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Expert Analysis Chapter

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When Will a Defendant Owe a Claimant a Duty to Take Reasonable Care? Recent Changes in How the English Courts Approach This Question

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Introduction

Under English law, it is easy to succinctly articulate the necessary elements of a successful negligence claim; a claimant must prove that:

(i) the defendant owed a duty to the claimant to take reasonable care;
(ii) the defendant breached that duty;
(iii) the defendant's breach caused the claimant to suffer loss/harm; and
(iv) the loss/harm caused is recoverable (i.e. it is of a type that falls within the scope of the defendant's duty).

However, this apparent simplicity belies the wealth of case law on the interpretation of the scope of each element. In this chapter, we focus on the first element listed above, which has arguably undergone the most persistent and significant change in recent years. We consider how the courts decide in what circumstances a defendant will owe a claimant a duty to take reasonable care, and the practical implications of this on the ease with which claimants can bring successful negligence claims.

While the Supreme Court in more recent years has been at pains to emphasise the importance of the courts taking an incremental approach to recognising categories of cases where duties are owed, and doing that by analogy with existing cases where it has already been established that a duty is owed, this process can, by definition, be difficult to apply in practice. And this leaves room for the courts to draw analogies broadly in certain circumstances. Further, the courts continue to apply fixed tests in certain circumstances. As such, it seems likely that the boundaries of duties of care will continue to expand, as they have done in recent years (particularly as regards duties found to be owed where a defendant has created the state of danger in which the loss occurs, and where the loss relates to environmental, social, and governance ("**ESG**") and sustainability issues), as judges continue to find creative ways to reach the decisions they consider fair, just and reasonable in the circumstances, for policy or other reasons. In practice, the renewed emphasis on developing new categories incrementally is likely only to serve as a check on the speed with which the boundaries of duties of care will continue to expand.

Starting Point: The Three-Fold Test in *Caparo*

It is well-established that a duty of care is owed in some circumstances, for example by car drivers to other road users, doctors to patients in their care, manufacturers to consumers and employers to their employees.

In less well-established cases, until relatively recently, the starting point in deciding whether a duty of care was owed by a defendant to a claimant was largely settled, at least in practice: the courts would apply a three-fold test, as set-out in the case of *Caparo*,[1] and ask whether:

(i) the damage which occurred was foreseeable;
(ii) there was a sufficiently proximate relationship between the parties; and
(iii) it was fair, just and reasonable in all the circumstances to impose a duty.[2]

Alongside this test, the courts would consider whether the circumstances showed that the defendant had undertaken or assumed a particular responsibility to the claimant to exercise reasonable care; if the defendant had done so, this would tend towards the finding of a duty. This was most often a relevant consideration in cases concerning the alleged provision of negligent professional services or quasi-professional services. In such cases, a duty was more likely to be found where: (i) such duty was not precluded by contractual agreement between the parties; (ii) the services involved the defendant providing advice (rather than merely information) to the claimant; (iii) the claimant relied upon the advice; (iv) it was reasonable for the claimant to have relied on the defendant's advice; and (v) the defendant should have foreseen that the claimant would rely on the advice.[3]

In addition, alongside these factors the courts would have regard to maintaining an "*incremental approach*" to novel situations – i.e. that the courts would look to recognise categories of cases where duties are owed incrementally, and by analogy with existing cases where it has already been established that a duty is owed.

Development: The Primacy of Incrementalism

This settled position was upset by Supreme Court decisions in 2018, including *Robinson*,[4] which held that *Caparo* had been misunderstood by the lower courts because it had not established a universal test to be applied in all circumstances to determine whether a duty of care in negligence exists. To the contrary, and correctly, *Caparo* had repudiated the idea that there was a single test which could be applied in all cases, and certainly did not provide that the courts will only impose a duty where they consider it fair, just and reasonable to do so on the particular facts. These Supreme Court decisions instead emphasised the primacy of incrementalism, which they asserted had always been a critical aspect of the judgment in *Caparo*.[5]

As such, following these decisions, the courts do not start with the *Caparo* test, but rather start by assessing whether a given case falls within an established category for which the courts have already decided whether a duty of care can arise. If the case does fall within such category, this is the end of the enquiry as to whether a duty can arise in principle; the court is required to make its decision consistent with the relevant prior decision(s). If the case does not fall squarely within such category, the courts must take care to identify the correct existing category of

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liability to which the given case is most closely analogous, and then weigh-up the reasons for and against imposing liability. At this latter stage, it is still appropriate to consider the *Caparo* test.

