最新不列颠法律袖珍读本（英汉对照）

侵权法
Tort Law

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侵 权 法

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出版说明

最新不列颠法律袖珍读本(英汉对照)系列丛书之原本是英国卡文迪什出版有限公司(Cavendish Publishing Limited)最新推出的,我们采用英汉对照的形式出版,以利于读者研习法律及法律专业英语之用。该读本系列包括了对不列颠法律的广泛介绍,其中每一本都是研习一个专业科目的完整的袖珍指南。其精致的文本、原版的法律专业英语、规范的专业汉译以及简明的格式、友好的界面使得该读本系列成为读者研习各个学科的基本理论和最新研究成果,尤其是学习纯正的法律英语的理想帮手。

1 Negligence

Duty of care

Duty situations

The tests for determining the existence of a duty of care have changed. Prior to 1932, there were numerous incidents of liability for negligence but there was no connecting principle formulated which could be regarded as the basis of all of them. These were referred to as 'duty situations'.

The neighbour principle

The first attempt to create a rationale for all the discrete duty situations was made by Brett MR in *Heaven v Pender* (1883), but the most important formulation of a general principle is that of Lord Atkin in *Donoghue v Stevenson* (1932). This is known as the 'neighbour principle':

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee are 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 into question.

The 'two stage' test

The 'neighbour principle' is a test based on reasonable foresight and is unquestionably too wide. It needed further refining.

In the 1970s, there were attempts to extend it by defining it as a general principle. In *Home Office v Dorset Yacht Co Ltd*

1 过失侵权

谨慎义务

存在谨慎义务的情形

判断一项谨慎义务是否存在的检验标准已经改变。在1932年以前，存在着无数因过失而产生的责任事故，但是却没有人系统阐述出一个被大家公认为是所有事故基础的通用原则，即“义务存在的情形”。

邻居原则

为所有互不关联的义务创造一个基本原理，这一最初的尝试是由保管案卷的布瑞特法官在 Heaven 诉 Pender（1883年）一案的判决中作出的。但是，该基本原则最重要的阐述是埃特肯法官在 Donoghue 诉 Stevenson（1932年）一案判决中作出的，这就是为人们所熟知的“邻居原则”：

> 你必须采取合理的谨慎措施，以便根据合理预见避免有可能伤害你邻居的行为或疏忽。那么，谁是我法律上的邻居呢？答案看起来是那些人——他们受我行为的影响是如此的密切而直接，所以，当我决定那些容易引发问题的行为或疏忽时，由于他们易受到影响，我应该合理地把其纳入我考虑的范围。

“二级”检验标准

“邻居原则”是建立在合理预见基础上的检验标准，无疑太过于宽泛，它需要进一步限定。

19世纪70年代，曾有人试图把它定义为一个总的原则而扩大它的适用。在 Home Office[①]诉 Dorset Yacht Co Ltd

① （英国）内政部（译者注）

(1970), Lord Reid said, '[the neighbour principle] ought to apply unless there is some justification or valid explanation for its exclusion'. This lead to Lord Wilberforce's 'two stage' test in the case of *Anns v Merton LBC* (1978):

> First, one has to ask whether ... there is a sufficient relationship of proximity ... in which case a *prima facie* duty arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any policy considerations which ought to negative, or to reduce or limit the scope of the duty.

The 'three stage' test

Lord Wilberforce's general principle soon came in for heavy criticism. This began with Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* (1985) when he said that, in addition to proximity, the court must decide whether it is 'fair, just and reasonable' to impose a duty of care.

The case of *Murphy v Brentwood DC* (1991) marked the death knell for the 'two stage' test by overruling *Anns*. *Murphy* talked of adopting an 'incremental' approach to determining the existence of a duty of care. Following the case of *Caparo Industries plc v Dickman* (1990), it is now fashionable to talk of a 'three stage' test, with the following criteria being taken into account:

- reasonable foreseeability;
- proximity;
- 'fair, just and reasonable'.

The reaction against the 'two stage' test was primarily focused on the fact that it created a massive extension to the tort of negligence. The 'incremental' approach avoids such an increase; instead, the tort of negligence is developed by

(1970年)一案中,瑞特法官说:除非有正当的理由或合法的解释能排除**邻居原则**的适用,否则就应该适用。这一论述使得威尔伯弗斯法官的"二级"检验标准在 Anns 诉 Merton LBC (1978年)一案中得以确立:

> 首先,一个人必须提出疑问:是否……存在足够的最邻近原因关系……在该案中产生了足以构成法律义务的义务。其次,如果第一个问题的回答是肯定的话,则有必要考虑是否存在应该否定、减少或限制这种义务范围的政策原因。

"三级"检验标准

威尔伯弗斯法官的基本原则迅速招致强烈批评。开斯法官首先发难,在 Governers of the Peabody Donation Fund 诉 Sir Lindsay Parkinson & Co Ltd(1985年)一案中,他认为,除了最邻近原因外,法庭还必须判断:让被告负有谨慎义务是否"公平、公正、合理"。

Murphy 诉 Brentwood DC(1991年)一案中,Murphy 要求采用一种"渐进式"的方法来判断谨慎义务是否存在,推翻了 Anns 一案中确立的原则,为"二级"检验标准敲响了丧钟。遵循 Caparo Industries plc 诉 Dickman(1990年)一案,现在流行谈论"三级"检验标准,它将下列标准纳入了考虑范围:

- 合理预见性;
- 最邻近原因;
- "公平、公正、合理"。

反对"二级"检验标准的理由主要集中在其引起了过失侵权诉讼大量扩张这一事实上,"渐进式"方法避免了这种扩张,反之,通过类比既有案例,过失侵权法律得以发展。任何新颖

analogy with existing cases. Any novel type of situation would have to show that it is analogous to an existing situation where a duty is owed. This has lead some to argue that the wheel has turned full circle and that there is now a return to 'duty situations'.

