

Existence of a duty



To what extent are the tests used by the courts to determine the existence of a duty of care simply a shroud for the exercise of judicial discretion?

In *Jobling v Associated Dairies* Lord Wilberforce said “ We do not live in a world governed by the pure common law and its logical rules.... No general, logical or universally fair rules can be stated which will cover [all events] in a manner consistent with justice” In this quote Lord Wilberforce acknowledges and stresses the importance of judicial discretion in negligence cases, showing that in his view perhaps tests used to determine existence of a duty are a shroud for discretion. In contrast to this is Lord Diplock’s position on the tests set out in *Perrett v Collins* ; “ where the circumstances comply with established categories of liability by appealing to some vaguer concept of justice and fairness [discretionary]; the law cannot be remade for every case” . Here the view that the tests, or “ established categories” of liability are more important than the discretionary element of “ justice and fairness” . In this essay both these two polarised views will be explored with an aim of finding if possible which one is preferred by the judiciary in the case law, and examining whether the approach differs based on the facts and circumstances of the case.

Firstly it is important to know what the tests for a duty of care are in the current law. *Caparo v Dickman* is currently the leading case on duty of care. Here Lord Bridge set out a three tier test which must be satisfied in order for there to be a duty of care. There must be firstly “ foreseeability of damage”, secondly “ a relationship...[of]...proximity or neighbourhood” and finally that the imposition of the duty is “ fair, just and reasonable.” This new approach builds on that of firstly *Donoghue v Stevenson* , where Lord Atkin set out that the test of duty is whether one can reasonably foresee [one’s acts] will

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injure your neighbour” . This is where the “ proximity” element of the Caparo test comes from. The next notable setp was the caes of Anns v Merton London Borough Council where the test was seen to be a two staged test, where the first step was foreseeabliliy and secondly there was a consideration of public policy taken into account, however the onus for this was placed on the defendant. However the problem with this method found by the courts was that there was a “ presumption of liability in every case where injury...was reasonably foreseeable”. Lord Keith on the same point said the Anns test had a “ failure to have regard to...all the relevent considerations...of whether a duty of care should be imposed”

The history of the test for duty of care here is very important for the discussion of the extent of judicial discretion. Firstly the way in which the test for duty has changed over the years could be seen as an excercise in discretion in creating the test. However this discreation has been used in Caparo to in effect limit the scope of their own discretion, by creating a more rigid test for duty. So it is evident that the courts have used their discretion to create the tests, which could point to the thought that the two elements are intertwined and not quite as polarised as the two judges in the introduction set it out to be.

Due to the doctrine of precedent judges will not be able to ignore the rules set out in Caparo and create their own, their discretion is contrained by the doctrine of precedent. This does not mean that in the future judicial discretion could not lead to a change in the test for a duty of care, as it has obviously happened in the past, but it happens in a piecemeal way where a certain case illuminates a problem with the existing test which must be

changed judicially. If judges must adhere to the test, does that mean that there is no room for discretion? No, although there may be no discretionary element in the overarching 3 tier test, there is certainly discretion within those three tiers, especially under the “ fair, just and reasonable” stage. The first two stages of “ proximity” and “ foreseeability” are merely objective tests that rely on the facts alone, the consideration of whether creating a duty would be “ fair just and reasonable” requires more judicial thought and attention.

The phrase “ fair, just and reasonable” is fairly ambiguous within a legal context, what do these words mean, what sort of duty is just? Due to this ambiguity it is down to the individual judge’s interpretation of what these terms means, and thus within this category of the Caparo test there is a large amount of judicial discretion. It is a “ general repository for a miscellaneous set of policy arguments, undefined”. Two alternative uses for the policy argument have developed since Caparo, the first being the traditional use from Anns where the fairness of a duty was used as grounds to deny it. The new “ positive usage” used to “ ground the imposition of a duty of care”

This new usage was recognised by Hoffman in *Stovin v Wise*, stating that instead of using policy to block a duty, they ask “ whether there are considerations of justice...for extending the duty to cover a new situation”. This extension of the scope as it were of the policy limb of the test shows how although judicial discretion cannot do much to change the main test, it can be used to change the elements of the test

