THE ROLE OF LAW AND POLICY IN SHAPING THE DUTY OF CARE IN NEGLIGENCE

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Abstract

The essence of the negligence tort is the imposition of a duty upon individuals to act with reasonable care. However, the determination of this duty has not been without uncertainty and controversy. The primary challenge of tort law is striking a balance between the elements of foreseeability and proximity, while considering broader policy concerns related to inordinate liability. This paper analyses the courts' approach to applying legal principles as well as policy considerations in defining and limiting the boundaries of the duty of care in negligence cases. This article adopts a doctrinal approach in its analysis of leading judicial decisions, including Donoghue v Stevenson, Caparo Industries plc v Dickman, and McLoughlin v O'Brien, as well as Nigerian and Commonwealth authorities. The findings of this article reveal that while legal tests provide the basis, policy factors like justice, fairness, public interest, and the deliberate intention to avoid opening the floodgates of liability ultimately shape judicial outcomes. It is recommended that the courts' reliance on policy factors should be made more explicit to ensure more transparency in their reasoning, thereby providing clearer guidance for future negligence cases.

Keywords: Duty of care, Foreseeability, Proximity, Policy factors, Courts

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1.0 Introduction

Negligence is the cornerstone of modern tort law. It is designed to impose liability where a defendant's careless conduct causes harm to another.[1] At the centre of negligence is the concept of the duty of care, which defines the circumstances in which an individual is legally obligated to avoid causing harm to another person. However, duty is not imposed as a matter of course. In determining the boundaries of duty, the courts must balance the litigants' desire for monetary compensation and the wider societal interests to keep inordinate liability in check.[2] Despite that, the duty of care is static. This counterplay informs the evolution of the social and economic realities reflected in the courts' interpretation of foreseeability, proximity and policy factors.[3] Moreover, the emergence of new areas of negligence, such as economic loss and professional liability cases, has made policy factors sine qua non considerations for the courts.[4]

This article examines the development of these complexities: judicial reasoning evolved through cases, with policy considerations playing a crucial, albeit hidden, role. Right from the expansive approach in the case of *Ann's v Merton London Borough Council* to the restrictive threefold test in *Caparo Industries plc v Dickman*, and later clarifications in *Michael v Chief Constable of South Wales Police* and *Robinson v Chief Constable of West Yorkshire Police*, English law has continuously recalibrated the balance between principle and policy.

The article will employ a comparative approach to highlight the differences and similarities in the law of negligence across both common law and civil law systems. The analysis found that although the framework of duty of care is doctrinal, its judicial application is flexible and practical. Invariably, this reflects the evolution of social norms and the courts' balancing of competing interests.

[1] Mullis and Oliphant, *Torts* (Palgrave Macmillan 2011) 12.
[2] Christian Witting, 'Of Principle and Prima Facie Tort' (1999) 25 *Monash University Law Review* 295.
[3] Ashwin Shenoy, *Recovery of Pure Economic Loss in the Construction Industry* (Master's thesis, University of Technology Malaysia, 2007) 45.
[4] John G Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998) 133.

1.1 Conceptual and Theoretical Framework

The duty of care in negligence law embodies both moral expectations and legal obligations.[5] Morally, individuals must take steps to avoid conduct that is likely to cause harm to others. Legally, liability only ensues when the law recognises the existence of a duty, breach thereof resulting in harm and a causal link between the breach and the damage.[6]The law of negligence, thus, obliges one to act with reasonable care and prudence. When one fails to so act or meet a recognised minimum standard of prudence, he would be said to be negligent. It is argued that if the defendant's action or omission causes harm to another person, he will be held liable to compensate the victim for the damage sustained.[7] It must be noted, however, that negligence law 'takes no cognisance of carelessness in the abstract.' As Lord Macmillan stated:

> It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.[8]

Foreseeability and proximity are the two doctrinal elements that underlie the duty concept. Foreseeability assesses the likelihood of a reasonable person in the defendant's position predicting harm to the complainant.[9] Proximity, on the other hand, examines closeness, be it temporal, relational or circumstantial, between the parties, which may warrant the imposition of a legal duty.[10] The courts also weigh policy factors, such as fairness, justice, and reasonableness, alongside the necessity of avoiding indeterminate liability.[11]

