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INTRODUCTION OF THE TORT OF NEGLIGENCE IN THE UK LEGISLATION AND JURISPRUDENCE

Griselda Muhametaj

Part-time Lecturer at University of Tirana, Faculty of Law

ABSTRACT: *In legal practice today, negligence has pride of place in tort. The majority of tort claims are for negligence and, even if other torts such as breach of statutory duty or nuisance are involved in a particular case, negligence is frequently claimed as well. This has not always been the case. Negligence is a relatively recent tort to emerge in its own right in the long history of tort. This scientific paper will introduce the tort of negligence by tracing the rise of fault as a basis of liability and commenting on the case of Donoghue v Stevenson*[1].

KEYWORDS: Tort, Negligence, Legislation, Jurisprudence, Fault

INTRODUCTION

Fault

Although much emphasis is placed on the notion of fault in the modern law of tort, this is a comparatively recent development[2]. Legal historians have different theories about the significance of fault in early law. However, it is clear that the need to prove fault in order to establish liability in tort became increasingly important towards the end of the 19th century. As social attitudes changed following the reforms pioneered by Chadwick and others, the volume of social legislation designed to improve the lives of employees, tenants and citizens naturally increased. Ascribing responsibility became easier with the advancement of science and greater competence in determining causation. There was a trend away from selfish individualism towards stronger social and civic responsibility. This trend eventually manifested itself in legal decisions culminating in the case of *Donoghue v Stevenson* in 1932, although there had been a large number of specific actions based on fault before this case. Allowing for a degree of cultural lag, the common law will inevitably follow some years behind enlightened social attitudes. Indeed, the majority decision in that case came as a surprise to some experts in 1932 because of the dearth of favourable precedents, and it involved a degree of ingenuity on the part of the judges, especially Lord Atkin.

Donoghue v Stevenson and the modern tort of negligence

In *Donoghue v Stevenson*, the appellant brought an action against the manufacturer of ginger beer bought for her by a friend at Minchella's cafe in Paisley. She drank some of the ginger beer and when the rest was poured into her glass she noticed the remains of what appeared to be a decomposed snail floating out of the opaque bottle into her tumbler. The appellant claimed damages for personal injury, including gastroenteritis and nervous shock as a result of having drunk some of the ginger beer, and the nauseating sight of the foreign body in her drink. The case proceeded to the House of Lords on the preliminary point as to whether an action for negligence was available irrespective of the fact there was no contract between the appellant and the manufacturer of the ginger beer. The basis of the case was that the manufacturer owed a duty to the consumer to take care that there was no harmful substance in his product, that he had breached this duty and that she had been injured as a result. The House of Lords reviewed the few relevant existing authorities and by a majority of three to two decided in favour of the appellant, so establishing authoritatively the existence of negligence as a separate tort in its own right. The two most significant speeches are those of Lord Atkin, expressing the majority view in favour of the appellant, and of Lord Buckmaster, who was in the minority.

The policy arguments

Lord Buckmaster expressed fears that if the case were to be decided in favour of the appellant it was difficult to see how trade could be carried on. This economic consideration undoubtedly weighed heavily on the minds of the minority judges. However, social justice considerations

[1] [1932] AC 562.
[2] *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, 2006, Chapter 3.

