

OBLIGATIONS IN CONTRACT, TORT AND EQUITY: RELIANCE, RESPONSIBILITY, AND THE MORAL DIMENSION: ESSAY IN HONOUR OF SIR JOHN MCGRATH

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I publish this essay to honour the memory of Sir John McGrath. I sat with Sir John for a number of years, first in the Court of Appeal and then in the Supreme Court. Professional respect soon turned into friendship. While we did not always agree, I always respected his views. They were carefully considered and fully researched. John gave detailed consideration to the opinions of others but was very much his own man when it came to his ultimate conclusion.

His innate caution in departing from the well-trodden path was a valuable contribution in a final appellate court. Stability is an important feature of any legal system. And John provided that quality, but not at the expense of innovation when that was clearly desirable and could be achieved in a principled way.

John's passing, so soon after his retirement, was a great loss, not only to his wife and family, but also to his many friends and colleagues, both in the law and beyond.

I INTRODUCTION

In this essay I will discuss two matters that influence decisions whether a duty is owed in contract, tort and equity. The first is whether there exists a relationship between the parties that gives rise to reasonable reliance by one party on the other (the reliance dimension). The second is when and how moral responsibility should lead to legal liability (the moral dimension).

Our moral views are influenced by the society into which we are born and by the instruction and example we receive from parents and teachers. But deep down most of us are born with an intuitive

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sense of what is fair. The young child who cries out "that's not fair, it wasn't my fault" is responding to an instinctive sense of justice. There is nothing wrong when judges, with all their training and experience, have the same instinctive reaction. But care must be taken lest that reaction be adopted without mental discipline.

In contract cases the position is comparatively simple. The contract creates the necessary relationship. Contractual duties are voluntarily assumed and are reasonably relied on by other contracting parties. A moral duty to keep one's word leads comfortably to a legal liability to do so.

In cases of tortious negligence the law may impose a duty of care, subject to policy considerations, when the relationship between the parties morally justifies reliance by one party on the other to take reasonable care. The proximity and policy inquiries help to determine in a disciplined way whether a moral duty should be reflected in legal liability.

In equity, fiduciary duties are recognised in cases where the relationship between the parties is such that one party is morally entitled to rely on the other to eschew self-interest and to act with loyalty to the first party. That entitlement gives rise to a moral duty. The question is whether the moral duty should become a duty enforceable in equity.

In all three cases a relationship that gives rise to reasonable reliance by one party on another and hence a moral duty in that other, leads, or can lead, to liability in law, if the other party acts in breach of the relevant duty.

II CONTRACT

I will examine the position in contract first, because contract is the simplest of the three areas. In earlier times the common law (as opposed to equity) normally recognised duties of care and duties of other kinds only when the parties were in a contractual relationship. This was reflected in the old common law writ of "assumpsit", whereby the plaintiff pleaded that the defendant had "assumed" (undertaken) the asserted obligation.

Assumpsit is Latin for "he has assumed", and the writ was used historically for obligations arising *ex contractu* (in contract) rather than *ex delicto* (in tort). In the case of tort, the writ was traditionally based on trespass ("*vi et armis*" for direct physical harm and "on the case" for other harm of a less direct kind). The underlying basis for the writ of assumpsit was a promise, either express or implied, that had been broken.

It has been inherent in the common law of contract from Roman times that the state, through its legal system, will recognise and enforce duties that contracting parties have voluntarily assumed. The parties are then both morally and legally "bound" to each other in the sense of being obliged to do what they have agreed to do. The word obligation itself comes from the Latin "*obligare*" meaning to be bound or tied to someone or something. The expression "My word is My bond" has for a century

been the aspirational motto of the London Stock Exchange, reflecting the oral traditions of that institution.¹

It was not until 1932, in *Donoghue v Stevenson*, that it was finally accepted by the House of Lords that a duty of care could exist, in the tort of negligence, between parties who were not in a contractual relationship.² And that, of course, was in a case involving physical harm. Mrs Donoghue was entitled to rely on Mr Stevenson, the manufacturer of the ginger beer, to have taken reasonable care in its preparation, even though it was bought for her by a friend and she therefore had no contract with the shopkeeper in his cafe in Scotland.

Then in 1963, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, the House of Lords accepted that duties of care in tort to guard against economic harm could exist outside contract.³ The party seeking the credit reference from the bank was, absent the latter's disclaimer, entitled to rely on the bank to take reasonable care in giving the reference. And detrimental reliance on the reference would have given rise to an entitlement to damages.

The conceptual basis for imposing legal duties in contract is simple enough. They are, strictly speaking, not imposed at all. The parties have assumed them and the law is doing no more than recognising that fact and enforcing a voluntarily assumed obligation.

III TORT

But when duties of care came to be recognised by the common law outside contract, through the law of tort, another relational basis had to be identified for imposing the duty. Lord Atkin famously founded his Lordship's approach on the metaphorical relationship of "neighbourhood": "Who, then, in law is my neighbour?" his Lordship asked.⁴ Lord Atkin's question and his Lordship's concept of neighbourhood came from the Christian duty to "love thy neighbour as thyself", and the Pharisee's question: who is my neighbour? (see the parable of the Good Samaritan: Luke 10:25–37).