Legal scholars point out that the duty of care is a dynamic tool employed by the courts. Fleming maintains that foreseeability provides the measure for liability, while policy factors ensure that legal intervention does not overstretch the limit of reasonable liability.[12] Cane, on the other hand, argues that proximity and policy factors work hand in hand in aiding the courts to apply duties in

[5] ibid
[6] ibid
[7] (n 3)
[8] *Donoghue v Stevenson* [1932] AC 562 (HL) 580–81.
[9] ibid
[10] *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (HCA).
[11] *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* [1976] 136 CLR 529.
[12] (n 4) 135.

the right cases as they maintain doctrinal consistency.[13] Stapleton is of the view that, given the new risks created by technology and social expectation, it is important to maintain a flexible approach to duty of care.[14]

Comparative theory broadens our understanding and opens our minds to different perspectives on proof in negligence across various systems. In civil law systems in continental Europe, including Spain, duty is often defined in codified statutes that provide for general standards of care, foreseeability, and risk mitigation.[15] The common law systems, on the other hand, are based on judicial precedent tempered with policy consideration.[16] This distinction demonstrates how legal culture shapes understanding of the concept of duty.

1.2 Evolution of the Concept of Duty

The essence of tort is that if anyone infringes upon another's right, they should be made to compensate for it. Moreover, in early English law, the basis of American common law, the requirement for this conduct was absolute, and a person who acted wrongfully was liable for any resulting damages, irrespective of any relationship between themselves and the defendant. Since, presumably, the defendant's obligation was owed to the whole world. In cases where a breach of this right is intentional or reckless, the absolute wrong concept remains, and courts make no distinction between the categories of loss; they readily oblige the plaintiff. Witting argued that a general tort doctrine in the United States provides remedies for intentional harm without a just cause.[17] On the other hand, if the damage is caused negligently, the moral imperative becomes weaker, and courts are more reluctant to allow recovery. That was how the courts began to develop the duty concept under the tort of negligence.

Negligence covers both positive actions and omissions. Hence, one can be liable for acting negligently or negligently omitted to act. There are many torts other than negligence, but they are usually identified by the particular interest they seek to protect. For example, nuisance protects against interference with the claimant's use and enjoyment of land, while defamation protects

[13] Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Hart Publishing 2019) 210–12.
[14] Jane Stapleton, 'Duty of Care: Moral Foundations' (2000) 23 *Melb UL Rev* 45.
[15] Van Boom, Koziol and Witting (eds), *Pure Economic Loss: Tort and Insurance Law* (Springer 2003) 103–108.
[16] ibid
[17] (n 2)

against damage to his or her reputation. By contrast, negligence is not tied to a particular relationship, type of harm, or the protection of a particular interest. Lord MacMillan insisted that "the categories of negligence are never closed".[18] However, this is by no means underestimating the importance of other classes of torts. However, they are beyond the purview of this article.As Baker and Prentice (2008) pointed out, "the heart of tort law [nonetheless] is based on personal injury arising from negligence".[19] The tort of negligence and the duty concept that courts apply in cases involving pure economic loss are examined in the following sections.

1.3 The Requirement of Proof in Negligence Action

It is trite that who alleges must prove. Consequently, to prove the negligence of the defendant and, therefore, warrant the defendant being held responsible for the harm suffered by the claimant, the claimant must establish the following:

Duty of care: Does the defendant owe the claimant a duty of care?

Breach: Has the defendant breached that duty?

Damage: Would that breach have caused a legally recognised damage to the claimant?

(a) Duty of Care

A duty of care is a legal obligation to avoid conduct that could foreseeably harm others. Fleming defines duty as "an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others." The landmark case *Donoghue v Stevenson* established the modern principle through the 'neighbour principle.'[20] Lord Atkin held that one must take reasonable care to avoid acts or omissions likely to injure one's neighbour, defined as persons closely and directly affected by one's actions. Subsequent refinements introduced structured tests for determining duty. In *Anns v Merton LBC*,[21] Lord Wilberforce outlined a two-stage test: proximity between the claimant and the defendant, and policy considerations that might limit liability. This was further refined in

[18] (n 8)
[19] Mark Baker and Dan Prentice, The Liability of Auditors in the following section(Oxford University Press 2008) 167.
[20] (n 8)
[21] [1978] AC 728 (HL).

