Caparo Test and the Assumptions of Responsibility

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Discussion limited to:

What is meant by the Caparo test?

To what extent do you agree with how the courts examine the duty of care for public defendants, such as the police service?

Essay:

The law of tort of negligence revolves around distributing loss from the defendant to the claimant (Kinder, 2012) as well as protecting victims and alleviating disruptions caused by omissions or negligent acts (Stanton, 1994). Negligence is the most important tort. The conduct of the defendant is labelled as tort; it is its unifying factor (Blyth vs Birmingham Waterworks Co.). Other significant torts include private nuisance and defamation. The prior protects reputation, whereas the latter protects the use and enjoyment of land. Certain types of harm are caused as a result of negligence; it presents a problem for the courts because the extent of damages for compensating pure economic loss and psychiatric damage can be recovered in the tort of negligence. Lord Bridge stated that it is not sufficient for the employee to ask his employer to work on the duty of care; the scope and nature of the duty must always be explained (Caparo Industries plc vs. Dickman).

One of the components of tort laws is the duty (Kinder, 2012). It represents the duty of taking responsibility to avoid fault by taking due care (Howarth, 2006). This duty exists between a defendant and a claimant in a case where the relationship between the two falls within the category established through case laws along with the component of the duty of care (Finch & Fafinski, 2017). The common examples in this regard include employers and employees (Wilsons & Clyde Coal Co Ltd vs English), road users (Nettleship vs Weston), and doctors and patients (Barnett vs Kensington and Chelsea Hospital Management Committee). To succeed in a negligence claim, the defendant must prove that there was a duty of care from him towards the claimant, the defendant breached the duty of care, the breach caused damage which was suffered by the claimant, and the damage was material and not

too remote.

However, in the cases where the relationship between the defendant and the claimant does not fall into any category provided with the component of the duty of care established under the case law, the courts must apply tests formulated by case laws to determine if a new category can be introduced or not (Finch & Fifinski, 2017). The expansive application of tests to establish duties in novel situations must be avoided. One of the suggested safeguards in this regard is incrementalism; the cautious development of law founded on the grounds of analogies supporting situations with similar facts (Stanton, 2006). Views are mixed about the discussion of whether incrementalism is the most suitable option in this scenario. Several researchers and practitioners such as Witting (2005) have asserted that this criterion has not been helpful and successful in assisting the judges to identify new duties. The courts have consistently faced challenges when faced with novel circumstances (McGrath, 2015). This essay examines the incremental approach and critically assesses the development of the law's response to the duty of care.

Several approaches to the duty requirements have been formulated during the interpretation of the law; they have undergone both restriction and expansion. The concept of duty of care was first recognized through the formulation of the 'neighbor principle' by Lord Atkin in Donoghue vs. Stevenson. According to this principle, any foreseeable acts or omissions that are likely to injure the neighbour (or the other party in the situation or agreement) must be avoided with reasonable care (Donoghue vs. Stevenson). Subsequently, the ascertainment of sufficient relationship of neighbourhood or proximity was carried out through a two-stage test (Anns vs. Merton London Borough Council). Such steps signified the unwelcome expansion of the laws concerning negligence. The test was radically applied, which led to its overruling by the courts. Lord Oliver observed that the two-stage test did not only serve to obscure the true nature of the claim but the nature and scope of the duty as well (Murphy vs Brentwood District Council). Thus, the subsequent case laws became confused about recovering damages for material damage or pure economic loss (Horsey & Reckley, 2015).

Later, the three-stage test was introduced (Caparo Industries plc vs. Dickman). This approach required the necessity of being fair, just and reasonable, sufficient proximity, and foreseeability (Caparo Industries plc vs. Dickman). Each of these components has an analytical perspective (Witting, 2005). Nevertheless, there is criticism regarding the usefulness of this approach (Rendell, 2014). For instance, the test has been largely criticized by Lord Bingham for its failure to provide a straightforward answer to a vexed question of whether or not a party owes a duty of care in a novel situation (Customs and Excise Commissioners vs. Barclays Bank plc). Moreover, the three-stage test produces comparable outcomes (Stovin vs. Wise), the similarities of which cannot be denied (Leng, 2007). Another strong criticism in this regard has been put forward by Brennan (2015), who argued that the separation of proximity from foreseeability is the reason behind the failure of the Caparo test. Therefore, it is harder to satisfy, yet it is a positive change in the law.