The duty to love your neighbour is, in moral terms, capable of applying very widely; everyone is potentially your neighbour. But in legal terms, the inherent duty to take care applies only to particular people or classes of people with whom the negligent party is in a sufficiently close relationship. The concept of neighbourhood in law developed into the concept of "proximity". This was a reflection of language first used by Sir William Brett MR in *Heaven v Pender*.⁵ This usage was adopted in the

1 See "Our History" London Stock Exchange <www.londonstockexchange.com>. "My word is My bond" is translated from "*Dictum Meum Pactum*".

2 *Donoghue v Stevenson* [1932] AC 562 (HL).

3 *Hedley Byrne Co & Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

4 *Donoghue v Stevenson*, above n 2, at 580.

5 *Heaven v Pender* [1883] 11 QBD 503 (CA) at 509.

speeches in *Hedley Byrne* where proximity was the terminology used, rather than neighbourhood. Whether there is sufficient proximity depends very much on the nature and characteristics of the relationship between the parties and whether, in that light, it is reasonable for one party to rely on the other to take care.

The law's cautious approach to imposing liability for pure omissions arose largely on account of the fact that in pure omission cases the relationship (or lack of relationship) between the parties normally militates against recognising an affirmative duty to act. The notion of a "pure" omission is a reflection of the fact that there is no relationship between the parties making it appropriate to require one party to act, even though failure to do so is likely to cause the other party foreseeable harm.

A moral duty to help one's neighbour does not, in itself, give rise to a legal duty. The law does not see any reasonable reliance in this situation. As Lord Devlin said, in a lecture given to the Medical Society of London in 1960, the good Samaritan was never a person much esteemed by the law.⁶ The priest and the Levite who passed by on the other side were in breach of no legal duty. The Good Samaritan who stopped to help the man in trouble on the road from Jerusalem to Jericho was fulfilling a moral not a legal obligation.

The breadth of the concept of neighbourhood in moral terms meant that Lord Atkin had to confine his concept of neighbourhood in law. His Lordship did so by reference to the person harmed being so closely and directly affected by the negligent party's conduct that the negligent party ought to have had the victim in contemplation as likely to be affected by it. Omissions can, of course, give rise to liability in negligence, but before that is so, the parties must be in a pre-existing relationship on the basis of which the negligent party is at least morally required to act.

IV EQUITY

In equity, the concept of a fiduciary duty has only comparatively recently been applied outside the traditionally recognised relationships, such as solicitor and client, trustee and beneficiary, principal and agent and business partners. In identifying what ad hoc cases justify the recognition of a fiduciary duty the courts have again focused closely on the relationship between the parties. That relationship must be such that one party is entitled to rely on and to place trust and confidence in the other. The other then owes duties of loyalty and denial of self-interest to the first party. The question whether party A is entitled to rely on party B in this way involves both moral and legal considerations.

V TORT OF NEGLIGENCE: PROXIMITY GENERALLY

Whether parties in a novel situation are in a relationship of sufficient proximity to justify imposing a duty of care in tort is generally the most difficult issue in the law of negligence. A finding of sufficient proximity does not necessarily lead to imposing a duty of care. There remains the policy inquiry. But, as I have said judicially, I consider a finding of proximity should prima facie lead to a

⁶ See Lord Devlin *Samples of Lawmaking* (Oxford University Press, London, 1962) at 90.

duty of care. In such a case policy issues must clearly outweigh the proximity finding for a duty of care to be denied. If a person who is in a sufficiently proximate relationship with another, negligently causes that other foreseeable harm, the community will generally expect what is then seen as a moral obligation to be recognised as a legal obligation, unless there are clear reasons why that should not be so.

What then are the ingredients of the proximity inquiry? I must confess at the outset that the concept of proximity, in itself, really states a conclusion rather than giving much guidance as to how to reach the conclusion. Lord Atkin spoke of closeness and directness in his Lordship's formulation of neighbourhood in law; to be a neighbour in law a person must be "closely and directly affected" by the negligent conduct of the potentially liable party.⁷

These are important concepts, but in the end, it is difficult to deny that an intuitive sense of whether the defendant *should* be responsible to the plaintiff for the harm caused comes into the equation. That necessarily involves a moral dimension. Lord Atkin himself acknowledged this when his Lordship said that liability for negligence is based on a general public sentiment of moral wrongdoing for which the offender must pay.⁸ But moral wrongdoing does not necessarily lead to legal responsibility. That would be conceptually too imprecise and would risk casting the net too wide.

The existence of a moral dimension is a recognition of the fact that the law of negligence must command general public support. Tort law performs a normative function. Community norms and societal perceptions of what is fair and reasonable play a part in deciding whether a duty of care should exist in a novel situation. It is neither possible nor desirable to hide the fact that the courts are making an informed value judgment. In that respect the judge or judges are the representatives of the community and make their judgment on behalf of the community. To achieve coherence and a measure of predictability the necessary judgment must be based on analysis and principle as well as moral intuition.

A legal duty is a normative recognition of what the community regards as fair, just and reasonable. Analogous situations that have already been the subject of previous duty of care decisions will obviously play a significant part, as will other indicators to be found in the particular relationship. But, in the end, the courts must decide whether moral responsibility should become legal liability. It is most unlikely that a duty of care will be found to exist in the absence of an intuitive sense of moral responsibility. In this respect I am reminded of what Lord Coleridge CJ said in *The Queen v Instan* (a case involving manslaughter at common law); that not every moral obligation gives rise to a legal duty; but "every legal duty is founded on a moral obligation".⁹

7 *Donoghue v Stevenson*, above n 2, at 580.

