OCR
Oxford Cambridge and RSA

Friday 19 June 2015 – Afternoon

A2 GCE LAW

G158/01/RM Law of Torts Special Study

SPECIAL STUDY MATERIAL

Duration: 1 hour 30 minutes

5072019965

INSTRUCTIONS TO CANDIDATES

- This is a clean copy of the Special Study Material which you should already have seen.
- You may **not** take your previous copy of the Special Study Material into the examination.
- You may **not** take notes into the examination.

INFORMATION FOR CANDIDATES

- This document consists of **8** pages. Any blank pages are indicated.

INSTRUCTION TO EXAMS OFFICER / INVIGILATOR

- Do not send this Resource Material for marking; it should be retained in the centre or recycled. Please contact OCR Copyright should you wish to re-use this document.

G158 LAW OF TORTS

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

***Donoghue v Stevenson* [1932] UKHL 100 (1932)**
http://www.bailii.org/uk/cases/UKHL/1932/100.html

Lord Buckmaster (read by Lord Tomlin)

MY LORDS,
The facts of this case are simple.
On August 26th, 1928, the Appellant drank a bottle of ginger beer, manufactured by the Respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed. As a result she alleged and, at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro enteritis. She accordingly instituted the proceedings against the manufacturers which have given rise to this appeal.

Lord Atkin

MY LORDS,

… At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," 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 be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes 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 persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question

… a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumers life or property owes a duty to the consumer to take that reasonable care.

SOURCE 2

***Anns v Merton London Borough Council*, UKHL 4 (1977)**
http://www.bailii.org/uk/cases/UKHL/1977/4.html

Lord Wilberforce

MY LORDS,
This appeal requires a decision on two important points of principle as to the liability of local authorities for defects in dwellings constructed by builders in their area namely:

1. Whether a local authority is under any duty of care towards owners or occupiers of any such houses as regards inspection during the building process.

2. What period of limitation applies to claims by such owners or occupiers against the local authorities.

Through the trilogy of cases in this House … [t]he position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise (see *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2, loc. cit., p. 1027 per Lord Reid).

SOURCE 3

***Caparo Industries plc v Dickman & Others*, UKHL 2 (1990)**
http://www.bailii.org/uk/cases/UKHL/1990/2.html

LORD BRIDGE OF HARWICH

My Lords,
… The action in which this appeal arises is one in which Caparo alleges that the purchases of shares [by them] which took place after 12 June 1984 and the subsequent bid were all made in reliance upon the accounts [prepared by the defendants – Dickman] and that those accounts were inaccurate and misleading in a number of respects … Had the true facts been known, it is alleged, Caparo would not have made a bid at the price paid or indeed at all. Caparo accordingly commenced proceedings on 24 July 1985 against two of the persons who were directors at the material time, claiming that the overvaluations were made fraudulently, and against the appellants, claiming that they were negligent in certifying, as they did, that the accounts showed a true and fair view of Fidelity's position at the date to which they related.

… since Anns a series of decisions of the Privy Council and of your Lordships' House … have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope […]. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia, […] where he said:

"It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed."'

SOURCE 4

Joanne Conaghan and Wade Mansell, 1999, *The Wrongs of Tort (Law and Social Theory)*, 2nd Edition, London, Pluto Press

… [W]hile the case law from Donoghue to Anns witnessed a change in direction away from a case-by-case approach towards the application of a universal principle of liability, cases from *Junior Books Ltd v Veitchi Co Ltd* [1982] UKHL 4 through to Caparo appeared to evidence a reversal of this trend; the judicial period of liability expansion ground to a halt, if only temporarily. Even the decision in Anns itself was dramatically overruled by the House of Lords in *Murphy v Brentwood District Council* (1990) UKHL 2, by which time the leading cases of the day seemed almost always to indicate circumstances where a duty of care would not arise rather than pointing to situations where one would.

The interrelation between liability restriction and the rejection of a universal principle seems clear. Close attention to the particular facts facilitates the drawing of fine and distinct lines in deciding in what circumstances a duty will arise. The court is not so easily bound by a precedent which places particular weight on the facts at hand. The overall effect is to free the courts from any constraint which a principled approach might impose and allow for a much wider range of reasons for finding or denying liability. At the same time, the invocation of concepts of proximity, foreseeability and justness and reasonableness, furnish, where appropriate, sufficient continuity of language and form to provide the necessary legitimation for decisions in terms of abstract rules of conduct whose content varies in accordance with the context in which they arise.

This approach is strangely resonant with the work of Friedrich Hayek, a well-known right-wing philosopher and economist whose thinking influenced the Conservative government in the 1980s. From a Hayekian perspective, the retreat from Anns can be understood as signifying a judicial rejection of instrumental, goal-oriented uses of tort law in favour of an approach which views the common law as purposeless, as having no goal beyond that of articulating general and abstract rules of just conduct in accordance with which individuals can plan and pursue their own particular ends. The emphasis in Anns on 'other considerations' was, arguably, too much of an invitation to judges to play the role of legislator (Lord Keith in *Murphy v. Brentwood DC* (1990) disparagingly described Anns as 'a remarkable piece of judicial legislation'). It asked them to look beyond the facts of the case to the broader implications of the decision, to imbue the law of negligence with a purpose rather than to see it as 'the articulation as rules of practices that have proved their worth' (Thomson, 1991, p. 85). By contrast … subsequent cases sought to divest the duty concept of its reliance upon policy and purpose in favour of a very general framework of rules (duty, breach, damage) which operated to guide rather than command human conduct and, at the same time, by virtue of that very generality, facilitated attention to detail in the resolution of individual disputes.