Further Development: Assumption of Responsibility

In more recent years, the courts have also developed and refined the law around the circumstances in which a duty of care will be found to have arisen on the basis of an undertaking or assumption of responsibility by the defendant, including where the defendant will be considered to owe a duty arising out of the conduct of a third party.

For example, it has been found that once a defendant undertakes to provide professional services, it will, in principle, be liable for any lack of skill or care on the part of any agent it delegates the performance to.

Similarly, it has been found that parent companies will be liable for the activities of their subsidiaries, and thereby owe duties to third parties and the employees of their subsidiaries, where they assume such responsibility by actively taking "*the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations* […] *of the subsidiary*".[6] In other words, the specific circumstances, and the role of the parent, are key, rather than, for example, the wider company's legal structure.[7]

In a different case, the Supreme Court clarified that when considering alleged negligent professional advice, the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose and commercial rationale for which the advice is being given, i.e. the courts will look at what risk(s) the duty was supposed to guard against and then assess whether the loss suffered represented the fruition of that risk. As such, the Supreme Court has reduced the importance to be attributed to the distinction between information and advice when assessing liability for negligent professional advice.

Rationale for These Developments

The Supreme Court, by placing reduced importance on the role of the *Caparo* test and reemphasising the primacy of incrementalism, was seeking to scale-back what it perceived as "*a recipe for inconsistency and uncertainty*",[8] whereby the lower courts had started, in cases that were not truly novel, to discard established principles, resorting to what they considered fair, just and reasonable in the circumstances and/or deciding cases on the bases of their broader merits. More generally, this was a response to the substantial expansion in the reach of the law of negligence which had taken place in England and Wales since *Anns* and *Caparo*, and even before that.[9] It was thought that a renewed emphasis on incrementalism would give the appellate courts — who the Supreme Court considered were better placed to balance the policy and other considerations relevant in deciding whether to recognise new duties — greater control over the future development and expansion of the law of negligence, and forestall any potential for massive expansion in the future.[10]

In this intention, there is perhaps some parallel with the efforts of the Supreme Court around the same time to reign in the freedom of the lower courts to interpret contracts in line with their contextual background, and what the reasonable person would understand them to mean, in favour of a greater focus on the ordinary meanings of the words used.

Criticism of Incrementalism

Despite its endorsement at the highest level, incrementalism has been subject to considerable academic criticism. Much of this has focused on a perceived inherent vagueness; it is difficult for courts to decide, and parties to try to predict, at which point the facts of a case are sufficiently analogous to established categories to allow incremental extensions – what one judge finds analogous and a small step, another may consider entirely dissimilar and a giant leap.

Indeed, even Supreme Court judges have found this exercise difficult. In *White v Jones*,[11] a case concerning whether a solicitor retained by a testator owed a duty of care to the estate beneficiary, there was a fundamental difference of opinion between the majority and dissenting judgments. The majority, finding in favour of establishing a duty, presented this as an acceptable incremental step beyond existing authorities. The minority, on the other hand, dissented on the basis that they could find no decided case of which the grounds were capable of being extended incrementally by analogy to cover the scenario, considering that to extend the duty would amount to something radically different to the approach taken in prior cases.

A potential response to such criticism is that there is also inherent vagueness and ambiguity in the alternate fixed tests, as regards their appeal to "*proximity*", what is "*fair, just, and reasonable*", and to "*assumption of responsibility*", and that more generally this approach is consistent with the incremental character of the common law.

The incremental approach also requires the courts to carefully identify the correct category of liability to which a case is most closely analogous, which can sometimes be difficult. The Supreme Court was critical of the lower courts in *Robinson* and *Poole BC*[12] for failing to identify in both cases that the right outcome depended on the long-established distinction between causing harm by positive action (for which liability in negligence can arise) and causing harm by failing to prevent harm or confer a benefit, i.e. by omission (for which liability in negligence will not usually arise).

Another criticism levied against incrementalism is that, in the absence of any underlying principles, the existence of a duty of care rests on illusory foundations.[13] In other words:

> "*If the only justification for saying that a situation was a duty-situation is that it had been declared to be such on a previous occasion, the question arises as to what justified the decision to treat the situation as a duty-situation the first time that it arose. By definition, the first time that it arose, there was no specific authority for the decision 'on those precise facts', and if such authority is the only justification for a decision that a duty exists, the first case must therefore have been wrongly decided.*"[14]

An additional criticism is that incrementalism, with its requirement for courts to proceed gradually, is unable to handle truly novel cases, i.e. "*those that do not fit into existing pockets or incremental extensions of existing pockets, other than with the unhelpful response that the claimant must lose*",[15] and therefore it is a technique more suited to use in relation to a mature body of law, rather than to one that is in a state of some considerable evolution, as is professional negligence law in England and Wales in recent decades.[16] Some commentators have countered this with the argument that it is difficult to conceive of a situation about which past cases have nothing relevant to say.[17]

Recent Decisions

Recent decisions in this area have referred to incrementalism as underpinning the decision of whether or not to find a duty of care in novel circumstances. However, this has not stopped there from being decisions that could be said to represent substantial expansions to the boundaries of such duties of care.