8 At 580.

9 *The Queen v Instan* [1893] 1 QB 450 (Cr C R) at 453.

This is not "seat-of-the-pants" jurisprudence. It is a recognition of reality. New Zealand law has developed the analytical framework of proximity and policy to assist in making duty of care decisions. Under each heading there are indicators that have been found useful in particular cases. I will return to them later. While the proximity inquiry is focussed on the relationship between the particular parties, the policy inquiry is focussed on matters external to the particular relationship and on the coherence of the law generally. The two aspects are not self-contained and may overlap.

It is important, when deciding whether a duty of care should be imposed, to bear in mind what form of harm the duty is designed to prevent. A person is not liable in tort in the abstract. A person is, or is not, liable *for* the particular loss or harm for which the plaintiff is suing. There is no tort unless the negligence has caused qualifying harm. The nature of the harm in suit is always relevant to whether the defendant owed a duty to take care to prevent it. Guarding against physical harm has traditionally had a higher claim for recognition than guarding against economic harm.

In New Zealand, physical harm is confined to property damage because of the ACC bar on claims for personal injury.¹⁰ But in cases involving economic harm resulting from property damage the two elements cannot rationally be separated. The fact that the harm is "purely" economic (that is, not consequent on property damage) is not an impediment to finding a duty of care but it invites caution, as does the fact that the cause of the harm is negligent words rather than negligent conduct. Negligent words can have a widespread impact, whereas the impact of negligent conduct is likely to be more confined.

In the end, whether a duty of care should be imposed is influenced by all the features of the particular case both as regards proximity and as regards policy. Those on each side must be weighed and a judgment must be made as to where the balance lies. All this is rather trite and general and does not give much assistance in making individual decisions.

Those who lament the inherent lack of certainty and predictability are raising an age-old issue. But there are some areas of the law where it is not possible to give more than general guidance. There are always situations at the margins where different minds can reasonably come to different conclusions. That is why we sometimes have dissenting judgments and reversals on appeal! This does not mean the law is deficient. The uncertainty is inherent in the diversity of human affairs and the perceptions of different minds.

VI EQUITY: FIDUCIARY DUTIES GENERALLY

Similar issues arise in deciding whether a fiduciary duty should be recognised in a new ad hoc situation. Answering the question whether one party is *entitled* to place trust and confidence in the other, again states a conclusion rather than explaining it. In answering the question the court has to

¹⁰ Accident Compensation Act 2001, s 317.

examine very closely all relevant aspects of the relationship between the parties. There is no substitute for that and the unpredictability this again can sometimes cause.

We can however identify particular factors that are likely to influence the outcome. In doing so it is helpful to consider why the law has developed the concept of a fiduciary duty. What purpose is such a duty designed to serve? The duty was first recognised by the courts of equity and applied to certain accepted relationships. That background shows that the purpose of the duty is underpinned by the traditional role of equity as the keeper of consciences. That role was and still is significantly influenced by moral considerations.

A fiduciary duty is recognised when equity finds it necessary to say to a party: "you cannot in all good conscience do that". This idea underpins the duty that is inherent in the traditional fiduciary relationships. These relationships are inherently of a kind, both morally and legally, that requires one party to be selflessly loyal to the interests of another party. A fiduciary duty represents a kind of trusteeship. It makes one party a trustee for the other in the sense of being the guardian of the other party's interests to the exclusion of self-interest.

When the relationship is not inherently of a fiduciary kind it is necessary to determine whether the features of the relationship as a whole, or as regards a particular aspect, are such that it is appropriate to require the same standards. The first point, and it is a key one, is whether the ad hoc relationship is such that one party can properly be regarded as having undertaken, either expressly or implicitly, to act selflessly in the interests of the other party, either generally or in respect of a particular aspect of their relationship. If that is so, moral and also legal considerations will usually require the party to fulfil their undertaking. For that reason a fiduciary obligation will seldom be recognised in an ad hoc situation unless it has been expressly or implicitly undertaken. There is a closer analogy here with contract than with tort. In contract obligations are undertaken; in tort they are imposed.

The introduction of fiduciary obligations into the commercial arena has been controversial and has proved challenging for the courts to administer. Commercial parties are normally entitled to be self-interested. They are not normally required, even in moral terms, to put the interests of others first. But there can be occasions in commerce when one party has expressly or implicitly undertaken to do so and thereby assumed a moral obligation. The undertaking does not have to be contractually enforceable. If it is, there is no need to resort to equity.

If one party has relied on another's express or implied fiduciary undertaking and suffered harm from its breach, equity requires the party in breach to compensate or otherwise account to the other party. A fiduciary duty is not imposed, it is enforced because it has been accepted, expressly or implicitly, and equity requires the conscience of the errant fiduciary to recognise that fact.

