

THE DUTY OF CARE IN IRISH TORT LAW

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Introduction

The duty of care arises in the tort of negligence, a relatively recently emerged tort. Traditionally, actions in tort were divided into trespass and trespass on the case, or simply 'case'. Trespass dealt with the situation where the injury was immediate, in other words direct and foreseeable. Actions based in case however, covered consequential injuries in the case of libel or deceit, etc. An underlying problem of this approach was that there was no fundamental principle or test that was applicable to a novel set of facts.

A broader formulation was introduced by Lord Esher (then Brett M.R.) in *Heaven v Pender* [1883] 11 Q.B.D. 503. This broader formulation was very much the precursor to the modern doctrine of negligence. Lord Esher, essentially proposing a doctrine of foreseeability, explained why a duty might be owed by one party not to injure another. He stated that *"whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."*

The Elements of Negligence

Since this case, a number of elements have been established in order to prove the tort of negligence. Firstly, there must be a duty of care. Secondly, there must be a breach of this duty of care. Thirdly, there must be loss or damage and fourthly, there must be a causal link between the breach of the duty of care and the loss or damage suffered.

The Duty of Care

In *Lievre v Gould* [1893] 1 Q.B.D. 491, Lord Esher stated that *"the question of liability for negligence cannot arise at all until it has been established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."*

The general principle is that you should not harm those people to whom you owe a duty of care by your acts or omissions. If you fail in the standard of care owed, you will be liable for your acts or omissions due to negligence. The questions arise as to whom a duty is owed and more significantly as to the standard of the duty owed. In Ireland, a duty is generally owed to any person who can be classed as your neighbour, which involves issues of proximity, foreseeability and policy considerations. Differences exist in Irish and English law in terms of who is owed a duty of care. As regards the standard that is owed, it is that of the 'reasonable person'.

The cornerstone of the duty of care principle, was expounded on the basis of the now dogmatic 'neighbour principle' by Lord Atkin in *Donoghue v Stevenson* [1932] A.C. 562. The case involved a woman who had suffered shock and gastroenteritis upon the consumption of a bottle of ginger ale. The shock and gastroenteritis resulted from a decomposed snail at the bottom of the bottle. The plaintiff had no action against the shop owner, as he had not been negligent in any way. The question was whether she take an action against the manufacturer of the ginger ale. The Court ruled in her favour, finding that a duty of care was owed to your 'neighbour'. Lord Aiken stated that:

"The rule that you must 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 liable to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

This duty of care was later endorsed and developed in *Anns v Merton Urban District Council* [1978] A.C. 728, in which Lord Wilberforce established a two stage test.

"First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

In subsequent cases in the U.K., this ruling was initially approved, but ultimately rejected in *Murphy v Brentwood DC* [1991] 1 AC 398, as it lacked precision and created a duty of care of general application. As a result, in the U.K., the law has developed certain categories of negligence, as suggested by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 1 All E.R. 568, when he stated that *"the law should develop new categories of negligence incrementally and by analogy with established categories rather than by a massive extension of a prima facie duty of care restrained only by an indefensible consideration which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed."*

The Irish Approach

Until recently, the approach of both the *Donoghue* and *Anns* cases was accepted by the Irish courts, whose approach involved an examination of the issues of proximity and foreseeability and any policy considerations that would limit or negate the scope of the duty of care. In *Ward v McMaster, Louth County Council and Nicholas Hardy & Co. Ltd.* [1985] I.R. 29, it was held that the duty of care arose from the proximity of the parties and the foreseeability of the damage, balanced against the *"absence of any compelling exemption based upon public policy."* However, recent decisions of the Supreme Court, discussed below, indicate a retreat from this approach and an adoption of the UK approach.

In *Purtill v Athlone UDC* [1968] I.R. 205, the Supreme Court had to deal with the injury of a young boy resulting from activity at the premises of an abattoir. At the time, young boys would often go into the abattoir to observe the slaughtering of animals, by means of a pistol-like instrument and detonators. The doors of the abattoir were always open and the gates were never locked during slaughtering. The young boy in question took detonators from the abattoir on several occasions and exploded them either in his back garden at home or in the garden shed. On one such occasion, a detonator hit him in the eye and resulted in the loss of his right eye. He sued the abattoir for negligence. The abattoir claimed that as he was a trespasser, it did not owe him a duty of care. It also claimed that the plaintiff was guilty of contributory negligence and that the loss suffered was too remote for it to be liable. The Supreme Court rejected the claim of trespass and focused on whether a duty of care existed. To establish if this was the case the Court examined the issues of proximity and foreseeability. The Court held that the relationship was proximate, given the frequency with which young boys visited the abattoir. They were classified as being owed a duty by employees of the abattoir. The Court also ruled that harm was foreseeable, given the easy accessibility to the detonators. Walsh J, stated that *"When the danger is reasonably foreseeable, the duty to take care to avoid injury to those who are proximate, when their proximity is known ... is based upon the duty that one man has to those in proximity to him to take reasonable care that they are not injured by his acts."* The Court did accept however, that the plaintiff had contributed to his own injuries and a 15% liability was apportioned to him.

