Lancaster University

BA (Hons) Accounting & Finance

Year 2- 2002/2003

Law 231 Assignment

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17/01/03

Assignment Title

'Judges have been reluctant to allow economic losses to be claimed for in negligence, and have been careful to restrict the circumstances where such claims will be permitted'

Critically assess this statement with reference to the development of liability for economic loss in negligence. Support and illustrate your answer with reference to relevant case law and academic opinion.

Introduction

In this essay, I am going to discuss whether economic loss in negligence should constitute a cause of action. I will discuss this in three sections. First of all, I will explain briefly what the tort of negligence is and the development of the related law. Second of all, I will explain what the law relating to the recovery of economic losses is and what types of economic loss might be claimed under negligence. Final, I will bring forward my points of view on whether there is a duty to avoid causing foreseeable economic loss.

The tort of negligence is where someone's carelessness, therefore, failure to exercise the degree of care considered reasonable under their circumstances, resulting in an unintended injury to another party.

In a normal tort case involving a claim of negligence, the claimant must prove three things. The onus is, therefore, on the claimant to prove the negligence of the defendant on the balance of probabilities.

1. **The existence of a duty to take care which was owed to him by the defendant.**

2. **Breach of such duty by the defendant.**

3. **Resulting damage to the claimant.**

Donoghue v Stevenson [1932] AC 562 is a classical case in the modern tort of negligence. It effectively created the modern tort of negligence. Lord Atkin laid down a general applicable test to determine when a defendant would owe a duty of care. He stated: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injury your neighbour'. As can be seen from this statement, the whole statement is dominated by the concept of reasonableness and Lord Atkin actually defined a reasonable man as the man on the 'Chapham omnibus' – a purely hypothetical observer imbued with simple reasoning faculties. In practice, of course, it is down to what the judges consider to be reasonable.

I totally agree with these two statements which I mentioned above. In many circumstances there should be no problems. For example, a motorist owes

a duty of care to other road-users due to the fact that a motorist is foreseeable that his negligence may injury road-users. But what happens, for example, Anns v London Borough of Merton [1977] 2 ALL ER 492. In this case, the claimants held a lease of a block of flats built in 1962. Later, considerable settlement caused cracks and the tilting of floors. The claimants blamed the builders and also the local council because it was alleged that the council had not inspected the flats during building as the by-law required, so their shallow foundations were not detected. The Lordships found that the local authority had a duty of care to claimants and made general comments on the duty of care, and this new test was laid down. However, it is doubtful whether the local authority had foreseeability for the damages caused to the claimants. In addition, they have no sufficiently close relationship which would justify imposing s duty of care. In fact, the test from this case was rejected by the House of Lords in Caparo Industries plc v Dickman and Others [1990] 2 WLR 358, which decided that in the future the law should be developed 'Incrementally' and that in any new situation, there had to be:

1. **Foreseeability that the negligence would injury the claimant.**

2. **A sufficiently proximate relationship which would justify imposing a duty of care.**

3. **'Just and reasonable' is most important in all circumstances.**

This approach was approved in Murphy v Brentwood District Council [1990] 2 ALL ER 908 which overruled the Anns case and decided that local authority building inspectors did not owe a duty of care to local residents when faults developed in buildings due to the negligence of the inspector who had not properly supervised the erection of the building.

An area with some difficulties, and in which there has been much development, is in the field of economic loss. Is there a duty to avoid causing foreseeable economic loss? The position is as follows:

1. **Negligent misstatements. Broadly speaking, a person who makes a careless statement which causes economic loss to a claimant with the area of his foresight may be liable to compensate that claimant for economic loss. In Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 ALL ER 575, the appellants asked defendants for a reference as to the creditworthiness of a third party. The defendants said that the that third party was respectably constituted and considered good, although they said to appellants that these was bigger figures than they had seen and also that reference was given in confidence and without responsibility to their part. However, the third party went to liquidation and the appellants lost over £17,000. The appellants sued the defendants for the amount of the loss, alleging that the defendants had not informed them sufficiently about the third party before writing the statement, and were therefore liable in negligence. At last, the House of Lords ruled that defendants were not liable for this loss due**

to the use of a disclaimer of liability. However, the court pointed out that if not for the disclaimer clause, the action would have succeeded. Therefore, before this case, the courts could not award damages for pure economic loss, but the position was then altered in this case as a misleading credit reference led to loss being suffered by reliance on it.