Whether a party has undertaken a fiduciary duty expressly is not likely to be difficult to determine. It is when the undertaking is said to have been undertaken implicitly that difficulties will often arise. In that situation all the relevant features of the relationship and its incidents must be examined. And

in these circumstances, as so often in the law, there is no substitute for the exercise of judgment. The best the law can do is to set out general principles upon which individual cases will turn. Judge-made law has always proceeded in this way. Reasoning by analogy from previous cases is a well-accepted technique. And if there is no close analogy, courts have always had to work from general principle, either as already laid down or as formulated for the purpose.

VII RELIANCE AS THE UNIFYING THEME

As I suggested at the outset, there is one concept that is helpful in identifying whether obligations should exist in contract, tort and equity. It is the concept of reasonable reliance. With reasonable reliance will usually come a moral obligation to recognise and fulfil that reliance. In our complex society we all rely on others to a greater or lesser extent in many of our daily interactions. The law must decide whether that reliance is such as to give rise to legal consequences, if the other person has been careless or disloyal and thereby caused us harm.

Let us take contract first. When parties are in a contractual relationship it is perfectly reasonable for each party to rely on the other to perform their contractual obligations. That is the whole point of having a contract. The primary duty in contract is to perform; to do what you have promised. A party defaulting on performance has a secondary duty to provide compensation for that default. The whole foundation for both the primary duty and the secondary duty is that of reasonable reliance. Commerce could hardly be carried on if contracting parties could not rely on each other to perform their contractual obligations. The law reinforces that reliance.

The position with reliance in the tort of negligence is conceptually similar. Whether there is sufficient proximity between the parties depends very much on whether it is reasonable for one party to rely on the other to take care. This applies to both physical conduct and to oral and written statements. If, on a social occasion, I offer the view, having no particular expertise in the subject, that such and such an investment would be a good one, it would hardly be reasonable for the person to whom I am speaking to rely on my statement so as to hold me liable if my statement was negligently made. If, however, I have some expertise or knowledge in the subject, and my advice is sought in more formal circumstances, but short of contract, it may well be reasonable for reliance to be placed on my taking care in what I say about a proposed investment or other matter.

In New Zealand, with our inability to claim damages for personal injury, most negligence cases concern negligent statements causing economic loss and negligent conduct causing property damage. In these fields, in the absence of a contractual relationship, the essential question is whether the circumstances are such that it was reasonable for the party harmed by the other's negligence to have relied on the other to take care. The counterpoint is whether the party harmed should reasonably have taken their own steps to verify the information relied on, or to check that the product had been carefully made or installed. Whether the claimed reliance was reasonable is substantially influenced by the relationship between the parties. The closer it is to contract the stronger the case for reasonable reliance is likely to be.

What then of the position in equity? The traditional relationships where equity recognises fiduciary duties can all be seen as ones where it is reasonable for one party to rely on the other not to act against the first party's interests. Those relationships can be seen as based on status: the status of a trustee; the status of a solicitor; the status of a principal; the status of being a business partner. In these cases reasonable reliance is not directed so much to the taking of care (albeit that will normally be inherent) but rather to being able to trust and rely on the other party to be loyal and not to act against the first party's interests.

As in tort, there is a moral dimension here too. Equity's touchstone of conscience imports a moral dimension. The question is whether a party in a particular relationship with another *should* be able to rely on that other to act solely in the first party's interests. That will be so if party A has expressly or implicitly undertaken duties of a fiduciary kind to party B. Moral responsibility in these circumstances is accompanied by legal liability. And in these circumstances it is reasonable for party B to rely on party A to honour their express or implied undertaking. Party A's conscience requires no less.

The breach of an express or implied undertaking of the kind in issue will usually lead to the existence of a cause of action for breach of fiduciary duty but not inevitably. I say that in order to draw attention to the need to address the scope of the undertaking. The undertaking must cover the circumstances of the alleged breach. Has party A undertaken, expressly or implicitly, to do or not to do something the doing or not doing of which has brought about the harm suffered by party B? This can be seen as an aspect of causation, as well as an aspect of the duty inquiry. On either basis it should be recognised here for completeness.

VIII PROXIMITY IN TORT IN MORE DETAIL

A Introduction

I will now seek to identify specific matters that may feature in the proximity inquiry. My purpose is not to produce any form of checklist but to examine aspects of the inquiry that may be found helpful in a particular case. I will list the matters I will be addressing and then examine each of them. It is useful for present purposes to remember that we are dealing with two types of case: those involving economic loss without related property damage, and those involving property damage which results in economic loss. The former category represents cases often described as involving pure economic loss and the latter represents cases often described as involving product liability. Negligent misstatements comprise the bulk of the former category; negligent manufacture and construction comprise the bulk of the latter.

B Relevant Features

The features that can have a bearing on the proximity issue, in no particular order of importance except the first, are these: foreseeability, closeness, directness, reliance, vulnerability, control, reasonable expectations, nature of the loss in suit, level of risk, societal norms, cost of taking care and assumption of responsibility. This list is not intended to be exhaustive. Some elements may well

overlap with others, and some will be useful in some cases but not others. They are all capable of contributing to the ultimate answer. I will now look at each of these features and expand, as necessary, on how they may operate.

C Foreseeability

First we have foreseeability. This acts as an initial screen. It is a necessary but not, in itself, a sufficient requirement for proximity. If the loss in suit was not foreseeable, there can hardly be proximity in relation to its occurrence. There can hardly be a duty to take care to prevent unforeseeable harm. If the harm was foreseeable the inquiry continues.

