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A CRITICAL ANALYSIS OF THE ROLE OF COURTS IN DETERMINING BREACH OF DUTY OF CARE IN THE LAW OF TORTS*

Abstract

To succeed in an action for negligence under the law of torts, a plaintiff must prove that the Defendant owed to the plaintiff a duty of care, that the Defendant had violated that duty of care, and that the plaintiff suffered some injury as a result of the breach of duty of care. Accordingly, before going into the question as to whether a breach of the duty has occurred, it is necessary to first resolve the issue as to existence or otherwise of a duty of care and the degree of such duty as well as standard of care. It is only after this that an examination into the actions of the defendant and as to whether a breach has occurred, would become necessary. This paper undertakes a critical look into involvement and attitude of the court over the years in resolving the question of breach of duty of care under the Law of Torts. Beginning with a cursory look at duty of care and the neighbor principle as enunciated in *Donoghue v. Stevenson* as well as the factors that determine existence or otherwise of duty, the paper proceeds for purposes of proving breach of duty, to determine the expected standard of care, the reasonable man's test and the doctrine of *Res Ipsa Loquitur*. Then follows a consideration of what prevailing attitude of courts of law to (classes of defendants in cases relating to) breach of duty of care is, and a conclusion that acknowledges the continuing nature of discussions on breach of duty of care, especially in view of the wide and flexible nature of the subject and the fact it is more often than not, affected by numerous, sometimes unanticipated and unanticipatable circumstances.

Meaning of Duty of Care

Duty of care means taking reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure his neighbour.¹ Thus, where there is sufficient relationship of proximity or neighborhood such that in the reasonable contemplation of the wrongdoer, carelessness on his part may cause damage to the other party, then the duty of care arises.² Where there is duty of care, it is the duty of the trial court to consider whether there is a breach of the duty and whether there is any other considerations which ought to negate or reduce the scope of the duty of care. Some relationships are so straightforward that that existence or otherwise of duty of care is easily determined. Such include occupier's liability,³ and motor

* **UDEMEZUE Sylvester**, Lecturer, Nigerian Law School [Yenagoa Campus] Bayelsa State, Nigeria; E-Mail: udemysl@gmail.com, sylvester.udemezue@nigerianlawschool.edu.ng. +2348109024556

* **OJEIH Chukwunye Augusta Mrs.**, LL.M. [UNIZIK], LLL.B Hons. [UNN], BL, B.A. Hons. Communication Arts [UNIUYO], PGDE [University of Ibadan], Aciarb [UK], ANIPR, Lecturer, Faculty of Law, Elizade University, Ilara-Mokin, Ondo State, Nigeria; E-Mail: ojeihaugustafrancis@gmail.com; ojeihaugusta@yahoo.com +2348037403937

¹Babalola, O. (2018). In: *Babalola's Law Dictionary of Judicially Defined Words and Phrases*, 1st ed. Lagos: Noetico RepertumInc, p. 126. See also *OilsrevLtd. L A Ibeanu& Co Nig Ltd* (2008) 2 NWLR (Pt 1083)

²Ishaku, B.P, (2017). In: *Judicial Law Dictionary*, 2nd ed. Lagos: Elite Publishing Academy, p. 1312.

³*Bourhill v. Young* (1943) AC 92; *Owens v. Brimmell* (1977) QB 850

vehicle liability.⁴ Beside these, the factors the court would look at determine existence of a duty of care include.⁵

- (a) the type of injury suffered by the plaintiff -- bodily, pecuniary, emotional;
- (b) the wrongdoer's power over the state of affairs that occasioned the injury and the plaintiff's susceptibility to the injury;
- (c) the type of connection the plaintiff had with the wrongdoer;
- (d) moral factors; and
- (e) constancy and lucidity of legal concepts and connections.