For example, in *Begum*[18] (a decision refusing the defendant's preliminary applications for strike-out and summary judgment),

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the court held that it was arguable to the required degree that the defendant shipbroker, who had negotiated the sale of an oil tanker to a demolition cash buyer, owed a duty of care to a worker who was injured and died while demolishing the vessel. This was primarily on the basis of the argument that the defendant had created the state of danger in which the loss occurred. This was so despite the decision conceding that the alleged duty would represent an "*unusual extension*" of an existing category of cases where a duty has been found, and that the alleged duty would be at the "*edge of developments in this area*". This is the latest in a series of cases which seek to push the boundaries of tortious duties of care relating to ESG and sustainability issues.

In particular, in *Vedanta*,[19] the Supreme Court held (in another preliminary application) that there was a real issue to be tried regarding whether a UK parent company owed a duty of care to persons living in Zambia in relation to alleged loss and damage due to pollution and environmental damage from emissions from a copper mine owned and operated by its Zambian subsidiary. Similarly, in *Okpabi*,[20] the Supreme Court held that there was a real issue to be tried (in yet another preliminary application)[21] regarding whether a UK parent company owed a duty of care to persons living in Nigeria because of the actions of its Nigerian subsidiary relating to oil spills and a failure to remediate them. The court confirmed that it was not piercing the corporate veil but rather finding that there was a triable issue as to whether the parent company owed an independent duty of care in respect of the actions of its subsidiary.

The continued potential for expansive interpretations is clear from a recent professional services case. In that case, the high court found that four UK-based entities owed a duty of care to a non-employee, a partner of a Dubai-based affiliate of the UK-based entities (i.e. an independent member firm of an international group of offices trading under the same global brand), to protect the partner against pure economic loss (in the form of future employment opportunity) by providing an ethically safe work environment, free from professional misconduct. In doing so, the court drew on past decisions (*Okpabi* and *Vedanta*), finding that a parent company actively involved in the affairs of a subsidiary owes duties to the employees of that subsidiary, to find that the UK-based entities in this case owed duties to a non-employee of an affiliate. In reaching this decision, the court considered the knowledge and perceptions of individual global and regional leaders within the firm's global network as attributable to the UK entities. The court was not especially concerned with the precise contractual position of the claimant within the global organisation and, although the claimant had a partnership contract with a particular regional entity, he was found to owe duties to the broader organisation, beyond those he owed to the immediate party with which he had a contract, and so too he was considered to be owed duties by the broader organisation.

Similarly, in finding that a duty of care was owed to protect against pure economic loss by providing an ethically safe work environment, the court drew on past decisions to find that employers owe employees a duty of care to protect against physical injury and consequent financial loss by providing a physically safe work environment. In reaching this decision, the court characterised the partner's relationship to the Dubai-based entity as quasi-employment in nature, thereby allowing the court to draw on employment law analogies and references, such as to (i) the rights of whistle-blowers, (ii) the implied duty of trust and confidence, and (iii) the concept of constructive dismissal[22] (despite points (ii) and (iii) not applying in any way to a partnership relationship under UK law, and point (i) only arguably applying in limited circumstances).

It is clear that in this case the court's decision was influenced by the status of the claimant, which meant that he would – but for a favourable decision from the court – be denied a remedy as a conventional whistle-blower, and that this was wrong on policy grounds, considering the factual basis of this case, which related to improper influence being placed on the partner, in his position as an accountant; the court held that professionals like accountants should not be pressured to act unethically.

While the court noted that the decision would apply only to a small class of exceptional cases and was an outlier with a factual basis that will rarely if ever recur, this nonetheless sets a precedent for how analogies with past cases in this area can be drawn broadly to justify quite significant extensions to the ambit of duties of care, and when such duties will apply. Perhaps tellingly, while this decision referred to concepts of incrementalism, it also cited the dictum of Lord Steyn in *Williams v Natural Life Health Foods Ltd*[23] that "*the law of tort, as the general law, has to fulfil an essentially gap filling role*".