Caparo Industries Plc v Dickman,[22] establishing the three-stage test: foreseeability of harm, proximity, and whether it is fair, just, and reasonable to impose a duty. These criteria are now the definitive tests for establishing the duty of care. Courts apply these criteria to ensure the duty is imposed within a reasonable scope.

(b) Breach of Duty

A breach occurs when the defendant fails to meet the standard of care that a reasonable person would expect in the same circumstances. The standard is objective, based on what a reasonably prudent person would do. In *Blyth v Birmingham Waterworks Co*,[23] the defendant was held negligent for failing to prevent foreseeable water damage during a severe frost, highlighting that breach arises when conduct falls below legal standards. In professional contexts, auditors are held to the standard of a reasonably competent auditor, as illustrated in *Caparo*, where negligent misstatements formed the basis of breach.

(c) Damage

The final element requires that the breach caused legally recognisable harm to the claimant. Damage may be physical, financial, or emotional, provided it is foreseeable. For example, in *Spartan Steel & Alloys Ltd v Martins & Co Ltd*,[24] physical damage to the plaintiff's property justified recovery of lost profits directly linked to that damage, while purely economic loss unrelated to property was not recoverable. Causation must be proven: the damage must result from the breach, rather than from independent events as held in Barnett v Chelsea & Kensington Hospital.[25] Together, duty, breach, and damage form the tripartite foundation of negligence. Courts balance foreseeability, proximity, and policy to ensure accountability while limiting open-ended liability, thereby evolving the law of negligence to meet social and legal expectations.

In *Donoghue v Stevenson*, Lord Atkin laid the groundwork for modern negligence law. In that case, the Plaintiff, Mrs. Donoghue, purchased a ginger beer fromher friend. The ginger beer was in an opaque bottle, preventing the contents from being viewed clearly. After consuming some of the product, the remains of a decomposed snail emerged from the bottle during a refill. ThePlaintiff

[22] [1990] 2 AC 605 (HL).
[23] (1856) 11 Ex Ch 781, 156 ER 1047 (Ex Ch).
[24] [1973] QB 27 (CA).
[25] [1969] 1 QB 428 (QB).

suffered from resulting nervous shock and gastroenteritis, which she blamed on the accident, and sought damages against the manufacturers.

The Plaintiff could not sue the shopkeeper with whom she had never had a contract because the drink was purchased for her by a friend, and she could not have any remedy under contract against the manufacturers of the ginger beer. Therefore, she sued the manufacturers for negligence. The court then had to decide whether the defendants owed a duty of care to the plaintiff in the absence of any contractual relationship.

The House of Lords decided the matter in the affirmative, with Lord Atkin formulating what is now commonly known as the 'neighbour principle' and undoubtedly the bedrock of the English law of tort. The main thrust of his Lordship's dictum is reproduced below:

> 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.[26]

The significance of this case lies in the fact that it established a separate cause of action in negligence. It also made the proximity of the relationship between the Plaintiff and Defendant and the reasonable foreseeability of injury the basis of duty. Above all, it is regarded as the foundation of modern negligence law upon which later developments are built. As Lord Reid later remarked:

[26] (n 8)

> *Donoghue v. Stevenson* . . . may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.[27]

Generally, the courts have little difficulty in finding that a duty of care exists in cases where the damage suffered is personal or to property. In such cases, the nature of the damage, like the consumption of the faulty product, demonstrates some closeness between the parties at some point. However, where the damage is purely economic loss, the courts have found this principle inappropriate, fearing inordinate liability. This reason prompted the courts to restrict the application of the 'neighbour principle' to only cases of physical damage. Lord Pearce articulated this concern in as follows:

> Negligence in words creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage.[28]

Hedley Byrne was the first case decided on the grounds of pure economic loss in the context of negligent misstatement. The fact of the case, succinctly, is that the Appellants sought to recover their loss after granting credit based on the report provided by the Respondent bank to their bank, which turned out to be incorrect. The House of Lords held that a duty did exist. Still, the Appellants were unsuccessful due to an express disclaimer on the credit report, which stated, "in confidence and without responsibility."