In simple terms, therefore, duty of care means the duty a person owes in law to be careful so that his conduct will not injure another person; the duty to take care so that one's actions or omissions does not injure another. The concept of duty of care, when a duty of care is owed, when it is breached, and when liability will attach to the breach for the breach, was established in the case of *Donoghue v. Stevenson* (1932).⁶ In that case, a man bought from a retailer bottle of ginger beer brewed by the defendant/respondent. The man's lady companion, who drank the ginger beer became ill. Unknown to them. The bottle contained the decomposing remains of a snail. The bottle was opaque so that the poisonous substance could not be seen and was not discovered until the lady was refilling her glass. The lady had no cause of action in the law of contract against either the retailer or the manufacturer because she had no privity of contract as it was not her, but her friend, who bought the beer. Accordingly, her claim arose in the tort of negligence, based on the duty of care owed by the manufacturer to her as a consumer, which duty had been breached. The House of Lords held that the manufacturer of the beer was liable to the plaintiff-consumer. Lord Atkin took time to define a **duty of care**, when it is said to exist, and to whom owed in the famous dictum which is now popularly known as the "neighbourhood" or "neighbour" principle. Said he:⁷

The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world ... give a right to every person injured by them to demand relief. In this way, rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour became in law, you must not injure your neighbour; and the lawyer's question who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be the persons who are so closely and directly affected by my acts that I ought reasonably to have them in

⁴ *Cole v. De Trafford* (No 2) (1918) 2 KB 523; *Speed v. Thomas Swift & Co* (1943) KB 557

⁵ "Negligence and Duty of Care" (Hobart Community Legal Service 2018) <<https://www.hobartlegal.org.au/handbook/accidents-and-insurance/negligence/negligence-and-duty-of-care/>> accessed February 10, 2021.

⁶ (1932) AC 562. See also *Haley v. London Electricity Board* (1964) 3 All ER 185 (HL)

⁷ *Ibid* (n 4) 580

contemplation as being so affected, when I am directing my mind to the acts or omissions which are called in question.

The neighbour principle established in this case is based on reasonable foreseeability or reasonable proximity. Proximity in this context is not physical nearness; it means reasonable foreseeability, in the sense that where injury is remote or not reasonably foreseeable, there is no liability. The law as to whether and when a duty of care exists grew through court cases. In *Heaven v. Pender* (1883), Brett, MR explained when a duty of care existed, as follows:⁸

Whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty of care arises to use ordinary care and skill to avoid such danger.

It is important to note that a duty of care arises in tort irrespective of whether or not there is privity of contract between the plaintiff and the defendant, provided there is reasonable foreseeability of injury to the plaintiff.⁹ Note also that for existence of a duty of care may be denied for reasons relating to public policy, as happened in *Ashton v Turner* (1980)¹⁰ where two friends were fleeing in a get-away car from the scene of a burglary which they had committed. The defendant drove carelessly and his partner in crime was injured. The court held that on grounds of public policy, one partner cannot succeed in law against a fellow partner in crime, because no duty of care is owed in such situations. Besides, a criminal should not be permitted to profit from his crime. There is however some need to impose a restriction or limit as to the existence of a duty of care so as to curtail the range of liability for negligence and not leave it too open-ended, as explained by Lord Denning in *Dorset Yatch Co. Ltd v. Home Office* (1969).¹¹

The Standard of Care

Generally, the standard of care expected is the legal standard, the standard of a reasonable man who is in the defendant's shoes in a given situation; the standard of care a prudent, responsible man would exhibit in the circumstances under consideration. The reasonable man is an adult of normal intelligence, with average knowledge and commonsense in everyday matters. The factors looked at in determining who a reasonable man is, include intelligence, knowledge, and skill. The court would measure the action of the defendant against what is expected of a normal intelligent person in his shoes; the defendant's conduct must not fall below a man of ordinary intelligence.¹² For this purpose, the idiosyncrasies of the defendant are not taken into

⁸ (1883) 11 QB 503 at 509

⁹ *Pearl v. Camden LBC* (1983) 3 WRN 769 CA

¹⁰ (1980) 3 All ER 870

¹¹ (1969) 2 QB 412 at 426

¹² *Vaughan v. Menlove* (1837) 132 ER 490 at 493

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consideration.¹³ Second, the defendant is expected to have the degree of common sense and knowledge of everyday things of life, which a normal adult in his shoes should have.¹⁴ Finally, the defendant is expected to exercise the standard of care of a person of ordinary normal intelligence. Generally, where a person does not hold himself out as possessing any special skill, it is sufficient if he exercises average skill, except in high risk endeavours. Where a person professes to possess a particular skill, he is expected to exhibit the level of care expected by a reasonable member of that profession, vocation or calling.¹⁵