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involving the need to compensate consumers injured through the negligent acts of manufacturers won the day. The majority, described later by Lord Devlin as 'bold spirits' as against the 'timorous souls' in the minority, were prepared to take a creative leap and to generalise from slight pre-existing authority. Lord Atkin, to calm the fears of the minority that a flood of actions might follow this case, emphasized the need for 'proximity' between the parties: Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way, rules of law arise which limit the range of complainants and the extent of their remedy. He went on to attempt to limit the scope of future claims by formulating his famous 'neighbour principle'. It was only when this principle applied, he argued, that a duty of care can be established and the basis of a negligence action will be in place: 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?[3] The answer seems to be – persons so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when directing my mind to the acts or omissions which are called in question. Ironically, this very limitation was used later, as will be seen, as a device to extend the scope of the tort of negligence beyond the manufacturer/consumer situation into a wide range of fact situations affecting many spheres of life. In principle, the appellant could continue with her claim. It did not matter that there was no contract between the appellant and the manufacturer. However, the manufacturer died before she was able to proceed with her claim and the case was settled out of court for £100. The facts relied upon by the appellant were never proved, and to this day no one knows with certainty that the foreign body in the drink was a snail, that it was this which caused the illness. It could, for example, have been contaminated ice-cream or something the appellant ate for supper the previous day which made her ill. Trade was still carried on despite the fears of the minority, and the cost of consumer products increased because manufacturers, fearing legal claims, systematically insured their products, so spreading the cost of compensating injured consumers. Manufacturers improved their mechanisms for quality control to the benefit of the whole of society. The cost of this and of insurance premiums was passed on to consumers by increases in the price of goods. With the passage of time, common law, through the operation of the doctrine of *res ipsa loquitur* made it difficult for manufacturers to escape liability for foreign bodies in foodstuffs, and this has been confirmed by statute in the Consumer Protection Act 1987.

The significance of the decision

At least five important points emerge from *Donoghue v Stevenson*: • negligence was confirmed as a separate tort in its own right; • a claim for negligence can exist whether or not there is a contract between the manufacturer and injured party; • a claim for negligence will succeed if the claimant can prove: a duty of care is owed by the defendant to the claimant; a breach of that duty by the defendant; resulting damage which is not too remote; • in order to establish the existence of a duty of care the 'neighbour principle', based on reasonable foresight, must be applied. This is a minimum requirement and would not justify liability in all cases; • a manufacturer of drinks owes a duty of care to the consumer not to cause injury by negligently allowing foreign bodies to contaminate those products. *Donoghue v Stevenson* only provides a remedy to consumers in the case of products which are likely to cause injury to health. It does not offer a remedy for shoddy or unmerchantable goods. That is the province of contract. Since 1932, the law concerning duty of care has moved on. The modern approach was established in 1990 in *Caparo Industries plc v Dickman*.[4]

Establishing liability for negligence

It is difficult to define negligence in simple terms. As Lord Atkin explained in *Donoghue v Stevenson*: To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. Many years later, Lord Roskill explained the position in the following terms in *Caparo* when he said: There is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the question whether, given

[3] *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, 2006, Chapter 3.
[4] [1990] 2 WLR 358

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certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of that liability.

What must be proved: duty; breach; damage

Despite the difficulties, lawyers need to have a conceptual framework within which to decide whether there is the basis of a claim or the possibility of a good defense, and it is now well established that, in order to succeed in a claim for negligence, the claimant must prove each of three elements: first, that a legal duty of care is owed to him or her by the defendant; secondly, a breach of that duty; thirdly, a causative link between the breach of duty and the injury or loss. Linked to the element of causation, the claimant must establish that the damage which was suffered is not regarded in law as too remote. If the claimant is successful in proving each of these elements, the value of the claim (quantum) must be assessed. It is this framework which is set out here under three general headings: (1) duty of care; (2) breach of duty; and (3) damage . Each of these elements requires detailed consideration, and there are numerous authorities to be examined under each of the three headings, as the tort of negligence has been developed for the most part through the cases.