D Closeness

Closeness potentially has three dimensions. It may relate to physical closeness, or to economic closeness or to legal closeness. The linking idea is that the party harmed must be sufficiently close, in a relevant way, to the negligent party for the court to be able to say that the negligent party should have realised that their negligence could well cause harm of the kind in question to the party harmed.

E Directness

Directness is concerned with how, that is, by what mechanism, the negligent party's conduct has harmed the victim. How direct is the link between the negligent conduct and the harm it has caused? Was the process which led from the negligent conduct to the harm suffered a natural and direct one, or was it influenced by an unexpected or unforeseeable intervention or event or series of events? This can also be seen as an aspect of causation. As Lord Denning once said: "Sometimes I say: 'There was no duty'. In others I say: 'The damage was too remote'."¹¹ On either basis there is no liability.

The question of directness is often influenced by community notions of when legal responsibility should be recognised. The more direct the chain of causation from negligence to harm the more likely it will be that community standards and expectations will support liability in law.

F Reliance

Next we have reliance. This is a concept I have already addressed in general terms and which is integral to my overall thesis. Reliance is a necessary element in negligent misstatement cases; a statement has no relevant effect unless it is relied on. Reliance will often be a relevant element in product liability cases too.

For there to be proximity in cases of negligent misstatement two things are necessary. The first is that the circumstances must be such that the maker of the statement realised or ought to have realised that the person to whom the statement was addressed was likely to rely on the maker of the statement to have taken reasonable care in what was said. The second is that the reliance placed on the statement

11 *Spartan Steel & Alloys v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA) at 37.

must be reasonable. For example, it will not normally be reasonable for a party to rely on a statement for one purpose when the statement was made for a different purpose. In *Attorney-General v Carter*, it was alleged that a certificate following the survey of a ship had been given negligently.¹² The purpose of the survey related to the safety of the vessel. The purchaser of the vessel relied on the certificate for economic not safety purposes. That reliance was held not to have been reasonable and hence there was insufficient proximity between the maker of the statement and the party relying on it.

In product liability cases it must be reasonable for the person harmed by the negligent manufacture, construction or other process to have relied on the negligent party to take reasonable care. There will not usually be a contract between the parties. The question in these cases may turn on how close or analogous to a contractual one the relationship is. The commercial context will often be such that there is an intermediate party between manufacturer and consumer, such as a retailer; but the transaction is in substance between manufacturer and consumer. This was the situation in *Donoghue v Stevenson*.¹³ It will normally be reasonable in the ordinary processes of commerce for an ultimate consumer to be able to rely on the manufacturer or installer to have taken care.

The overall result in respect of reliance is that in most proximity assessments the court must decide three things. The first is whether it was reasonable for the victim to rely on the negligent party to have taken reasonable care in what was said or done. The second is whether the negligent party ought reasonably to have realised that reliance was likely to be placed on their having taken care. The third is whether the reliance actually placed on the negligent party was reasonable.

G Vulnerability

Vulnerability is a potentially relevant but also potentially elusive concept in this field. All members of society are vulnerable to a failure by other members to take reasonable care. The use of vulnerability can risk begging the question. But, on the other hand, the fact that one person has a particular vulnerability to a failure by another to take care can be a factor in determining the proximity question. Whether there is a particular vulnerability will depend on the relationship between the parties. Is the relationship one where community norms make it necessary or desirable that party A should take reasonable care not to harm party B because of B's particular vulnerability?

There are echoes here of the inquiry that arises when fiduciary duties are in issue. But in tort the potential duty is not to be loyal but to be careful. Fiduciary relationships of the traditional kind generally involve a duty on the trustee's side to take care in looking after the beneficiary's interests. If the relationship in question does not involve fiduciary duties it may nevertheless involve a duty to take care on account of the vulnerability of one party when that party has less than normal ability to

12 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

13 *Donoghue v Stevenson*, above n 2.

protect themselves from negligence. If the negligent party knows or ought to know that to be the case, then he or she should know that the vulnerable party is all the more reliant on his or her taking care. This may well be a significant factor in the proximity inquiry.

H Control

In some cases a party may have a duty or a power to control the activities of another. If that duty or power is exercised negligently, a third party may be harmed by the conduct of the person over whom the first party has the power of control. This feature arises in cases where territorial authorities have power, indeed a duty of control, over building work. It can also arise in cases such as *Home Office v Dorset Yacht Co Ltd* and *Couch v Attorney-General* where state officials have power to control wrongdoers both in prison and after release.¹⁴ If a person (A), having the power and ability to control another (B), exercises that power negligently and thereby foreseeably allows or enables B to harm C, A may be found to have been in a sufficiently proximate relationship with C.

I Reasonable Expectations

It may sometimes be helpful to analyse a case on the basis of whether A has a reasonable expectation that B will take reasonable care not to cause loss or harm to A. There is a link here with the concept of reasonable reliance. An expectation that care will be taken can give rise to reliance on that being so. We must guard against circularity of reasoning, but this different angle can sometimes assist.

