors to verify the creditworthiness of a proposed defendant before commencing proceedings in the absence of specific indications that something might be wrong.

Damages: scope of duty

19. Undoubtedly the most important single development in recent years in the area of damages for professional negligence was the decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)*²². Prior to that decision the approach to damages was that where a claimant sustained loss which he would not have suffered ~~but for~~ the defendant's negligence, he was entitled to damages in respect of that loss, unless the loss was

- (1) not reasonable foreseeable; or
- (2) attributable to a new intervening cause; or
- (3) caused by the claimant's own failure to mitigate.

This led the then Master of the Rolls to comment, on the question of duty, in the Court of Appeal judgment in that case²³, that

It is not, as was argued in *United Bank of Kuwait plc v Prudential Property Services Ltd*, a duty limited to safeguarding *L* against loss amounting to the difference between the overvaluation figure and the true value of the property.

²² [1997] AC 191

²³ [1995] 2 All ER 769, at 840

Happily, the House of Lords held that the duty of the valuer was exactly that. Relying in particular upon the dictum of Lord Bridge in *Caparo*²⁴ that

It is never sufficient to ask simply whether *A* owes *B* a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage for which *A* must take care to save *B* harmless.

The House of Lords established that a defendant is only liable for damage of a kind against which he has assumed responsibility to safeguard the claimant. The first and fundamental question is to determine the scope of the duty. This applies both to contract and tort actions.

20. The principle is frequently invoked, either to limit the damages (in a case where some of the claimant's damage is within the scope of the duty, but other damage is not) or to exclude liability completely (where the only damage sustained by the claimant is not within the scope of the duty).

21. A recent illustration of the principle operating to limit the damages is provided by

*Pearson v Sanders Witherspoon*²⁵

The claimant sued solicitors who had acted for him since 1988 in an action against *F*. The negligence alleged against the defendants consisted of failing to pursue his action expeditiously. In 1993 *F* was placed in administrative receivership. In 1996 the Claimant obtained judgment against *F* for £1m+, by which time *F* had no assets against which the judgment could be

²⁴ [1990] 2 AC 605, at 627

²⁵ [2000] PNLR 110

enforced.

Held by the Court of Appeal, (1) a solicitor's duty when conducting litigation was to act with all due expedition and not to cause delays which resulted in the loss of the right of action. Any inability to enforce a judgment obtained was not within the scope of the solicitor's duty, unless (a) such a duty was expressly assumed by the solicitor, or (b) the solicitor was given sufficient notice of the impecuniosity of the defendant to make it fair, just and reasonable to extend the duty; (2) in the present case, the firm had in fact acquired knowledge of F's impecuniosity, and was thereafter liable for the loss of the chance of obtaining an earlier judgment and successfully enforcing it (assessed at , 30,000).

22. For a recent example of the principle operating to exclude liability completely, see the decision of the Court of Appeal in

*Darby v The National Trust*²⁶

The National Trust was negligent in failing to warn the public against bathing in a pond on one of its properties; the need for such a warning arose due to a risk of Weil's disease presented by the possible presence of rats in the water. Mr Darby went swimming in the pond on a hot day and inexplicably drowned. Although his widow established a breach of duty, her action failed, by the application of the *SAAMCO* principle. The damage against which The National Trust owed Mr Darby a duty to safeguard him was that of catching Weil's disease, not that of drowning.

23. However, where the court decides that the whole of the loss was within the scope of the duty, the same will be recoverable even though, at first sight, it may appear that the defendant was

²⁶ Court of Appeal, 29. 1.01

only assuming a limited responsibility. Thus in

*Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd*²⁷

the plaintiff underwriters had been approached by the defendant reinsurance brokers with a proposal that they should reinsure certain excess of loss risks and simultaneously cede some \$10m of those risks to other underwriters as retrocessionaires; the defendants offered to place the retrocession on the plaintiffs= behalf. Subsequently the plaintiffs paid out some \$30m in respect of the reinsured risks and claimed against the retrocessionaires for \$10m. It then became apparent that the defendants, in placing the retrocession on the plaintiffs= behalf, had been guilty of non-disclosure, as a result of which the retrocessionaires legitimately avoided the policies. The plaintiffs then sued the defendants contending that they had been negligent in (i) failing to make full disclosure to the retrocessionaires, and (ii) failing to advise the plaintiffs that if proper disclosure were made, no retrocession reinsurance would in fact have been available on the London market. They claimed \$10m under (i) and \$30m under (ii). The trial judge awarded the plaintiffs \$10m.