Duty of care

The first matter to be established is that the defendant owed a duty of care to the claimant. Unless it is possible to establish this in the particular circumstances of the case, there will be no point in considering whether an act or omission which has resulted in harm was negligent. As will be seen, the existence of a duty of care depends upon one of two possible tests: Either: (test one), demonstrating that the situation under consideration falls within a category of duty that has already been established by precedent; Or (test two) if the situation is one which has not yet been categorized under test one, establishing that one or more of three factors is present – foresight, proximity and justice. It should be noted that in the vast majority of negligence cases there is no dispute about the existence of a duty of care because they fall within test one, and duties are well established. Most negligence cases in practice are fought on the issues of breach of duty and causation. Nevertheless, the impression given in many textbooks is that disputes frequently arise under test two about whether or not a duty of care exists. One reason for this is that the reported cases tend to involve important issues of legal principle in areas of human activity in which the law is developing or is unclear. These cases often reach the House of Lords and Court of Appeal and are, therefore, given much prominence in the media. On the other hand, the large number of cases concerning breach of duty turn on their own special facts. Most are now decided at county court level and never appear in the *Law Reports*, the more so now that the financial limits for county court claims have been increased. Still more claims are settled out of court or at the door of the court. The same is true of many cases involving causation. This has been encouraged by the Civil Procedure Rules, which aim to enable the parties to cooperate and reach settlements through negotiation and mediation without using the courts. Thus, it appears to students new to the study of tort that there are as many claims involving disputes about the existence of a duty of care as about the other elements of negligence. This false picture places undue emphasis on the duty of care element of negligence. For this reason, some tort courses in universities begin the study of negligence by examining breach of duty and causation and only cover duty of care at a later stage.

Breach of duty

The second matter to be considered is whether the defendant was in breach of the duty of care. This element lies at the very heart of the negligence action. It involves consideration of whether the act or omission of which the claimant complains gives rise to liability. What is in issue is whether the defendant met the standard of care required by law when undertaking the particular activity. This element of the negligence claim therefore involves proof of fault in legal terms on the part of the defendant, and in law fault means acting unreasonably in the particular circumstances. This often happens when the risk of harm arising from an activity outweighs the cost or inconvenience of taking precautions to avoid it. Like duty of care, this involves considerations of foreseeability. Different standards of care apply in different situations. For example, experts are expected to exercise a higher standard of care than lay people and all depends on the circumstances of each case. Courts and lawyers are concerned with the very basic factual details of precisely what happened in each case. When particulars of the claim are drafted by lawyers acting for the claimant, they refer in detail to acts or omissions that are the subject of the claim. In a road traffic claim arising out of an accident in which a pedestrian was knocked down by a car at traffic lights, the particulars might contain the following allegations of negligence on

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the part of the driver of the car: (1) failing to observe that the lights had changed to red; (2) failing to stop at a red traffic signal; (3) travelling at excessive speed; (4) failing to keep a proper lookout; (5) failing to observe that the claimant was on the pedestrian crossing with the traffic lights in his favour; (6) failing to observe that the claimant was in the process of crossing the road; (7) failing to take sufficient notice of ice on the road, and so on, depending on the circumstances. The defence filed on behalf of the motorist would seek to answer these allegations and would probably allege contributory negligence on the part of the claimant. Some of the factual matters involved in such a claim would be agreed on the basis of admissions by the defendant, and possibly an admission of a small amount of contributory negligence on the part of the claimant. The dispute can then be narrowed down to one or two points and the Civil Procedure Rules 1998 have speeded up this process. For example, it may be that there is a dispute about whether the lights were red when the motorist proceeded. Much will depend upon witness statements and whether or not the police successfully prosecuted the motorist for related criminal offences. Thus, in legal practice there is much emphasis on factual matters in relation to breach of duty.