J Nature of Loss in Suit

We have already touched on this aspect. The type of harm that a party has suffered is an integral part of deciding whether the party negligently causing that harm should owe a duty to take care to prevent it. The force of this point usually arises in cases of pure economic harm caused by negligent misstatement. In this type of case the law must be careful lest recognising a duty of care leads to an undesirably wide reach of liability. The reach of negligent statements can potentially be considerable. We must be able to identify something in the relationship between the parties, or otherwise, that provides a sufficient control over the scope of liability to which recognising a duty of care will potentially lead. Without a sufficient control it may be perilous to impose a duty.

K Level of Risk

This factor raises two dimensions. The first relates to the level of foreseeable harm the negligent conduct is likely to cause. And the second relates to the level of risk that foreseeable harm will result from the negligent conduct. If it is blindingly obvious that serious harm is likely to result from my negligence, the court is likely, other issues aside, to find that I owed a duty of care to prevent such

¹⁴ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL); and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

harm. Conversely if the level of foreseeable harm is slight and its likelihood is small, the court may be less inclined to impose a duty of care, particularly if the cost of taking care is disproportionate to the risk.

L Societal Norms

My inclusion of this feature in the list of proximity considerations is important. It is a reminder that it is legitimate to consider whether society would think the negligent party *should* pay for the harm their negligence has caused. If the answer to that is in the negative, the case for finding sufficient proximity is not likely to be made out. I am not saying it can never be made out, but there would have to be something powerful in favour of finding sufficient proximity in these circumstances. Conversely, if the court considers that society would think the negligent party should pay for the harm caused, the court must, before imposing a duty of care, consider the wider consequences of doing so. This is a good example of how proximity and policy considerations can merge and how a particular factor can apply to both aspects of the duty assessment.

Community norms and societal standards play a significant part across a range of issues in the law of tort, particularly the tort of negligence. These include whether a duty is owed, whether it has been breached (ie, whether reasonable care was taken), and whether the harm caused was reasonably foreseeable and within the scope of the duty. The concept of reasonableness that informs what care is required and what harm is foreseeable is a paradigm of community values. When a court decides whether reasonable care was taken or whether harm caused was reasonably foreseeable, the court is applying community standards.

M Cost of Taking Care

The cost of taking the necessary care is a relevant factor in deciding whether a duty of care should be recognised. If the likely harm from a failure to take care is small but the cost of taking the necessary care is high, this will be a pointer against imposing a duty to take that care. The converse applies when the likely harm is substantial and the cost is relatively small. This can be seen as an aspect of proportionality and economic efficiency.

Tort law can act as a loss spreading or apportionment mechanism. These factors are designed to foster economic efficiency. It would not be efficient in economic terms to require a party to incur substantial cost to guard against a relatively small risk of minor harm. If the position is the opposite, the cost of taking care is likely to be proportional and economically efficient. Society requires that A spend \$100 to save B losing \$10,000.

N Assumption of Responsibility

This is another concept that tends to state a conclusion rather than telling us how to get there. But it is nonetheless quite often used, particularly in misstatement cases. It featured substantially in *Hedley*

Byrne, particularly in Lord Reid's speech.¹⁵ The concept is helpful provided it is properly understood. It will seldom be the case, outside contract, that one party has expressly assumed responsibility to another to take care. The question will usually be whether a party has implicitly undertaken that responsibility. Again, that will depend very much on the relationship between the parties.

Take the situation in *Hedley Byrne*.¹⁶ If the Bank had not made its disclaimer of liability, its relationship with the party seeking a credit reference in respect of its customer was one where the House of Lords would have held it had implicitly assumed a responsibility to take care. That no doubt is why the Bank, foreseeing that prospect, expressly disclaimed responsibility. You cannot be deemed to have accepted responsibility in the face of an express denial.

The question of reliance also arises in this context. If A realises or ought to realise that B will reasonably rely on A to take care in the circumstances arising, A may well be seen as having implicitly assumed a responsibility to take care, unless that responsibility is expressly disclaimed. In addition, foreseeable and reasonable reliance by B on A to take care will often lead to the law deeming A to have assumed responsibility to take care.

Assumption of responsibility can therefore arise in two ways. Responsibility can be viewed as having been implicitly accepted; or a party can be deemed in law to have assumed responsibility. These are both ways of testing an intuitive sense that the negligent party *ought* to bear responsibility for the harm their negligence has caused. And so we return to where I began in discussing the concept of assumption of responsibility. It states a conclusion; but the aspects I have discussed can help in reaching that conclusion.

IX FIDUCIARY DUTIES: RELEVANT FACTORS

I will now address factors relevant to whether fiduciary duties exist in the same way as I have done for proximity in tort. I confirm that the first and key factor is whether party A has expressly or implicitly undertaken a fiduciary duty to B, whether generally or in respect of a particular feature of their relationship. An express undertaking needs no elaboration. But what are the indicia of an implicit undertaking?

There is again no substitute for a close examination of all aspects of the relationship. In that light, the court has to consider whether A's conscience should require him or her to eschew self-interest. This involves both a moral dimension and an analysis of whether moral considerations should lead to legal liability. When the issue arises in a commercial setting, as will often be the case, the court must consider how its decision will impact on commercial efficiency and legitimate self-interest. It will not always be the case that moral responsibility should lead to legal liability.

¹⁵ *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, above n 3, at 480–493.

¹⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, above n 3.

