The Role of Policy in Tort

I. Introduction

A tort is that branch of law which provides for redress of a legal wrong . A tort may be intentional, as in battery, invasion of privacy and defamation. It could also be unintentional as in the case of negligence. A duty of care is the springboard for a tort case. The general rule is that where there is no duty of care, there is no right to claim. In Bourhill v Young (1943)[1], the court ruled that a passer-by who came to the scene of a motorcycle accident had the moral duty to help the victims by notifying the appropriate authorities. Where the passer-by failed to exercise that moral duty, he/she could be held liable for damages for particular harm or loss suffered by the victim. The duty of care therefore is a requirement for policy tool in enforcing the law of tort[2].

When can we say that a duty of care exists? In the case of Donoghue v Stevenson (1932)[3], Lord Atkin established “The Neighbour test” to find out if there exist a duty of care. According to the doctrine of this case, one must take a reasonable care to avoid acts or omissions that you can reasonably foresee as having a negative effect or otherwise injurious to your neighbours. In defining neighbours, Lord Atkin said “The answer seems to be persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called to question." In view of this definition, we can surmise that the liability in tort arises where the person committing or omitting the act can directly

[1] 2 KB 669
[2] Dorset Yacht Co Ltd v Home Office (1970) AC 1004
[3] AC 562

affect or influence the current situation of the other party. Where the act of the person is intentional or is specifically directed on the person, there is intentional tort but where the omission or commission of an act was unintentional but had direct adverse effect on the person subjected to the act, then we have a tort of negligence.

Proximity is one of the key factor in establishing a duty of care. The case of Anns v Merton London Borough Council (1978)[4], established two stages of test. In the case of Anns V Merton London Borough Council, the council declared that a building founding was sound where in fact it was not. According to Lord Wilberforce in the Anns case, 1) a duty of case a prima facie duty of care exist where foresseability of harm and sufficient relationship of proximity and neighborhood exist 2) the second stage in establishing a duty of care involves the absence of policy reasons to deny a duty of care. In deciding the case of Anns, Lord Wilberforce submitted that on the basis of the duty of care, the Council owed that duty to the owners and occupiers of the houses. The nature of the duty presented in this case is in the exercise of the Council's power to regulate building structures.

Another set of test was also established in the case of Caparo v Dickamn (1989)[5] where the Court ruled that the test of the existence of the duty of care involves the following questions *"(1) was there foreseeability of harm? (2) Does a sufficiently proximate relationship exist between the parties? (3) Is it just, fair and equitable to impose a duty?"*

[4] AC 728
[5] 2 WLR 316

The rules established in Caparo v Dickman was latter on favoured over the Anns v Merton ruling in the case of Murphy v Brentwood District Council (1991)[6] and in the case of Marc Rich & Co v Bishop Rock Marine Co (1995)[7] where the court ruled that *"the classification society were only advisors, as they were not paid there is therefore no proximity."* However, in the case of Spring v Guardian Assurance plc (1994)[8] where an employer issued a job reference to the claimant stating that he is "dishonest" and describing him as "a man of little or no integrity", the Court found the employer to be liable for negligent misstatement. According this case, the *"duty of care arises by reason of an assumption of responsibility by the employer to the employee in respect of the relevant reference"*.

II. Proximity, Foreseeability and Public Policy

The question of proximity of relationship and foreseeability of the harm has always been a subject of varied opinions in the rulings. In the case of Hill v Chief Constable of West Yorkshire (1988)[9], Lord Keith said "*some further ingredient is invariably needed to establish the requisite proximity of relationship.*" Each case presented in Court has different circumstances that need to be looked into carefully before the Court can conclude that indeed there is a justiciable circumstance present. The ingredients of the case should be analysed carefully as not all circumstances of proximity would warrant liability. In ascertaining whether or not there was negligence that eventually caused harm

[6] 1 AC 398
[7] 3 ALL ER 307
[8] 3 ALL ER 129.
[9] 2 All ER 238

on the claimant, it is into enough that there was proximity of relationship between the parties.