Causation and remoteness of damage

Under normal circumstances it is essential to prove damage for a negligence claim to succeed. Thus in *Johnston v Nei International Combustion Ltd*[5], the claim failed because the claimants were unable to establish that they had suffered any damage in the legal sense, even though there were pleural plaques present in their lungs. Very recently a possible exception to this rule was laid down by the House of Lords in *Chester v Afshar*[6], but that rule applies only in extremely specialized circumstances in relation to negligent failure to inform a patients of the risks involved in medical treatment. The third question is whether the breach of duty complained of was the cause of the damage suffered. The burden of proof is on the claimant to establish that the negligent act caused, or substantially contributed to, the damage or injury which he or she suffered. Once again facts are important. It is not always a simple matter to prove causation, and expert evidence can be crucial. This aspect of causation depends on proof of factual matters. Even if the factual aspects of causation can be proved, there arises the question of 'remoteness of damage'. The law will not provide compensation for damage which it regards as too remote from the accident itself. This is a question of law rather than fact. The rules state that the defendant will not be liable for damage which is too far removed from the negligent act or omission because the defendant could not have foreseen the particular kind of damage which occurred. The concept of foresight which is considered in relation to duty of care and breach of duty also arises at this stage. Once it is established that there is foreseeability of the type of harm, the extent of the loss suffered by the claimant does not need to be considered. The defendant must take his claimant as he finds him. For example, if a pedestrian is knocked down by a motorist, it is foreseeable that he will suffer personal injuries. The defendant will, therefore, be liable if the claimant had a minor bruise or if he had a pre-existing heart defect which meant that he suffered a heart attack because of the shock of the accident and died as a result. Assessment of the damages is often closely related to issues of causation. For example, if the claimant states that he has suffered a back injury through being required to lift heavy objects at work without proper supervision, medical experts will be asked to give evidence about the injury which was sustained. There may be a dispute about how much of the injury was caused by the work accident and how much arose naturally through the natural process of aging. The answer will affect the award of damages. Many such disputes arise in personal injuries cases, and the parties often reach a compromise and settle the case out of court. Such factual matters may significantly affect *quantum* of damage (how much compensation the claimant will receive).

CONCLUSIONS

Some criticisms of tort

The fault principle, which is a legacy of earlier centuries, still dominates the law of tort. There have been numerous criticisms of the fact that in order to succeed in obtaining compensation it is usually necessary for the claimant to establish fault on the part of the defendant. Perhaps the only real justification for this is the imposition of some kind of punishment on the defendant and the possible general deterrent effect that the fault system generates. Yet, if the defendant is not

[5] [2007] UKHL 39
[6] [2004] UKHL 41

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personally required to pay the damages, and if people generally are aware of this, these arguments lose much of their value. The fault principle is unfair on claimants because it is not always possible to obtain the necessary evidence against the defendant, particularly in medical negligence cases, and those involving employers' liability. Victims of mass accidents, after which public inquiries are held to amass the evidence, are at a distinct advantage over the victims of isolated accidents who may not have the means, financial or otherwise, of establishing the truth and acting upon it. Development in the funding of claims have made justice more accessible for some, but have led to cries of derision by those in Government who would have us believe that we are living in a compensation culture. Tort is unfair on defendants because the law does not distinguish between different degrees of culpability, and in some instances judges are prepared to find that there has been negligence even when it cannot be said that the defendant was in any way to blame, as in *Nettleship v Weston*[7]. Tort is unfair on society as a whole because the fault principle distinguishes between different types of injury and illness, compensating in tort only those who are able to establish blame in the legal sense, and leaving uncompensated the victims of pure accidents and chance illnesses or genetic disease. Even the limited attempt to introduce strict liability in relation to defective products has proved less than satisfactory in redressing the balance between individual claimants and large producers and retailers of goods and services. As there is no truly objective approach to the problem of establishing fault, the system is open to arbitrary and inconsistent decisions. Yet despite recommendations for reforming the tort system to exclude a heavy emphasis on fault, there have been few radical changes in that direction, and the fault system would appear to be even more deeply embedded in our law with the advent of a complex system of conditional fees, and the rejection of recommendations for no-fault compensation for road accidents and medical accidents by the Pearson Commission in 1978 and the Bristol Royal Infirmary Inquiry report in 2001 respectively. Even the NHS Redress Bill was watered down by the time it had become an Act in 2006, and no longer included a no-fault scheme to compensate brain damaged infants. It could be that lessons have been learned from the problems encountered in other jurisdictions, such as New Zealand, which have introduced no-fault compensation schemes that have resulted in a very conservative approach being adopted in the UK.

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