

Duty of care



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The legal basis for finding a duty of care was initially established in the landmark case of *Donoghue v Stevenson*,^[1] in accordance with the requirements of ‘neighbour’ or ‘foreseeability’ as principles of liability. Wilberforce, in *Anns*^[2], sought to revive an all-embracing test for a duty of care and set out a two-stage test. The first stage recognises the elements of the neighbourhood principle, yet the second stage acts as a floodgate such that policy factors that could reduce the duty must be considered. This, however, was replaced by a more cautious ‘three-stage test’ of Lord Bridge of Harwich, known as the *Caparo*^[3] test. This essay will argue that whilst the duty of care remains a necessary tool to regulate liability in negligence, a general conception of duty identified by a relatively simple ‘test’ is no longer suitable. Criticisms of the *Caparo* test will be identified, as explored in *Barclays*,^[4] in addition to case law that highlights inconsistencies in the treatment of *Caparo*. Finally, the development of the duty of care since the House of Lords last looked into detail at *Caparo* will be compared with the efficiency of tort law. It will be found that a corrective justice approach does not satisfy all of the objectives of tort law. Therefore, a cost-based efficiency approach is welcomed in the development of strict liability. This further highlights that *Caparo* is unsuitable to define duties under tort law.

The ‘three-stage test’ established in *Caparo* has been subjected to heated criticism, which supports the argument it is no longer suitable to define duties. The test itself details that negligent actions must be reasonably foreseeable, there must be proximity and it must be fair, reasonable, and just to impose liability. Professor Jane Stapleton argues that the ‘three-stage test’ are ultimately circular and therefore empty labels.^[5] This is further

shown by Lord Hoffmann, who argued that the phrases of the three-fold test tended to be bandied about, shedding little light. ^[6] This is especially true as Lord Bridge explicitly disclaimed that the threefold test does not and cannot provide straightforward answers to the duty question. ^[7] He stated that “ the concepts of proximity and fairness...are not susceptible of any such precise definition as would be necessary to give them utility as practical tests.” ^[8] This irony demonstrates Caparo’s unsuitability to determine duties. In *Barclays*, Lord Walker claimed that the test ‘ does not provide an easy answer to all our problems, but only a set of fairly blunt tools.’ ^[9] The treatment of this concept by the House of Lords represents the cautionary tale of aspiration to attain practical justice may peak in a legal landscape that is unintelligible to those who work with it. Nevertheless, the difficulty in *Barclays* follows deciding whether it was fair, just and reasonable to impose liability to Barclays, despite there being foreseeability and proximity. All five of their Lordships in *Barclays* called for closer attention to the actual issues arising in a particular case, regarding the desirability of liability in negligence, without the distraction of abstract ‘ tests’ for duty. ^[10] This suggests the ‘ tests’ itself are useless and may even be a distraction for finding liability. Nevertheless, this creates implications for the new emphasis on policy in negligence. Does the new policy approach turn judges into legislators and remove any hope of certainty of development in the tort of negligence? ^[11] Such a concept brings in dangerous new issues to the rule of law and poses a threat to our constitution. Centrally, however, this demonstrates the Capao test as unsuitable in finding duties of care under English tort law, in addition to being held in distaste.

Post *Caparo* cases are inconsistent with the purpose of the Capro test, thus demonstrating that *Caparo* is not good authority for defining duties. In *Al-Nakib Investments (Jersey) Ltd r v. Longcroft 1990* ^[12], the court endorsed the view that no liability could lie because the prospectus was to encourage subscription, rather than a ‘particular transaction’ for which the defendants were aware reliance would be placed on it. Therefore, there was no foreseeability. This, however, is an unrealistic line to draw. The directors would no doubt owe a duty of care to persons who subscribe for shares offered by that prospectus they created for such purpose. ^[13] The plaintiff is a member of the ‘identifiable’ class. Proximity is evident as the defendant knew it would be likely that the statement would be communicated in connection with a particular transaction. Additionally, it was likely that the plaintiff would rely on the statement to decide whether or not to enter on that transaction, ^[14] establishing foreseeability. Therefore, in establishing that there was no duty of care from the *Caparo* threefold test, it is a perversion of *Caparo’s* ultimate goal: to avoid “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” ^[15]

This unsuitability is heightened if the inconsistencies of cases are considered. *Morgan Crucible Co. plc v. Hill Samuel and Co. Ltd 1991* ^[16] heralds a less restrictive approach to liability. Hoffman J. decided the case was indistinguishable from *Caparo*. Following which, the reasons for denying a duty of care were even stronger, given that defences documents were to advise shareholders on accepting the bid and the interests of the bidders and FCE’s shareholders clashed. ^[17] Nevertheless, the Court of Appeal held

that ‘arguably’ there was sufficient proximity to create a duty of care, as the defendants were aware of MC’s reliance to decide whether it should increase its bid. ^[18] It should be emphasised that the Court of Appeal did not decide that a duty of care existed, only that the claim was not bound to fail, and highlighted that whether it was “just and reasonable” to impose a duty of care also remained to be considered. ^[19] It should have been clear that there was no duty of care as the case was almost identical to *Caparo*. Due to this, Hoffman J stated that judges were more concerned with what appeared to be fair and reasonable than with wider utilitarian calculations. ^[20] The irony lies in the courts willing to consider the presence of duty in the weakest of the post- *Caparo* cases. ^[21] Such uncertainties may result in professional advisors being forced to take out insurance cover, as a safeguard measure against unforeseeable extensions of liability. Furthermore, it is almost impossible for legal practitioners to advise their clients on what is likely to be expensive and protracted litigation. ^[22]