Conclusion

Viewing the recent case law in the round, it seems that judges are continuing to find ways to reach the decisions they consider fair, just and reasonable in the circumstances, for policy or other reasons. Following Supreme Court guidance, judges are keen to present their decisions as following an incremental approach. However, there is some inherent uncertainty in how analogies are drawn with past cases which, in certain circumstances, allows judges to draw analogies broadly and continue to apply the *Caparo* test in cases they consider novel, which allows for an assessment of what is fair, just and reasonable in the circumstances, and which therefore provides scope for more subjective decisions. In this regard, the sentiment of Kirby J in *Graham Barclay Oysters*[24] is apposite, notwithstanding that this was issued in the Australian High Court and pre-dates the most recent re-statement of the underlying principles in this area, as typified by *Robinson*:

> *"Perhaps this is the ultimate lesson for legal theory in the attempted conceptualisation of the law of negligence and the expression of a universal formula for the existence, or absence, of a legal duty of care on the part of one person to another. The search for such a simple formula may indeed by a 'will-o'-the wisp'. It may send those who pursue it around in never-ending circles that ultimately bring the traveller back to the very point at which the journey began. Thus we seem to have returned to the fundamental test for imposing a duty of care, which arguably explained all the attempts so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so … So after 70 years the judicial wheel has, it seems, come full circle."*

Endnotes

1. *Caparo Industries v Dickman* [1990] 1 All ER 568.
2. The *Caparo* test replaced the earlier two-fold test set down in *Anns v Merton London Borough Council* [1977] UKHL 4, under which the court would recognise a duty where there was a sufficiently close relationship between the claimant and defendant, such that in the reasonable contemplation of the defendant, carelessness on its part may cause damage to the claimant (i.e. in essence, the first two limbs of the *Caparo* test). Under this test, the court would also consider whether there were any countervailing factors which ought to reduce the scope of the duty.
3. Further, generally, the courts would adopt a more restrictive approach to finding that a duty existed in certain circumstances; for example, where the defendant was a public body, where the loss/harm suffered was purely psychiatric or economic, where the loss/harm was caused by somebody for whom the defendant was responsible (i.e.

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a third party), or where the loss/harm was caused by the defendant's omission rather than a positive action.

4. *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.
5. It is undoubtedly correct that *Caparo* contains much judicial discussion of the importance of incrementalism; see, for example, the comments of Lord Bridge at [618], Lord Roskill at [628] and Lord Oliver at [634]–[635].
6. *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20; and *Chandler v Cape plc* [2012] EWCA Civ 525.
7. Because the principle that a parent company can owe duties in this way has already been established, it is unnecessary and wrong to apply the *Caparo* test in individual cases to re-decide this issue. Instead, the court should move straight on to analyse whether it is justified to impose the duty on the facts, as confirmed by the Supreme Court (*obiter*) in *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.
8. *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 at [26].
9. See Stanton, '*Professional Negligence: Duty of Care in Methodology in the Twenty First Century*' P.N. (2006), 22(3), at [135], and Plunkett, '*The Duty of Care in Negligence*', at [74].
10. Stapleton, '*In Restraint of Tort*' at [85], and Plunkett, '*The Duty of Care in Negligence*', at [74].
11. *White v Jones* [1995] 2 AC 207.
12. *N and another v Poole Borough Council (AIRE Centre and others intervening)* [2017] EWCA Civ 2185; [2019] UKSC 25.
13. Plunkett, '*The Duty of Care in Negligence*', at [76].
14. Howarth, '*Negligence After Murphy: Time to Re-Think*' (1991) 50 CLJ 58, at [70]–[71].
15. Plunkett, '*The Duty of Care in Negligence*', at [75].
16. Stanton, '*Professional Negligence: Duty of Care in Methodology in the Twenty First Century*' P.N. (2006), 22(3), at [145].
17. McBride and Bagshaw, *'Tort Law'*, 3rd edn (Pearson Longman, 2008) at [56].
18. *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326.
19. *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20.
20. *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.
21. It is worth noting that decisions in preliminary applications are not binding authority (and that the tests for strike-out and summary judgment are less stringent than those that are applied to reach a final decision on liability), and therefore these decisions should be treated with some caution (albeit their rationale will be persuasive in future cases, unless and until there is a ruling to the contrary).
22. It is perhaps relevant, as to the willingness of the judge in this case, to find analogies with employment law concepts, to note that the judge had an employment law background and sits in the Employment Appeal Tribunal.
23. *Williams v Natural Life Health Foods Ltd* [1988] 1 WLR 830.
24. *Graham Barclay Oysters* (2002) 194 ALR 337, 402.

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