Held by the Court of Appeal, the appeal should be allowed and the award increased to \$30m. Although normally insurance brokers guilty of non-disclosure were liable only for the amount of cover rendered ineffective, in this case the fact that the defendants had approached the plaintiffs and been instrumental in influencing them to underwrite the risks meant that there was a duty to advise in terms asserted by the plaintiffs. The whole of the loss was therefore within the scope of the duty.

Damages: specific heads

24. There have been several recent decisions of the Court of Appeal, clarifying the proper approach to various specific heads of damage.

²⁷ [2000] PNLR 153

Damages not to be reduced by insurance proceeds

25. In principle the claimant's damages are not to be reduced because he has insured against the contingency which forms the subject matter of his claim. This was held to apply to the proceeds of a MIG policy in

*Bristol & West Building Society v May, May & Merrimans (No. 2)*²⁸

and, more recently, again by the Court of Appeal in

*Portman Building Society v Bevan Ashford*²⁹

The latter case also affords a useful illustration of the application of the *SAAMCO* principle. The action was one by mortgage lenders against solicitors who had acted for both the claimants and the vendors. In breach of duty the solicitors failed to notify the claimants that , 50,000 of the purchase price was to be obtained by way of a second charge. Following the borrower's default the claimants sued the solicitors in respect of their net loss on the transaction (giving no credit for the MIG proceeds); an argument that the claimant's loss was nil (because it was not caused by the existence of the second charge) failed. The consequence of the defendants failing to supply correct information was that the claimants were misled into believing that it was lending to honest and solvent borrowers and that the transaction was viable, whereas the contrary was the case and all of the society's loss was within the scope of the duty.

²⁸ [1998] 1 WLR 336

²⁹ [2000] PNLR 344

26. The same principle was applied to a different factual situation in

*FNCB Ltd v Barnett Devaney (Harrow) Ltd*³⁰

This was an action by mortgagees against brokers arising out of a fire at the mortgaged premises. The brokers had been retained to arrange insurance cover for the premises, in the joint names of the claimants and the owner, in order to safeguard the claimants' security. The insurers repudiated liability under the policy on the grounds of non-disclosure, misrepresentation and breach of condition by the owner. The claimants alleged that the brokers were in breach of duty in having failed to ensure that the insurance policy included a mortgage clause and/or a non-invalidation clause (which would have prevented liability to the claimants being repudiated because of the acts or omissions of the owner).

Held by the Court of Appeal that the action succeeded. Further the claimants did not have to give credit for the proceeds of a contingency policy, which responded upon a failure to obtain indemnity under the primary policy. The policies were successive not alternative.

Damages for loss of a chance

27. Damages are assessed on a loss of a chance basis³⁰ when, and only when, the extent of the claimant's loss would have depended upon the decision or action of a third party, but, because of the defendant's breach of duty, that decision or action was never made or undertaken. But where the issue is whether or not the defendant's breach of duty has in fact caused a loss which has occurred, in circumstances where there are arguable alternative causes of the loss, the judge

³⁰ [2000] PNLR 248

must find, on a balance of probabilities, what was the cause of the claimant's loss. There is no power to award a percentage of the loss.³¹

28. *Pearson v Sanders Witherspoon* (para.25 above) was a loss of a chance case, where the chance was assessed as a very small one..

29. In a claim against solicitors for allowing a claim to be dismissed or struck out, if the court concludes that the claim had prospects of success which were more than negligible it is bound to come to a realistic assessment of those prospects. On the other hand if the defendant can discharge the heavy burden of proving that the claim had been bound to fail, he will have suffered no damage. Such cases are rare; a recent example is

³¹ *Hotson v East Berkshire AHA* [1987] AC 750

*Mount b Barker Austin*³²

Valuation A bracket@

30. In

*Merivale Moore plc v Strutt & Parker*³³

the Court of Appeal reiterated the Aresults based@approach to negligent valuation cases, i.e. if the valuation does not fall outside the acceptable bracket, no further investigation of the valuation method is either required or appropriate; the valuer will not be found to have been negligent even if he has made palpable errors in the manner in which he has reached his figures.

Damages for distress

31. The Court of Appeal has again affirmed the principle that, while damages may be recovered for physical inconvenience, discomfort and mental suffering, damages for distress are only recoverable for breach of contract where the contract was one the purpose of which was to provide peace of mind and avoid distress. Thus in

³² [1998] PNLR 483

³³ [2000] PNLR 498

*Farley v Skinner (No 2)*³⁴

The defendant surveyor, instructed by the claimant to survey a house in Sussex, advised that the house was unlikely to suffer greatly from aircraft noise. Since the house was close to one of the holding stacks for Gatwick airport that advice was wrong and given negligently. It was found that the claimant had suffered no physical inconvenience, discomfort or mental suffering, but only distress. Therefore his action failed.

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[2000] PNLR 441