The bigger area for discretion in actually applying the rules to cases, and not just formulating how and in what way to apply them. One oft cited case is that of *The Nicholas H* which shows the “ varied nature” of the way that the policy factors are taken into account. Here the defendants were negligent in certifying a ship as seaworthy after repairs. Although their lordships held that the elements of proximity and foreseeability, and further it was a case of property damage where a duty is normally owed upon the mere foresight of damage. However in this particular case the Lords held that there was no duty here, for the reason that imposing a duty in this case would disrupt the balance of the Hague Rules which set out the rights and liabilities between shippers and cargo owners. Further the defendant was a non for profit organisation which campaigned for safety on ships. The house of Lords thought imposing a duty might endanger their status. This is an example of discretion being used under the “ shroud” of public policy and fairness and reasonableness, to go against the traditional rule in property damage cases to rule that there was no duty. This is an example of the traditional negative usage of the test, being used to deny the existence of a duty of care.

An example of a positive usage of the just and reasonable test is shown in cases involving members of the legal profession, where it seems reasons other than proximity and foreseeability were needed to justify an imposition of a duty. In *White v Jones* the daughters of a testator sued the defendant solicitor for negligently failing to draw up a new will before their father died, which would have named them as beneficiaries. Generally courts do not wish to impose liability in cases of nonfeasance even if the elements of proximity and foreseeability were present as they were in this case. In this

case Lord Goff gave reasons for why a duty should be imposed in these circumstances in a section of his dicta titled "The Impulse to do Practical Justice", where as the title suggests his ratio decidendi was firmly based on the third limb of the Caparo test.

These cases demonstrate not just the basic fact that discretion is used in cases under the title of fair just and reasonable in order to give judgements that in a sense go against the orthodox rules of the imposition of a duty of care in tort. The use of this discretion is a crucial part of establishing duty, and without it justice would not be done in certain cases. As Goff said in *White v Jones*, without the test of policy the two worthy beneficiaries would be at a loss and unable to claim, and the only person who could claim is the deceased father who had no loss. So while it must be noted that there is discretion within the Caparo test, it must not be thought to undermine the test, it enhances it and makes sure that the correct decisions can be made despite the presence of foreseeability and proximity which under *Anns* were sufficient.

A further use of discretion is when establishing new categories of negligence, which according to Lord Macmillan "are never closed". The reason for needing these new categories of negligence and thus duty was expressed by Asquith LJ, new categories arise because of "changing social needs and standards new classes of persons legally bound or entitled to the exercise of care from from time to time emerge". However the decision whether or not to impose a new duty on a new category is not a completely discretionary one. Brennan J in *Sutherland Shire Council v Heyman* stated that "it is preferable that the law should develop novel categories of

negligence incrementally and by analogy with well established categories” , this dictum was approved by the House of Lords in Caparo. This shows us that discretion cannot escape from the force of precedent, but can be allowed to be exercised within the precedent.

Cases such as those involving the emergency services seem to fall into the spectrum of “ new categories”. For example the Police generally are said to have a blanket immunity and thus have no duty of care as stated in Hill v Chief Constable of West Yorkshire which was decided mostly upon policy issues, one being that the police should be able to act free from the fear of being sued, and direct manpower where they think it is needed. However for the Ambulance service, in Kent v Griffiths , it was held that there was no good reason why there should not be liability for the Ambulance service (if delayed for no good reason). This once again shows just how important discretion is under the tests for duty. The discretion is used in order to curb the harshness of the objective rules of duty, so that no wrong decision is made. Therefore the police can be left to do their job without fear of court action, but also unnecessarily late ambulances have no such protection.

To conclude, it is clear that discretion within the tests for negligence are prevalent, in the third limb of the Caparo test, and also in deciding new areas of negligence and duty. However this is not unqualified discretion, the policy argument discretion is limited by the overarching Caparo test, and further the incremental approach must also draw on previous precedent in order to create the new rules, albeit with an aspect of discretion as shown in Hill. The tests for duty are therefore not a shroud for judicial discretion, but are in fact a means for accommodating judicial discretion and controlling it to

an extent. And this element of discretion is the most valuable aspect of the Caparo test, for making sure that duty will not be imposed if it is unjust to do so, even if the tests of foreseeability and proximity are established, or for giving extra weight to an argument for imposing a duty.

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