After determining the standard that a reasonably prudent man would have demonstrated in similar situations the court would turn attention to determining the degree of care exhibited in the given case by the defendant and whether it measures up to the standard of a reasonable man in his shoes.¹⁶ Thus there is a marked difference between the standard of care expected of the defendant and degree of care shown by the defendant. While the former is the same for all situations, the latter depends on the amount of danger presented by a given situation.¹⁷ Greater care is expected where great consequences would result from carelessness. Hence, as stated by Lord Wright in *Northwestern Utilities Ltd v. London Guaratee & Accident Co Ltd* (1936),¹⁸ the degree of care which the defendant must show in a given situation is the degree of care which is proportionate to the degree of risk posed by the situation. It is submitted that exceptions exist to the reasonable man's test in the cases of children and mentally ill or displaced persons.¹⁹

In conclusion, it is obvious that the standard of care would always be judged by reasonable foreseeability, so that the courts would not look at whether or not the wrongdoer anticipated a certain result, but whether or not the wrongdoer ought reasonably to have anticipated same.²⁰ Thus, situations of high degree of unlikelihood might not succeed.²¹

The Doctrine of Res Ipsa Loquitur and the Onus of Proving Breach of Duty

The burden of proving that a duty of care existed, that it was breached and that injury resulted from the breach always lies on the plaintiff. Standard of proof for this purpose is on a balance of probabilities or preponderance of evidence. In some instances, however, the duty shifts to the defendant to prove that he was not negligent. Such cases are referred to as cases of *res ipsa loquitur*, which literally means "the facts speak for themselves." For instance, in the tort of trespass to the person, the burden may shift to the defendant to exonerate himself by proving that the injury to the plaintiff was an inevitable accident and not due to any willfulness or

¹³ *Glasgow Corpn v. Muir* (1943) AC 448

¹⁴ *yachuk v. Oliver Blais Co Ltd* (1949) AC 386

¹⁵ *Woodridge v. Summer* (1962) 2 All ER 978; *Condom v. Basi* (1985) 1 WRN 866

¹⁶ *Paris v. Stephney* (1951) AC 850 HL; *Davis Contractors v. Fareham* (1956) AC 696

¹⁷ Malemi, E., *Law of Tort* (Revd ed., Princeton Publishing Co 2013) 296

¹⁸ (1936) AC 108 at 126

¹⁹ AlaoA, "Breach of Duty of Care" (Academia.edu) <https://www.academia.edu/4600591/Breach_of_Duty_of_Care> accessed February 10, 2021.

²⁰ All Answers Ltd, 'Breach of Duty Lecture' (Lawteacher.net, February 2019) <<https://www.lawteacher.net/modules/tort-law/negligence/breach-of-duty/lecture.php?vref=1>> accessed February 10, 2021.

²¹ See *Fardon v Harcourt-Rivington* (1932) All ER Rep 81, cited in All Answers Ltd (n 20)

ceaselessness on his part.²² The doctrine of *res ipsa loquitur* was defined by Erle CJ, in *Scott v. London & St Katherine's Dock Co* (1865) thus:²³

Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.

Where the doctrine is successfully invoked, the effect is to afford prima facie evidence of negligence so that the defendant cannot succeed in a submission of “no case to answer;” and the onus would shift on the defendant to show either that the accident was due to a specific cause which did not involve negligence on his part or that he had used reasonable care in the matter.²⁴ This position must be contrasted with the *ratio decidendi* in the case of *Ng Chun Pui v. Lee Chuen Tat* (1988)²⁵ where the court held that it was “misleading to talk of the burden of proof shifting to the defendant in a *res ipsa loquitur* situation because the burden of proving negligence rested throughout the case on the plaintiff.”²⁶ It must however be stressed that to successfully invoke and rely on the doctrine of *res ipsa loquitur*, the plaintiff must establish the following:²⁷

- (a) that the thing causing the damage was under the management or control of the defendant or his servants; and
- (b) that the accident was of such a kind as would, in the ordinary course of things, not have happened without the negligence of the defendant.