Although *Hedley Byrne* allowed recovery of pure economic loss in cases of negligent misstatement, subsequent interpretations have narrowed its scope. Winn LJclarified that the *Herdley Berne* principle is limited to cases of negligent misstatement. He stated that:

[27] Home Office v Dorset Yacht Co Ltd [1970] AC 1004 (HL) 1031.
[28] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 536.

> Apart from the special case of imposition of liability for negligently uttered false statements, there is no liability for unintentional negligent infliction of any form of economic loss, which is not itself consequential on foreseeable physical injury or damage to property.[29]

Since that decision, the courts have categorised the circumstances in which recovery is permissible by reference to the nature of the defendant's conduct. The general view was to disallow recovery where the loss results from a negligent act or omission. Thus, the right to recover pure economic loss in tort, not flowing from physical injury, does not extend beyond the situation where the loss is sustained through reliance on negligent misstatement, as established in the case of *Hedley Byrne*.

In *Anns case*, the House of Lords initiated another effort to expand the framework for determining the duty applicable to all types of harm. The case was about structural defects in a property leased by the Plaintiff. The case involved tenants who sued the builders for negligence for defects in their property. The plaintiff sued the builders and local authorities for negligence in approving the building plans. Lord Wilberforce, in his speech, proposed a two-stage test for determining the duty of care and stated:

> Through the trilogy of cases in this House, Donoghue v. Stevenson, Hedley Byrne & Co Ltd v. Heller & Partners Ltd and Home Office v. Dorset Yacht Co Ltd, the 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

[29]*SCM (UK) Ltd v WJ Whittall & Son Ltd* [1970] 1 WLR 624 (CA).

> ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed….[30]

The above decision laid down a two-stage test for determining the duty of care. First, did the parties satisfy the neighbour test – in other words, was the claimant someone whom the defendant could reasonably be expected to foresee a risk of harm? If yes, a *prima facie* duty of care is presumed. Second, was there any policy consideration for excluding that presumption? If no policy considerations stand against establishing a duty of care, then a duty would be imposed.

Soon, *Ann's* decision was criticised for its expansive nature. The growth in liability for negligence in this case raised numerous alarm bells. Eventually, the problems of insuring against the new types of liability and how tort seemed to be encroaching on areas traditionally governed by contractual liability led to a rapid judicial retreat from *Ann's* approach.

Lord Keith took the bait and rejected the *Anns* test and articulated the issue as follows:

> [T]he two-stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended . . .. [Their] Lordships consider that for the future it should be recognized that the two-stage test in *Anns* is not to be regarded as in all the circumstances a suitable guide to the existence of a duty of care.[31]

The *Anns* principle was finally settled by the House of Lords in a subsequent case,[32] in which their Lordships invoked the 1966 Practice Statement and overruled *Anns*.

The rejection of *Ann's* case as a litmus test for duty of care soon paved the way for a new test set down by the same House of Lords in*Caparo's* case, which is now regarded as a definitive measure for determining the duty of care. The case concerns negligent misstatement, and the question is whether auditors can be held liable to investors who detrimentally relied on their statements. In his judgment, Lord Bridge stated:

[30]*Anns v Merton London Borough Council* [1978] AC 728 (HL) 751–752.
[31]*Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC) 195.
[32]*Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

> [I]n 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 characterized 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.[33]

As seen above, the *Caparo* case established a three-stage test for determining the duty of care: foreseeability of harm, proximity of relationship, fairness, justice, and reasonableness (policy factors). Accordingly, in addition to establishing proximity and foreseeability, the claimant must also establish that it is reasonable to impose a duty of care. These tests may be classified as follows,

1. That harm was reasonably foreseeable to the claimant.
2. There was a proximity relationship between the claimant and the defendant.
3. Under the case's circumstances, it is fair, just and reasonable to impose a duty of care on the defendant.[34]

The following paragraphs will elaborate more on these three tests.