In Hill v Chief Constable of West Yorkshire (1988), the father of the victim sued the police for not finding the rapist/killer who is known as "the Yorkshire ripper". The father alleged that the police had known the existence of the killer for sometime and the police failed to capture the criminal before it killed his daughter. The Court ruled in this case that although there was proximity of relationship between the police, the victim and the criminal in this case, "*there was no liability for the policy reasons of limiting the Police and the Police exercising their powers in a defensive way.*" [10]As Lord Keith stated "*In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind*".[11] Furthermore, it must be noted that in this case, the victim was considered as one of the 2 million women living within the place who are potential victims of the "Yorkshire Ripper" so proximity is hard to prove in this case. There was no showing that the victim was especially at risk or that the threat on the person of the victim was specifically greater than those other women in the area that she would require special police attention. As ruled in the case of X v Bedfordshire CC (1995)[12], there is no special duty to protect a person who is not in the care of the authorities at the time the crime was committed. According to Lord Browne-Wilkinson in his statement on this case, "*courts should proceed with great care before holding liable in negligence those who have been charged by parliament with the task of protecting society from the wrongdoings of others*".

[10] Hill v Chief Constable of West Yorkshire (1988) 2 All ER 238
[11] Ibid
[12] 3 ALL ER 353

The Court has decided many cases where the 'public interest immunity' of the police and other public services officers has been established. Public policy had been stated as the basis for immunity. Often times, public policy is considered either together with proximity[13], or as the sole ratio[14] in deciding cases involving the police and other public services officers. The same principle was applied in the case of X v Bedfordshire County Council (1995) [15] in relation to acts of public authorities. In the case of Phelps v Hillingdon Borugh Council (1999)[16] the Court made a qualification to the rule of immunity where it stated that the local authority educational psychologist has no liability because she had not "assumed responsibility" for a student referred to her by the teaching staff of the school. In this instant case, the school psychologist failed to diagnose the student as having dyslexia.

Immunity towards officials' actions of the police and other public service officers is not absolute and it could be defeated by competing public interest. In the case of Swinney v Chief Constable of the Northumbria Police (1996)[17], it was said that there is duty of the police towards informants who specifically asked that their identity be kept a secret[18]. In other words, where there is a clear showing that the officer owned a duty of care towards a person and failed to exercise such duty of care whether intentionally or unintentionally, that officer cannot hide behind the mantle of the immunity of police

[13] Alexandrou v oxford (1993); Ancell v McDermott (1993) a All ER 355
[14] Osman V Ferguson (1993) 4 All ER 344
[15] 2 AC 633
[16] 1 All ER 421
[17] 3 ALL ER 449
[18] Note that the claim in this case failed on the facts where it was found that the police did not fail in its exercise of their police. See Swinney v Chief Constable of Nothumbria (No. 2) 1999 The Times, 25 May 1999

officers and public service officers. Public interest and public policy so dictates that negligent actions, which result to damages to a person or entity, are actionable wrongs.

When does an actionable wrong arise against police officers and other public services officers? In the case of Kirkham v Chief Constable of Greater Manchester(1990)[19] the police officers were held liable for failing to advise the prison authorities that a prisoner was in the risk of committing suicide. According to this, the fact that the police officers had knowledge of the mental state of the prisoner made them liable for negligence in failing to inform the prison authorities of the suicidal tendencies of the prisoner who was mentally unwell. In the case Reeves v Metropolitan Police Commissioner (1999)[20] the doctor attending the prisoner confirmed that the prisoner has suicidal tendencies although he may not be classified as mentally ill. The Director of Prisons informed the police about the situation and issued a directive that the 'drop-down service hatch' should be left open when the cell is occupied. The police forgot to close the service hatch one day and the prisoner committed suicide by putting his shirt through the spy hole in the service hatch. The Court ruled that since the prisoner is of sound mind, the police have *'complete"* over the prisoners therefore, the '*special danger'* of prisoners committing suicide rendered the police liable. The court did not distinguish whether the prisoner in metally unwell or of sound mind in its decision as the main factor was the control over the acts of the prisoner to inflict hard against themselves. Where the element of control is present, then, there is a duty of care on the part of the police. As compared to the Hill case, the danger of harm is foreseeable in this case and the relationship is proximate, meaning, there was a specific person who is at risk and there is a specific

[19] 2 QB 253;
[20] 3 ALL ER 897

group of officers who have personal knowledge of such risk. In the Hill case, the information was very general – in essences, there could be no liability to the public at large[21].