The concept of duty of care has developed significantly since the House of Lords last looked into detail of *Caparo*. In considering the efficiency of tort law itself, it raises the debate of corrective justice and a cost-based efficiency approach. A corrective justice approach is a prominent theory of tort law, which seeks to place ‘the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed.’ ^[23] Nevertheless, Calabresi proposes the aim of tort law (aside from the requirement of justice) is to minimise the social costs of the tort. ^[24] Therefore, whilst corrective justice is an important

objective of tort law, it is not the sole objective, therefore developments must occur in order to satisfy a cost-based approach. Strict liability indeed achieves this. Under strict liability, the courts are not obliged to set the level of due care, as the injurer must bear the costs of the accident, regardless of the extent of her precaution ^[25]. Since it is in the injurer's self-interest to minimise her private costs: the total social costs are equal to her private costs. ^[26] Therefore, under strict liability in unilateral accidents, the injurer will select the socially optimal level of care. ^[27] The probability of trial should be less under strict liability. This is because it is easier to predict who is likely to win the case as it not necessary to establish that the injurer was negligent. Accordingly, voluntary payments should be much more probable ^[28], thus reducing the costs of going to trial. From this reasoning, the cost-benefit analysis is regarded as the best solution to all problems of social organisation in market transactions that are infeasible. This shows that the basic principles of economics are a powerful instrument for the achievement of social justice. ^[29] Nevertheless, in a social sense, people will act in a manner to minimise their losses. Therefore, this shows *Caparo* as being unsuitable in determining duties as it does not meet the English tort law's objective of minimising social cost. Effective functioning of tort law will balance the corrective justice approach and cost-based efficiency.

In conclusion, this essay has demonstrated that the *Caparo* test is not a good authority to define duties under English tort law due to its overarching inconsistencies. *Longcroft* demonstrates that in denying duty to the 'indeterminate' plaintiff (using the *Caparo* test) is a deep perversion of the very purpose of the test: to avoid 'liability in an indeterminate amount for <https://assignbuster.com/duty-of-care-essay-samples/>

an indeterminate time to an indeterminate class.’^[30] This is in addition to their Lordships explicitly disclaiming in the creation of the *Caparo* test that it should not be used to determine duties as it is unsuitable for such a task. Inconsistencies are further identified when post-*Caparo* cases, such as *Morgan*, which are seemingly indistinguishable from *Caparo*, support a less restrictive approach to liability with a finding of a duty of care. It seems that judges are indulgent in their decent, with greater concern with what appears to be fair and reasonable than with wider utilitarian calculation. It is important to note the reality of the inconsistencies in English tort law due to *Caparo*, for example, legal practitioners will struggle to advise their clients on what is likely to be expensive and protracted litigation. Nevertheless, the concept of duty of care has developed considerably since *Caparo*, with the concept of strict liability in alignment with the tort law objective of minimising social costs. Effective functioning of tort law will balance the corrective justice approach and cost-based efficiency, of which *Caparo* does not achieve.

[1] *Donoghue v Stevenson* [1932] UKHL 100

[2] *Anns v Merton London Borough Council*[1978] AC 728

[3] *Caparo Industries Plc v Dickman*[1990] 2 AC 605

[4] *HM Customs and Excise v Barclays Bank Plc* [2006] UKHL 28

[5] Jane Stapleton, 'Duty Of Care And Economic Loss: A Wider Agenda' (1991) 107 Law Quarterly Review.

[6] *ibid* 36

[7] *Caparo n(3) 6* (Lord Bingham)

[8] *ibid* 618.

[9] *Barclays n (4) 71*

[10] *ibid* 36

[11] Jonathan Morgan, 'The Rise And Fall Of The General Duty Of Care' [2006] Professional Negligence 6

[12] *Al Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All E. R. 321

[13] Gillian Morris, 'The Liability Of Professional Advisers: Caparo And After' [1991] Journal of Business Law. 8

[14] *Caparo n (3) 582-3.*

[15] *Ultramares Corporation v. Touche* (1931) 174 N. E. 441 (Cardozo CJ)

[16] *Morgan Crucible Co v Hill Samuel & Co* [1991] 3 All E. R

[17] *ibid* 330

[18] *Morris (n 13)*

[19] *ibid*

[20] Harvey Cohen, ' Auditors' Liability For Negligence: A Time For Reform?'
[1993] *Journal of International Banking Law* 9

[21] *Morris n (18) 9*

[22] *Morris n (18) 10*

[23] Ernest J. Weinrib, *The Idea of Private Law* (1995) 135

[24] Guido Calabresi, *The Costs Of Accidents: A Legal And Economic Analysis*
(Yale University Press 1970) 340

[25] Hans-Bernd Schäfer and Andreas Schönenberger, ' Strict Liability Versus
Negligence' 603

[26] *ibid*

[27] Jörg Finsinger and Philip von Randow, *New Activities And Liability Rules*
(Springer 1991) 89

[28] Schäfer, *n (27) 604*

[29] Richard Epstein, ' A Theory Of Strict Liability,' (1973) 2 *Journal of Legal
Studies*.

[30] *Touche n (15)*