Breach of Duty of Care and Attitude of Courts

The most fundamental ingredient of the tort of negligence is the breach of duty of care, which is actionable in law and not a moral duty.²⁸ For a claim in negligence to succeed, the plaintiff must prove that the defendant owed him a duty of care and that the defendant was in breach of that duty of care.²⁹ Breach of duty of care simply means failure to take reasonable care where such is expected.³⁰ Once it is established that a duty of care exists in a particular situation, the next step the court must take is to determine whether the duty of care was breached by the defendant --- either by his conduct or omission. This question is answered or considered based on the facts of each particular case. As discussed above, the test usually applied in deciding whether the defendant breached the duty of care owed by him is to check to see whether the defendant’s conduct or omission equals the degree or standard of care expected of a reasonable

²²Kodilinye, G., Aluko, O., *Nigerian Law of Torts* (Revd ed., Spectrum Books 1999) 48

²³ (1865) 159 ER 665

²⁴Kodilinye & Aluko (n 19) 48;

²⁵*Ng Chun Pui v. Lee Chuen Tat* [1988] R.T.R. 298 (PC) –

²⁶ All Answers Ltd, 'Tort Law Negligence Breach Cases | Free Tort Law Cases' (Lawteacher.net, March 2019) <<https://www.lawteacher.net/free-law-essays/tort-law/negligence-breach-cases.php?vref=1>> accessed February 11, 2021.

²⁷*Eason v. LNE Ry* (1944) KB 421

²⁸*Ishaku* (n 2) 274

²⁹*Abi v. CBN* (2012) 3 NWLR (Pt 1286) 1 at 34 (Nig.)

³⁰*Chagury v. Yakubu* (2006) 3 NWLR (Pt 966) 138 at 160

man in his shoes. If the conduct of the defendant falls short of what is expected of a reasonable man, the defendant is held to have breached the duty of care.³¹ Otherwise, he is not in breach. Baron Anderson explained this well in *Blyth v. Birmingham Waterworks*:³²

Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent reasonable man would not do.

Courts' Attitude to Different Classes of Defendants

Generally, courts distinguish provision of damages where breach has been proven and cases of real accident, guided by the notion that defendants ought to conduct themselves within a rational degree of proficiency in the action they are starting. In *Nettleship v Watson* (1971)³³ The defendant's plea to be judged by a lower standard because he was still a learner-driver was turned down on the grounds that "someone who undertakes a task should be judged against the standard of a reasonably qualified, competent person undertaking that task; a defendant cannot rely on their own lack of skill or knowledge as a defence." The courts would however apply lower standard to publicly esteemed events as shown in *Watt v. Hertfordshire County Council* (1954) where the court held that the emergency nature of the circumstances and the life-saving value rank above the duty to take care in the circumstances.³⁴ Note however that in this respect, each case is to be treated and resolved based on its peculiar circumstances.³⁵

Conclusion

Breach of duty of care is a large concept and is the backbone of the tort of negligence, without which the plaintiff cannot succeed. It is seen from this discussion that while maintaining and applying existing rules and principles and expanding the scope of duty of care, the courts prefer a somewhat flexible approach to determining breach of duty in order to ensure fairness and equity at all times. Thus, in the interest of justice, cases involving children, mentally retarded persons, public policy, commission of crime, social utility and many more are treated as capable of depriving the plaintiff the compensation to which he would have been entitled. Discussions on breach of duty of care is a continuing discussion considering its wide scope and flexible nature, being affected by numerous, sometimes unanticipated and anticipatable circumstances. Hence there are many other potentially relevant considerations in resolving cases of breach of duty of care.³⁶

³¹Malemi (n 17) 295

³² 11 Exch 781, report in <<https://www.casebriefs.com/blog/law/torts/torts-keyed-to-prosser/negligence/blyth-v-birmingham-waterworks-co/>> accessed February 12, 2021.

³³ [1971] 2 QB 691; cited in All Answers (n 26)

³⁴ (1954) 1 WLR 835

³⁵ *Scout Asso v. Barnes* (2010) EWCA Civ 1476

³⁶ Murphy R, "To Whom Do I Owe a Duty of Care?" (Forbes August 9, 2011) <<https://www.forbes.com/sites/richardmurphy/2011/06/10/to-whom-do-i-owe-a-duty-of-care/>> accessed February 12, 2021.