Again, a finding that A has implicitly undertaken a fiduciary duty to B tends to state a conclusion rather than explaining how the court has reached it. If a case is well-argued, counsel on each side should identify for the court factors that support the necessary implication and those that do not. The court is seeking to do justice in the individual case but must also consider the wider implications of finding that a fiduciary duty has implicitly been undertaken. What are likely to be the consequences generally of finding, or not finding, a fiduciary duty to exist? Which way does the balance tilt?

Again, if the case is well-argued, counsel should draw points either way to the attention of the court. If the court is intuitively disinclined to find for a duty, the factors analytically supporting a duty will have to be powerful to override that intuition. If the court's intuition is the other way, careful analysis will be necessary to ensure that giving effect to it will not lead to undesirable consequences commercially or otherwise.

The diversity of circumstances that give rise to the issue whether a fiduciary duty has implicitly been undertaken are such that, as in other fields, there is in the end no substitute for the exercise of judgment. The judge must identify the factors on either side and then state as fully and as precisely as possible why the case has been decided one way or the other.

That means the judge must say why party B was, or was not, entitled to rely on party A to be loyal to party B's interests and to put them ahead of his or her own. If party B is in a relationship with party A of a kind that makes party B vulnerable to disloyalty by party A, the case for an implicit undertaking may well exist. Vulnerability in this context arises when party A has a unilateral power to affect party B's interests.

Another way of examining the matter is through the concept of reasonable reliance, as in contract and tort. If B ought reasonably to be able to rely on A to be loyal to B's interests, it is likely to follow that A owes a fiduciary duty to B to that effect. There is a link between reasonable reliance and vulnerability. The more vulnerable B is to A's unilateral use of his or her powers to B's detriment, the more reasonable it may be for B to be entitled to rely on A not to do so. By the same token, the more obvious it is or ought to be to A that B is reliant on him or her, the more persuasive will be the case for finding that A has implicitly undertaken to be loyal to B's interests. These observations reflect the operation of societal norms in this field. They are an articulation of those norms in practical terms. They inform the ultimate issue whether A ought to owe B fiduciary duties in the circumstances in question.

All the matters I have identified, and no doubt others in some circumstances, are capable of playing a part in the ultimate assessment. That assessment combines moral intuition with necessary analysis and appreciation of wider consequences. The aim is to do justice between the individual parties but on a principled and coherent basis. The latter aspect is important for two reasons: first, so that society can see with clarity how the courts go about their decision making in this field; and second, so that there is as much predictability as is possible for litigants and those advising them.

X EXAMPLES: TORT

I propose now to give two examples of actual tort cases where an interesting or difficult duty of care issue arose in my early days on the High Court. In the first case my conclusion in favour of a duty of care was upheld 3:2 in the Court of Appeal. In the second case there was no appeal so I never found out if I was right!

The first case is *Williams v Attorney-General*.¹⁷ Mr Williams had built, largely with his own hands, an ocean-going yacht. He chartered it to a man (C) who used the yacht to smuggle Class A drugs in large quantities into New Zealand. Mr Williams was completely innocent and unaware of C's purpose. The yacht was forfeited to the Crown under the relevant legislation. Mr Williams, on becoming aware of this, immediately applied for waiver of forfeiture. The Minister of Customs was empowered to grant waiver either conditionally or unconditionally.

In the meantime the yacht was moored at a wharf in Greymouth. The Customs Department declined to pay a modest monthly fee to the harbourmaster to take care of the yacht pending a decision on Mr Williams' application for waiver of forfeiture. The consequence was that nobody looked after the yacht which was seriously damaged by vandals and by the elements. Mr Williams was led to believe that the yacht was being looked after. He, of course had no legal interest in the yacht following its forfeiture to the Crown. All he had was an expectation (in law a "*spes*" or hope) that his application for waiver of forfeiture would be sympathetically considered.

Sometime later the Minister did waive forfeiture unconditionally in Mr Williams' favour. On retaking possession he discovered his yacht was in a very dilapidated state. He then repaired it himself and sued the Crown for damages on account of its negligence in not looking after the yacht properly while it was in the Crown's possession and ownership. The Crown, of course, argued that because at all material times it had absolute ownership of the yacht pursuant to the forfeiture, it owed Mr Williams no duty of care in relation to it. There was, it was argued, in these circumstances no, or insufficient, proximity.

Mr Williams' lack of any legally recognisable interest in the yacht was of course the Crown's best point. It was really its only point. I considered that most sensible members of society would think the Crown should be liable in these circumstances. The loss was eminently foreseeable. It was reasonable for Mr Williams to rely on the Crown to take care of the yacht in view of its assurance, and in any event; if only to preserve its value in the interest of getting a good price from its sale, if waiver were refused. The cost of taking care was relatively small and could have been recovered from Mr Williams as a condition of waiver, if that eventuated.

I accepted that Mr Williams had no legal interest in the yacht at all relevant times, but considered he had a reasonable expectation of waiver, he being totally innocent of the drug running activities of

¹⁷ *Williams v Attorney-General* [1990] 1 NZLR 646 (CA).

C. That gave him a sufficient interest for proximity purposes, and policy issues did not require a duty to be denied. I therefore held that the Crown owed Mr Williams a duty of care and was in breach of it. He was awarded damages accordingly.