1.5 Foreseeability of Harm

The foreseeability test requires the claimant to be within the class of persons put at risk by the defendant's lack of care. This rule originates from Lord Atkin's 'neighbour principle' which requires that a reasonable person in the defendant's position would foresee that their actions could affect the claimant or someone in a similar class.[35] The test eliminates claims that are too remote from the negligent conduct. A practical example is found in *Langley v Dray*,[36] where a police officer was injured in a car crash while pursuing the defendant, who was fleeing in a stolen vehicle. The Court of Appeal held that the defendant owed the claimant a duty of care because he should have foreseen that his actions would endanger the pursuing officer.

[33] (n 22) 617.
[34] ibid
[35] (n 8)
[36] [1998] PIQR P314 (CA).

The principle is also famously explored in the U.S. case of Palsgraf v Long Island Railroad Co.[37] In this case, the plaintiff, Mrs. Palsgraf, was injured by falling scales after an explosion caused by a dropped package of fireworks. The New York Court of Appeals held that the railway owed no duty to her because she was not a foreseeable victim of the employees' actions. As Cardozo J stated:

> One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended…The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another…He sues for a breach of a duty owing to himself.[38]

It must be added that the foreseeability requirement has not escaped criticism. Its detractors sustain that the equities favour the former between the innocent and careless injurer. Foreseeability has also been criticised for being manipulated to obscure the policy considerations behind the rule. Accordingly, it is argued that in recent decisions, the courts have adopted a more effective approach to distinguishing between legal policy issues and factual duty questions, such as foreseeability.[39]

1.4 Proximity of Relationship

The requirement that the defendant must be in proximity to their victim - originally equated with foreseeability - has now assumed an independent and central role in the tort of negligence. Proximity refers to the closeness in terms of physical position. However, more than physical nearness, proximity is a legal term of art. It signifies a relationship between the defendant and the claimant or that the defendant is in a position to avoid harm to the claimant. For example, Lord Atkin used the word "neighbour" not to describe geographical closeness but to identify those who might reasonably be anticipated as being affected by one's negligent acts. With a similarly passion in Justice Deane elaborated as follows:

[37] .*Palsgraf v Long Island Railroad Co* 248 NY 339, (1928).
[38] ibid 341.
[39] (n 1)

> It involves the notion of nearness or closeness. It embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship … of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity... [and may include] an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another.[40]

Proximity, however, should not be regarded as having an immutable meaning. It is a generic term used to describe the existence of a duty in various circumstances. Different proximity rules apply to different duty situations. For example, the foreseeability of harm often suffices to establish a duty in typical negligence cases, such as personal injury. In contrast, proximity imposes a more stringent requirement in cases involving pure economic loss. Here, the courts have held that a defendant must have voluntarily assumed responsibility to be liable.[41]

This does not necessarily mean that the claimant and defendant must know each other. Instead, their circumstances must warrant that the defendant could reasonably foresee their actions harming the claimant. As Lord Morris stated:

> If someone possessing special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise... if in a sphere in which a person is so placed that others could reasonably rely upon his judgment... then a duty of care will arise Hedley Byrne & Co Ltd v. Heller & Partners Ltd (1964).[42]

Under this reasoning, the assumption of responsibility satisfies the proximity requirement. Witting points out that the core function of the proximity test is to determine whether the defendant was appropriately situated to avoid harm to the plaintiff.[43] It draws on legal rules established by judicial

[40] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 (HCA).
[41] (n 28)
[42] (n 22)
[43] (n 2)

precedents that vary according to case-specific circumstances and aim to assign liability appropriately.

1.5 Fairness, Justice and Reasonableness

A duty will only be recognised by courts when it is fair, just and reasonable in the circumstances of the case to hold the defendant liable to the claimant. These are non-legal considerations, such as economic, social, or ethical factors, that a judge may consider when deciding the outcome of a case. Policy factors play a significant role in negligence law, particularly in the duty of care. Where proximity is said to be policy "crystallised" into a principle of law, fairness is "raw" policy. The test is whether a specific policy factor exists in the particular circumstances which should be used to deny a duty of care.