It is more than coincidence that the change in judicial rhetoric in 1980s tort cases echoed the political philosophy of Hayek. It is, surely, not accidental that the courts eschewed liability expansion, and the (admittedly limited) concept of social responsibility which it reflected at a time when the government of the day was ideologically committed to reducing the state and promoting individual responsibility. The correlation between legal and political rhetoric underlines the fact that the doctrinal debate carried on in the decade of cases running from Anns through to Caparo did not take place in a vacuum … but took place against a political background in which the very issues which resounded and reverberated so strongly in the cases were being openly and widely debated.

SOURCE 5

Patten K, 11/05/2012, *Snail Trail – Eighty Years On, Keith Patten traces the Legacy of Donoghue v Stevenson*, New Law Journal, Vol 162, Issue 7513

Donoghue may not have invented the tort of negligence, but it freed the cause of action from the shackles that had inhibited its growth. It did this by opening up the field for duty of care to spread into new situations. While the neighbour principle is the most famous element of the case, it is the quotation from Lord MacMillan, another of the majority, that 'the categories of negligence are never closed' which perhaps better caught the mood of the new departure that Donoghue marked. But, as has been recognised in more recent years, the simplicity of its approach to duty is, in reality, too simple. It fails to capture all the complicated variations of fact that negligence law has had to encounter. In many ways the modern approach is to deny the existence of any single approach to duty that works in all circumstances. There are different approaches for different contexts, something Lord Steyn has called 'a mosaic' […]. In cases involving physical injury caused by a positive act, the neighbour principle still works pretty well, because those are cases where foreseeability and proximity will get you home. Once we stray outside these spheres into liability for non-physical injuries, or for omissions, or for the conduct of third parties, other considerations beyond foreseeability and proximity begin to acquire greater significance. In those cases, Donoghue stands as a foundation stone upon which much more has been built.

At the risk of extending the metaphor too far, the builders of negligence law have not all been working to the same plans over the years. In the years of expansion (exemplified by Anns), judges seemed to view negligence as an instrument of social progress, and themselves as crusaders for justice. It seemed that there were few wrongs which negligence could not be used to put right. This corresponded with a time when the state (in its widest sense) tended to be viewed positively as a device for advancement. Whether for good or for ill, that collectivist approach has clearly fallen significantly out of fashion, and it is no surprise that the law of negligence has come to reflect that change. The consequence was that the tendency to reach for negligence as the primary instrument of loss distribution has diminished. Indeed, the whole project that would suggest that it is a positive thing to distribute losses to those most able to bear them has been cast into doubt. The idea that losses should be left to lie where they fall has become much more prevalent.

Negligence did not become less expansionist because of the decision in Caparo. Rather, the decision in Caparo came about because of changes in social attitudes which led the judges to consider that the expansion had gone too far. Law is, therefore, a reflection of change more than it is a driver. From our current vantage point, it is hard to see a return to those expansionist times of the 60s and 70s, but attitudes that change can change back.

SOURCE 6

Cooke J, 2009, *Law of Tort*, 9th Edition, Harlow, Pearson Education Limited, pp 49 – 51

Human rights and policy

In cases where a policy immunity was thought to apply, the defence would apply at an early stage to have the claimant's case 'struck out' as it disclosed no cause of action. A striking out hearing does not involve a full hearing of the facts and appeal judges (hearing the appeal against the striking out) complained that they were having to make decisions while not in possession of all the facts.

The enactment of the Human Rights Act 1998 and a judgment from the European Court of Human Rights concentrated judicial minds on the problems created by public policy immunity and the practice of striking out in the context of Article 6 of the European Convention (the right to a fair trial).

The immunity given to the police was successfully challenged in the European Court of Human Rights.

***Osman v United Kingdom* [1999] FLR 193 (ECHR)**

Ahmet Osman was a pupil at a London school, where one of the teachers formed a disturbing attachment to him. Eventually Ahmet Osman was shot and killed by the teacher, who was subsequently convicted of two charges of manslaughter and sentenced to be detained in a mental hospital. Civil proceedings for negligence were begun against the police and the case was struck out by the Court of Appeal on the ground that no action lay because of … public policy reason[s]. An application was made to Strasbourg on the ground that this constituted a breach of Article 6 of the European Convention on Human Rights (the right to a fair trial). … The complaint was upheld by the European Court of Human Rights as there was never any determination of the claim on its merits. The court found that although the aim of the rule, to protect the effectiveness of the police, was a legitimate one, there had been no balancing of other competing public interests. A litigant was entitled to a full hearing where the facts would be found and the proportionality of the immunity to the claimant's rights weighed in the balance.

The decision in Osman caused great difficulties to the English judiciary. In essence, Article 6 was thought to confer procedural rights on a litigant, rather than substantive legal rights, such as whether a cause of action existed. It subsequently transpired that the European Court of Human Rights had misunderstood English tort law in Osman. They had failed to accept that a decision on the third limb of the test for duty of care is a part of substantive law. If a court decides that it would not be fair, just and reasonable to impose a duty of care, this is different to having a procedural immunity which bars a litigant's access to the court in breach of Article 6. (*Z v UK* [2001] 2 FLR 612.)

… The Human Rights Act 1998 brings a very different perspective to tort law which in time may well reshape its perspectives. In *Z v UK* [2001] 2 FLR 612, the issue was whether a local authority welfare system which broke down, resulting in children suffering neglect and abuse, rendered the local authority liable in negligence. The House of Lords and the European Court of Human Rights held that no duty of care was owed by the local authority in these circumstances but the Strasbourg Court found a breach of Article 3 (prohibiting torture and inhumane or degrading treatment). … One effect of this decision is that English courts have now held that a duty of care is owed to children by child care professionals (although not to the parents) in making decisions regarding taking a child into care and child abuse.