In *McNamara v ESB* [1975] I.R. 1, at issue were injuries sustained by a young boy when he broke into an ESB substation. The substation was surrounded by a fence of wire meshing, which was being replaced by a wall. The accident occurred at a spot where there was wire meshing topped with barbed wire. There were easily reachable uninsulated conductors at the ESB substation and this was the reason for the barbed wire topping on the wire meshing and for the building of the wall. The ESB also knew at the time that children were entering the substation. The temporary fence was severely criticised by both an architect and an engineer hired as experts by the plaintiffs. Again, the Court found the ESB liable on the basis of proximity and foreseeability. The Court did consider the steps taken by the ESB to prevent entry into the substation and decided that they were unreasonable in the circumstances. The Court also considered whether the children themselves could be held liable. It concluded that they were not, as they did not appreciate that there was a danger and this danger had not been communicated to them.

Another case involving the duty of care is the *Ward* case, mentioned above. The plaintiff had purchased a house with the aid of a local authority housing grant. He later learned that the house was severely substandard and structurally unsound. An engineer therefore advised him to leave the house, as it was a health and safety danger. He subsequently brought an action against the builder, the local authority, and the valuer of the local authority. The local authority was required by law to value the house before issuing the housing grant. They did so and their valuer found no defects. However, the valuer did not have any construction knowledge and therefore was not held liable. He was an estate agent and an auctioneer and had never put himself forward as competent to value the house.

The local authority however, was found to be negligent, as it had failed to engage a person competent to carry out the valuation. The local authority maintained that it failed in a duty not to the plaintiffs, but to the public whose rates and taxes went into funding the local authority. The Court rejected this, holding that there was proximity between the parties. It held that it was foreseeable that the plaintiff would rely on the local authority's valuation. The fact that the plaintiff had applied for a housing grant was proof that he was not wealthy, and would therefore have been unlikely to carry out a separate valuation. In particular, the Court held that the failure of the local authority to warn the plaintiff not to rely on its valuation was relevant in finding it liable.

The builder was also found to be liable on the basis on the law since and including *Donoghue*. The Supreme Court ruled that the duty owed would be to avoid foreseeable harm and also to avoid any financial harm that might arise from having to repair defects in the house. This ruling changed the common law position that a builder could not be liable in such a case. McCarthy J stated that the duty arose "*from the proximity of the parties, the foreseeability of the damage and the absence of any compelling reason based upon public policy.*"

Glencar

The recent Supreme Court judgement of *Glencar Exploration plc and Andaman Resources plc v Mayo County Council* [2002] 1 I.R. 84 demonstrates a retreat from the traditional stance of the Irish courts, bringing Irish law into line with English law. This judgement was followed in *Fletcher v Commissioners of Public Works in Ireland*, Supreme Court, unreported, 21 February 2003.

The plaintiffs in the *Glencar* case had been granted ten licences by the Minister for Energy to explore for gold in the Westport area and had invested heavily in such mining over a 24 year period between 1968 and 1992. In 1991, they set up a joint venture with an Australian company, Newcrest Mining Limited. However, this joint venture collapsed following the introduction of a mining ban by Mayo County Council pursuant to its 1992 draft county plan. The plaintiffs successfully challenged the mining ban in a judicial review proceeding in the High Court. They subsequently sought to recover damages from Mayo County Council for breach of duty in an action before the High Court, which dismissed the claim. The reason behind the dismissal was that although Mayo County Council had been negligent in adopting the mining ban, according to Kelly J, this negligence did not give rise to any right to damages.

The High Court decision was appealed to the Supreme Court, which again dismissed the action. Keane CJ dealt with the duty of care and the neighbour principle at length. He questioned whether the two step test of *Anns* was the correct test to follow in this jurisdiction and reinterpreted the decision of the *Ward* case. He stated that:

"There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable, and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff ... "

Conclusion

The *Glencar* judgment involves an additional third step to the *Anns*' two step test. The question must be asked as to whether it is just and reasonable to impose a duty of care. Arguably, this may be no different than the policy considerations inherent in the two step test. However, it adds a third hurdle for litigants to overcome. The *Glencar* judgement is in line with the approach favoured by the English courts.