2. **Physical injury. Damages for economic loss may be awarded if there is foreseeable physical injury to the claimant or his property. In Spartan Steel and Alloys Ltd v Martin & Co Ltd [1972] 3 ALL ER 557, while digging up a road, the defendants' employees damaged a cable which the defendants knew supplied the claimants' factory. The cable belonged to the local electricity board and the resulting electrical power failure meant that the claimants' factory was deprived of electricity. The temperature of their furnace dropped and so metal that was in melt had to be poured away. Furthermore, while the cable was being repaired the factory received no electricity so it was unable to function for 14 hours. The Count of Appeal allowed only the claimants' damages for the spoilt metal and the loss of profit on one 'melt', due to the fact that the loss of profit on this 'melt' had closed relationship with damages of the spoilt metal. On the other hand, the Court of Appeal refused to allow the claimants to recover their loss of profit which resulted from the factory being unable to function during the period when there was no electricity because it was too remote to be a head of damage, not because there was no duty owed to claimant or because the loss suffered in this case was not caused by the negligence of defendants. In Weller & Co v Foot and Mouth Disease Research Institute [1965] 3 ALL ER 560, the defendant carried out experiment on their land concerning foot and mouth disease. They imported an African virus which escaped and infected cattle in the vicinity. As a consequence, two cattle markets in the area had to be closed and the claimants, who were auctioneers, sued for damages for loss of business. In this situation, the defendants owed no duty of care to the claimants who were not cattle breeders, and had no proprietary interest in anything which could be damaged by the virus. The damages to the defendants were only losses of business rather than their persons or property. The damages in this case was the same as the loss of profit which resulted from the factory being unable to function during the period when there was no electricity in the case of Spartan Steel and Alloys Ltd. The court called it "pure economic loss", because they were not unconnected with physical damage to the claimants' persons or property. We can see from the two cases above that pure economic loss almost cannot be recovered.**

3. **Junior Books Ltd v Veitchi Co Ltd [1982] 3 ALL ER 201 case. This was a special case in this area. Junior Books (J) owned a building. Veitchi (V) were flooring contractors working under a contract for main contractor who was doing work on the building. There was no privity of contract between J and V. It was alleged by J that faulty work by V left J with an unserviceable building and high maintenance costs so that J's business became unprofitable. The House of Lords decided in**

favour of J on the basis that there was a duty of care. V were in breach of a duty owed to J to take reasonable care to avoid acts or omissions, including laying an allegedly defective floor, which they ought to have known would be likely to cause the owners economic loss of profits caused by the high cost of maintaining the allegedly defective floor and, so far as J were required to mitigate the loss by replacing the floor itself. Therefore, claimants could cover economic loss which was not parasitical because in that case there was no physical injury to the claimant or his property, but merely faulty work.

However, I think it would be unwise to assume that injury to person or property is not necessary anymore. There was a very close proximity in terms of foresight of injury between the parties in Junior Books and as a matter of public policy it may still be necessary to restrict liability in cases such as Weller above where liability was potentially endless. There have, in more recent times, been a considerable number of restrictions placed on Junior Books almost confining it to its own facts. For example, in Simaan General Contracting Co v Pilkington Glass Ltd [1988] 1 All ER 345, the plaintiff (S Ltd) was the main contractor to construct a building for a sheikh. The erection of glass walling together with the supply of the glasses were subcontracted to an Italian company (Feal). Feal bought the glass from the dependant (P Ltd). The glass units should have been a uniform shade of green but some were various shades of green and some were red. The sheikh did not pay S Ltd. It chose to sue P Ltd in tort rather than Feal in contract for its loss. In this case, there was no physical damage; this was purely a claim for economic loss and the court held that P Ltd had no duty of care and S Ltd's claim failed. As can be seen that Junior Books has been the subject of so much analysis and discussion that it cannot now be regarded as a useful pointer to any development of the law in the aspect of economic loss, it is also difficult to see that future citation from Junior Books can ever any useful purpose.

However, in my opinion, the House of Lords should not allow the claimants to recover economic loss in Junior Books due to the fact that this is a pure economic loss. In the future, there will be a lot of cases which are very similar with Junior Books. In these circumstances, should we use the doctrine of judicial precedent to allow the claimants to recover their economic losses? If yes, it will breach the principle of negligence for economic loss in part 2 I discussed. i.e. an economic loss which is only connected with physical damage to the claimants' persons or property can be recovered (It has the different situation with Negligent misstatements). If the answer is no, it will cause that an unfair situation to take place. A lot of claimants will ask why only Junior Books can recover the economic loss.

Conclusion

In my points of view, I totally agree that there must be a duty to avoid causing foreseeable economic loss; judges should allow economic losses

to be claimed for in negligence. However, we must carefully restrict the circumstances where such claims for economic loss. First, the courts could only award damages for pure economic loss in the area of careless or negligent misstatement. Second, in other situations, the claimants can only recover economic loss when the economic loss is connected with physical damage to the claimants' persons or property. The courts should restrict the application of Junior Books as precedent because judges do not limit the award of damages to this kind of circumstance. It is possible to use the law of contract to deal with the third-party claims under the Contract Act 1999. There is no problem about recovering economic loss in contract claims.

Although my opinion may be criticised for its rigidity and its restrictions for the proper development of law in this area, I do believe that it can ensure the consistency of the law of torts.