Now, let us compare the judgment of the Court is the case Capital & Counties plc v Hampshire CC (1997)[22] and the case of John Munroe v London Fire and Civil Defence Authority (1997)[23]. In the case of Capital & Counties plc v Hampshire CC , the Court ruled that it is not the part of the general duty of the fire brigade to answer phone calls the thus, *'[I]f therefore they fail to turn up or fail to turn up on time because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable'*.[24] The Court further explains that even if the commandeer overseas the firefighting, firefighters do not assume responsibility of the event. However, the fact they firefighters do not assume responsibility for the fire as a whole, they have the responsibility not to make it worst. In the case at bar, a fireman turned off a sprinkler during a fire by mistake. The act here was unintentional but it inadvertently made the fire worse. The Court ruled that mistake in judgment on the part of the fireman constitute a tort of negligence as firefighters have the duty not to exacerbate a situation. The fact that a firefighter is trained to respond to such emergency situations as fire would naturally equip him/her with the necessary knowledge to judge a situation correctly. Failing to assess the situation properly when one has the chance to make sound judgments constitute a tort of negligence. There is proximity of relationship between the cause and

[21] Hill v Chief Constable of West Yorkshire (1988), 2 All ER 238
[22] QB 1004
[23] 2 All ER 865
[24] Capital & Counties plc v Hampshire CC (1997) 2 All ER 865

effect of the action and the consequences of a faulty decision are foreseeable, therefore, liability is present.

On the other hand, in the case of John Munroe v London Fire and Civil Defence Authority, the fire Brigade though that the fire was already totally subdued when it left the scene. The team did not notice that there was still smoldering debris, which eventually caught fire and destroyed the building nearby. The Court ruled in this case that the firefighters were not liable as there was no negligence on their part in performing their duty. There was no proximity of the ensuing damage to the acts of the fire brigade as there was no specific act which can be attributed to negligence as in the case of Capital & Counties plc v Hampshire CC. Public policies deny that existence of a duty of care towards specific property owners as the duty of firefighters is towards the general public. There was "*no duty of the fire brigade to the claimant as they did not assume responsibility.*"[25] The assumption of responsibility is very important in determining proximity of relationship between parties for duty of care to operate. To illustrate this point, take the case of Kent v Griffith (2000)[26] where an ambulance was delayed in reaching the patient. Note that in the case of the firefighters, the duty was directed into the public at large and not to a specific person or persons thus proximity of relationship may be hard to pin down. In Kent v Griffith, the fact that the hospital informed the scene of the accident that the ambulance is on its way means they have assumed the responsibility that the ambulance would indeed get there in time. Unlike the case of the firefighters, the promise to deliver a service in the case of Kent v Griffith was made to the

[25] John Munroe (Acrylics) Ltd. v. London Fire and Civil Defence Authority and Others (1997) 2 All ER 865.
[26] 2 ALL ER 474

claimant alone and not to the general public thus, where the ambulance failed to arrive on time, the party affected is the claimant alone. Note that these cases have been decided based on policy decisions of the Court. The rationale behind such decisions as in the firefighters is that the fact that fires are often volatile, hard to control and involves a great number of people and properties, where the court would act and pin down the duty of care on firefighters, this would result in numerous cases with large number of claimants. The same policy principles were applied to the case of Hill v Chief Constable of West Yorkshire (1988), as the case involves the police's duty to the general public and not to a specific person or persons who are under police special protection.

III. Conclusion

Given the numerous cases decided by the English Court, we can now surmise that the policies affects the decisions of the court. These policies are imbued with public interest aspects that confer immunity over the public services officers in the performance of their duty. Assumption of responsibility by the public service officer should be proven before the duty of care can be attributed to the officer. In the absence of an assumption of responsibility, there can be no duty of care. However, we should always note that where the officers did not assume responsibility, they have the inherent responsibility not to make a situation worst that it should be. The fact that an officer did not assume responsibility in the event does not negative his/her responsibility for specific negligence that aggravates the situation.

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