Caparo's test and the assumptions of responsibility work together and act as the qualification for the

establishment of a duty of care. The assumption of responsibility addresses some vital questions: firstly, the most important question is whether the defendant had taken his first step and assumed the responsibility towards the claimant or not, and secondly, whether the claimant relied on the advice provided. It is a crucial question because it determines whether compensation should be given to redress the financial loss suffered. On the other hand, the Caparo test and duty of care are intertwined. The scope of the duty of care can be found in the Caparo Industries plc vs. Dickman. The case law has stemmed from a situation where the loss was caused by an accountancy firm due to negligently audited accounts, and the investors and shareholders sought to sue the firm (Caparo Industries plc vs. Dickman). In its ruling, the court decided the following three-stage test, also termed as Caparo test: (I) the harm caused due to the negligent acts of a party must be foreseeable; (II) there must be a reasonable proximity in the relationship between parties to the disputes; and (III) it must be just, reasonable and fair for the purpose of imposing liability. (Caparo industries plc vs. Dickman). The court ruled that the duty of care was only applicable to the shareholders and the company itself only; it does not extend to the investors (Caparo Industries plc vs. Dickman). The reason behind this court decision lies in the fact that the duty of care was owed to the company and its shareholders only; the investors were not included (Caparo Industries plc vs. Dickman). It happened because the investors lacked reasonable proximity to the advice given. Thus, it cannot be relied upon.

The Caparo test focuses on the policy considerations, and thus, the third stage is the most critical stage of them all because attention is directed to the imposition of the connection between the social norms and the process of decision-making and is diverted from factual circumstances (Witting, 2005). For this reason, an imbalance is created, as Leng (2007) argued. Moreover, the policy considerations require the law to recognize a legal relationship while concerning its social, economic and ethical implications (Brennen, 2015). Thus, denial of duty due to policy considerations becomes questionable; considering it a valid reason is controversial (Robertson, 2013). However, stressing the court to close its eyes on its decision and its manifest social consequences would be strange (Morgan, 2009).

Establishing duty categories is controversial. Several public bodies are excluded from this context. The police, when directly causing damage, have an operational liability (Rigby vs. Chief Constable or Northamptonshire). The courts have attempted to limit the scope of the duty of care in negligence among the public authorities on public policy grounds. To attain this purpose, the courts have also weighed up the rights of the claimant against the public interest as a whole. The social needs of the public authority are balanced against the defendant’s claim of compensation. Additionally, the claimant must also demonstrate that the public authority has acted beyond the scope of its duties and that the decision which caused the harm was not taken at a policy-making level but an operational level only.

As a rule of thumb, the police are responsible for fulfilling their duty of care towards the interests of the general public instead of the interests of any specific individual. The Chief Constable will be held liable for his actions in the performance or purported performance of his functions. The Chief Constable is the defendant in this situation and is considered liable for the wrong actions of the public authorities. The potential claimants include police officers as employees, third parties to a crime,

suspects and convicted criminals, informants, and victims and witnesses to a crime. The claimant must satisfy the Caparo rule to establish liability in a claim against the police. For instance, false imprisonment is a clear tort. It is the complete deprivation of liberty without legal grounds. Similarly, misfeasance in public office is a tort. It is rarely invoked in personal injury claims. The rationale behind tort and the rule of law is based on the rule of law in the context of our society and legal system.