The Crown appealed, in part I understand, because the then Minister of Customs was a lawyer. He had apparently informed his officials that there was no possibility that any rational judge would find the Crown owed a duty of care in these circumstances! A five judge court was assembled to hear the appeal. Three judges (Cooke P, Somers and Bisson JJ) upheld my decision. Two (Richardson and Casey JJ) would have reversed me. Their view was that Mr Williams' lack of legal interest was fatal to a duty of care being imposed. The three judges in the majority accepted that despite his lack of legal interest, Mr Williams had a sufficient interest to justify a finding of proximity. That interest derived from his reasonable expectation, fulfilled in the event, that forfeiture would be waived.

My second example is *Mainguard Packaging Ltd v Hilton Haulage Ltd*.¹⁸ As its name implied, Mainguard manufactured cardboard packaging in its factory in Christchurch. Its manufacturing plant was powered by electricity which was conveyed to its factory by a cable running from the street. The power cable ran down the side of a large wooden power pole sited at the entrance to its driveway before going underground. A truck driven by an employee of Hilton Haulage negligently collided with the power pole, crushing the power cable and thereby cutting off electric power to Mainguard's factory for about 24 hours.

As a result, Mainguard lost production and sued for its loss of profits. As a further result of the damage to the power cable, there was arcing in a switchboard on Mainguard's premises that led, by an unusual electrical process, to fire breaking out in an office building separate from the factory. Mainguard also claimed for the cost of repairing the fire damage. The problems that faced the Court could be seen as ones of proximity and remoteness of damage. I held that there was proximity between Hilton Haulage and Mainguard as regards the damage caused by the loss of production and that damage was not too remote. But the fire damage was too remote and there was no proximity in that respect. My ultimate conclusion was based on a combination of moral intuition and analysis.

XI EXAMPLES: FIDUCIARY DUTY

My example here is taken from *Amaltal Corp Ltd v Maruha Corp*, a decision of the Supreme Court, in which I sat but did not write separately.¹⁹ I joined the judgment written by Blanchard J. In that case a Japanese company (A) and a New Zealand company (B) decided to cooperate in a fishing venture. They formed a jointly-owned New Zealand subsidiary (C) for the purpose, each subscribing to the share capital, albeit in unequal shares on account of the overseas investment rules. It was agreed

18 *Mainguard Packaging Ltd v Hilton Haulage Ltd* [1990] 1 NZLR 360 (HC).

19 *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192.

that company B would look after the tax and accounting affairs of company C. In doing so company B defrauded company A in several ways. It was found liable in deceit to company A.

The High Court held that company B was also in breach of fiduciary duty to company A.²⁰ That conclusion was overruled by the Court of Appeal on the basis that the relationship between the parties was not of such a kind as to raise a fiduciary duty.²¹ That conclusion was itself overruled by the Supreme Court.²² The Supreme Court agreed with the Court of Appeal that the relationship was not generally of a fiduciary kind; that is, across all its aspects. But the Supreme Court held that the taxation and accounting dimension of the relationship did import a fiduciary duty. This was because company A had effectively appointed company B as its agent to deal with the taxation and accountancy affairs of company C in which it was a shareholder and therefore had a significant financial interest. Company B had in these circumstances implicitly, if not expressly, undertaken to act with loyalty to company A and in denial of self-interest.

This is a good example of a case where there was no general fiduciary relationship between the parties but there was a fiduciary duty in respect of an aspect of their relationship. In the circumstances of the case there was a close analogy with the law of principal and agent in the relevant aspect of the relationship. Company A was entitled to rely on company B to act with loyalty to its interests when performing this agency function. It could not prefer its own interests, whether fraudulently or otherwise.

Hence, company B was liable to company A both in deceit and for breach of fiduciary duty. The desire of company A to have company B found liable for breach of fiduciary duty as well as deceit had to do with matters of interest and other quantum issues. They are not relevant to my present purpose. The lesson from this example is that in ad hoc commercial cases the court must look not only to whether a fiduciary duty resides in the relationship generally, but also, if that is not so, whether it resides in a particular aspect of the relationship. The latter is more likely to be the case in the commercial arena, if a fiduciary duty is to be found at all.

XII CONCLUSION

I have reached the end of my essay. My purpose has been:

- to emphasise the point that the nature and quality of the relationship between the parties is a vital component in assessing whether duties are owed in tort and equity and to a lesser extent in contract;
- to draw attention to the concept of reasonable reliance and the role it performs in the duty inquiry;

²⁰ *Amaltal Corp Ltd v Maruha Corp* HC Auckland CIV 2003-404-1773, 19 October 2004.

²¹ *Amaltal Corp Ltd v Maruha Corp* [2007] 1 NZLR 608 at 610 (CA).

²² *Amaltal Corp Ltd v Maruha Corp*, above n 19.

- to acknowledge openly the moral dimension that underpins the duty inquiry in most cases, and to discuss the basis upon which moral responsibility may lead to legal liability; and
- to examine in detail the elements that can form part of the proximity inquiry in tortious negligence cases, and the elements that can inform whether a fiduciary duty arises in ad hoc cases outside the traditional categories.

In all four respects I hope that what I have written may be of some assistance to busy judges and practitioners as they go about their daily roles.