This essentially involves the courts 'pragmatic consideration' of whether it is just, fair, and reasonable to impose a duty of care on the defendant, considering all the circumstances of the case. In the dual tests of foreseeability and proximity, judgment is based on factual evaluation, while here, the court weighs the balance between principle and policy considerations. Ordinary reason and common sense are considered, but the case is ultimately determined by reference to judicial value.

One case that demonstrates the application of policy is that of Arthur JS Hall v Simons,[44]in which the House of Lords was tasked with determining whether to abolish an advocate's immunity from liability for their conduct in a court case. Lord Browne-Wilkinson reasoned as follows:

> First . . . , given the changes in society and in the law that have taken place since the decision in Rondel v. Worsley . . . , it is appropriate to review the public policy decision that advocates enjoy immunity from liability for the negligent conduct of a case in court. Second, that the propriety of maintaining such immunity depends upon the balance between, on the one hand, the normal right of an individual to be compensated for a legal wrong done to him and, on the other, the advantages which accrue to the public interest from such immunity. Third, that in relation to claims for immunity for an advocate in civil proceedings, such a balance no longer shows

[44]*Arthur JS Hall v Simons* [2000] 1 WLR 1573 (HL).

> sufficient public benefit as to justify the maintenance of the immunity of the advocate Rondel v. Worsley (1969).[45]

Extra-legal considerations influenced judges in determining liability for pure economic loss. This approach has been called into question in recent years, with the House of Lords casting doubt on the appropriateness of using policy considerations in legal reasoning. There is a considerable divergence of opinion over the justifiability[46] of policy consideration in judicial undertakings. However, one supreme fact is the difficulty of taking an extreme stance either way. While it would be naïve to deny policy considerations in determining legal questions, applying blanket policy considerations regardless of legal principle will leave much to the individual judge's discretion. The middle ground was enunciated by Stephen J in as follows:

> Policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of law; the policy considerations to which their Lordships paid regard in Hedley Byrne are an instance of just such a process and to seek to conceal those considerations may be undesirable. That process should, however, result in some definition of rights and duties, which can then be applied to the case in hand, and to subsequent cases, with relative certainty. To apply generalized policy considerations directly, instead of formulating principles from policy and applying those principles, derived from policy, to the case in hand, is... to invite uncertainty and judicial diversity.[47]

Generally, the basis for these liability principles is none other than a duty to avoid harm to the claimant. As demonstrated in *Mercer v South Eastern & Chatham Railway Crossing Companies' Management Committee*,[48] a gate to a railway crossing was left unlocked. It was the practice to lock whenever a train passes. Believing that it was safe, the claimant crossed and got knocked down by a train. The defendants were held liable for failure to close the gate- an omission.Finally,

[45] ibid
[46] *McLoughlin v O'Brien* [1983] 1 AC 410 (HL).
[47] *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* [1976] HCA 136, 529 (HCA).
[48] (1875) LR 10 Ex 142 (Ex Ch).

all three elements of reasonable foreseeability, proximity, justice and fairness must be considered in determining whether a duty of care should exist in any particular case.

1.6 Conclusion

The duty of care as a concept in negligence tort has witnessed a significant evolution over the years as a result of the development of both the law and society. The courts have relied not only on legal reasoning but also on policy considerations in shaping the law. The courts have looked further than tests of foreseeability and proximity to policy factors such as fairness, public safety, and the potential for overwhelming litigation in determining liability. This ensures that liability is imposed only where it aligns with societal interests and legal coherence. Several seminal cases demonstrate that courts have applied the duty of care concept to various factual and legal contexts. The analysis found that policy factors courts employ help them to manage the scope of negligence claims, especially in areas such as pure economic loss or psychiatric harm. It is recommended that the courts' reliance on policy factors should be made more explicit to ensure more transparency in their reasoning, thereby providing clearer guidance for future negligence cases. Ultimately, the role of law and policy in shaping the duty of care reflects a balanced approach that protects claimants without placing unreasonable burdens on defendants. It underscores the judiciary's active role in evolving tort law to reflect changing social realities.