However, this duty of care is denied in the interests of the wider community (Van Colle vs Chief Constable of Hertfordshire) unless there is a special relationship (McBride, 2016). In the process of combating crime, retreating from this key principle can lead to an undue approach (Brooks vs. Commissioner of the Police of Metropolis). Moreover, consequences of opening the floodgates have come into force in recent years; however, in case of an expansion of the acknowledged duty categories, there would be an increased risk of litigation (Brennon, 2015; Witting, 2005). There are far-reaching consequences of widening the duty requirements risks beyond individual cases. For the sake of this argument, Lord Toulson states that the established method for the courts includes an examination of the decided cases to see the extent of the law and its future scope as well as to see where the court has refrained from going (Michael vs. Chief Constable of South Wales Police). He reaffirmed the incremental approach and elaborated that the decisions must remain on a day-to-day basis in novel circumstances (Brennon, 2015).

Law has been developing in this context. However, it is a debated matter whether such development has been incremental or not. The biggest reason behind it is, as Lord Macmillan pointed out, that the categories of negligence are never exhausted (Donoghue vs. Stevenson). Based on this argument, the court prefers imposing liability through small steps despite the fact that restrictions and expansions have occurred to approaches of duty (Horsey & Rackley, 2015). The incremental approach has also been deemed as the most suitable method for the development of law by Lord Bridge, who stated that it was the time to recognize the wisdom (Caparo Industries plc vs. Dickman). A similar suggestion has been made in other cases as well (Sutherland Shire Council vs. Heyman). This approach arguably ensures a more efficient, secure legal system where the duty is identified by the courts in circumstances analogous to previous cases (Rendell, 2014; Johnston & Markesinis, 2008). However, the absence of a relevant previous case can pose a logistical issue because the duty would be denied (Horsey & Rackley, 2015). It also avoids unfair outcomes from minority claims; thus, it is impractical for today’s era. Therefore, in novel circumstances, the Caparo test remains the contemporary control mechanism.

There has been an acknowledgement of an incremental approach to the development of law in recent years. It concerns the duty of care in negligence; thus, it works on finding a duty in novel situations by learning from past mistakes. The focus remains on solidifying a single test. The Caparo test has widely been accepted as a culmination of various approaches to duty requirements along with the evident relationship between the two (Leng, 2007). Despite the fact that it aims at improving negligence laws, there are mixed views regarding its effectiveness in the real-world scenario. The test is a fairly blunt set of tools (Customs and Excise Commissioners vs. Barclay Bank plc) and, thus, is a

control mechanism (Stychin, 2012). It is the best approach for the court to tackle the duty question. Moreover, the ability of the Caparo test to determine proximate relationships and their tendency to focus on policy remains debatable. However, the over-emphasized policy considerations and the third stage are limited by the use of narrow incrementalism (Dolding & Mullender, 1996). The courts can obtain greater consistency in the development of the law related to duty of care, which will eventually lead towards the dissolution of criticism placed on the Caparo test (Rendell, 2014).

The law of tort of negligence represents the duty of taking responsibility to avoid fault by taking due care (Howarth, 2006). Duty is one of the components which exists between a defendant and a claimant in a case where the relationship between the two falls within the category established through case laws along with the component of duty of care (Finch & Fafinski, 2017). However, the expansive application of tests to establish duties in novel situations must be avoided. In this context, incrementalism is the cautious development of law founded on the grounds of analogies supporting situations with similar facts (Stanton, 2006). Views are mixed about the discussion of whether incrementalism is the most suitable option in this scenario. It is the two-stage test, whereas the Caparo is the three-stage approach that requires the necessity of being fair, just and reasonable, sufficient proximity, and foreseeability (Caparo Industries plc vs. Dickman). The two-stage process was radically applied, which led to its overruling by the courts. Lord Oliver observed that the two-stage test did not only serve to obscure the true nature of the claim but the nature and scope of the duty as well (Murphy vs Brentwood District Council). The courts have attempted to limit the scope of the duty of care in negligence among the public authorities on public policy grounds. Law has been developing in this context. However, it is a debated matter whether such development has been incremental or not. The biggest reason behind it is, as Lord Macmillan pointed out, that the categories of negligence are never exhausted (Donoghue vs. Stevenson). Therefore, in novel circumstances, the Caparo test remains the contemporary control mechanism.