There is also a view that the 'three stage' test and the 'incremental' approach are two different tests. The courts have left the situation confused as to which test is to be used and cases such as *Caparo* are authority for both the 'three stage' test and the 'incremental' approach.

Policy considerations

Policy plays a vital role in determining the existence of a duty of care. It can be defined as the departure from established legal principle for pragmatic purposes. Cases such as *Donoghue v Stevenson* and *Anns* consider policy expressly, whereas the approach followed in *Caparo* and *Murphy* is to impliedly consider policy and merge it in to other considerations such as 'proximity' and whether it is 'fair, just and reasonable' to impose a duty.

What issues of policy are commonly raised?

(1) To allow an action would open the 'floodgates' and expose the defendant to an indeterminate liability.

The courts are always keen to limit liability to a determinate amount and to a determinate class of persons. For example, in *Weller & Co v Foot and Mouth Disease Research Institute* (1966), the plaintiffs were auctioneers who lost money on account of being unable to hold their auctions as a result of the defendant's negligence in allowing the foot and mouth virus to escape, which led to restrictions on the movement of cattle. It was said by the court that their damage was 'foreseeable' but so was the damage to 'countless other enterprises'. It would have been equally foreseeable that

的案件类型都必须证明它与某一既有案例相似，该案例中被告负有义务。一些人据此主张时过境迁，应该回归到"谨慎义务存在情形"原则。

还有一种观点认为，"三级"检验标准和"渐进式"方法是两种不同的检验标准。至于应该使用哪一种，法院已经把它们搞得混淆不清，类似于 Caparo 之类的案例不仅是"三级"检验标准，同时也是"渐进式"方法的权威。

政策考虑

在判断谨慎义务是否存在时，政策扮演了关键角色。它可以被定义为为了实用目的而对现有法律原则的偏离，类似于 Donoghue 诉 Stevenson 案和 Anns 案之类的案子明显考虑了政策，而随后的 Caparo 案和 Murphy 案中所采用的方法则隐蔽地考虑了政策，把它混合到其他因素中，如"最近原因"，或者被告负有义务是否"公平、公正、合理"。

哪一些政策因素经常被提及？

(1)许可某种行为无异于开了"泄洪门"，使得被告负有不明确的责任。

法院总是热衷于限制特定数量或特定阶层的人的责任。例如，在 Weller & Co 诉 Foot and Mouth Disease Research Institute(1966 年)一案中，由于被告的过失，口蹄疫病毒扩散，导致牛的迁移受到限制，原告是个拍卖商，他因上述原因不能举行拍卖会而遭受金钱损失。法庭认为，原告的损失是可以预见的，就像"无数其他的企业"的损失一样，市场上的小餐

cafés, newsagents etc in the market town would also lose money. The burden on one pair of defendant's shoulders would be insupportable and policy had to act to limit liability.

(2) The imposition of a duty would prevent the defendant from doing his job properly.

This leads to a class of what have been termed 'protected parties' – persons who enjoy immunity from suit:

- judges and witnesses in judicial proceedings enjoy immunity on grounds of 'public policy';
- barristers and solictor-advocates. Lawyers used to enjoy immunity from suit concerning their conduct of cases in court: *Rondel v Worsley* (1969). However, this case was overruled by the House of Lords in *Hall v Simons* (2000). Lord Steyn commented that public policy was not immutable, and had changed since 1969. The court emphasised that an advocate's primary duty is to the court, and that performing this duty could never amount to negligence in the conduct of the client's case.

There is a public policy immunity for the carrying out of public duties by public bodies, unless that public body has assumed a responsibility to the individual. It is thought that to impose a duty, in this situation, would interfere with the way in which public bodies carry out their tasks. The immunity originates with the case of *Hill v Chief Constable of West Yorkshire* (1989). The mother of the last victim of the Yorkshire Ripper sought to sue the police for negligence in failing to apprehend him earlier. There was found to be no special relationship between the police and the victim and consequently no duty could arise. It was felt that to impose a duty would be damaging to police operations. They would deploy their resources defensively on the basis of

馆、报刊经营人也因此损失了金钱，原告的损失与他们的损失同样是可以预见的。如果大家都来起诉的话，被告的双肩将不堪重负，所以，政策必须在限制其责任方面发挥作用。

(2)负有义务会阻碍被告正确完成其工作。

依据这一标准，产生了一个被称为"受保护方"的阶层——即享有免予被起诉权利的人。

- 法官及证人在司法程序中因"公共政策"而享受免责；
- 高级律师①和初级辩护律师②。律师一般就其在案件诉讼过程中的行为享受免责，如 Rondel 诉 Worsley (1969 年)案。但是，此案被上议院在 Hall 诉 Simons (2000 年)一案所推翻。斯特恩法官认为，公共政策并非一成不变，自从 1969 年以来它就已经改变了。法庭强调：辩护人的基本义务是对法庭的义务，履行此义务永远不能与其在当事人案子中的行为过失等量齐观。

这是公共主体为了履行公共义务的一个公共政策性免责，除非该公共主体已经对某个个人承担了责任。有人认为，在这种情形下，使其负有义务将会影响公共主体执行任务的行为方式。这种免责理论起源于 Hill 诉 Chief Constable of West Yorkshire(1989 年)一案。由于未能早日抓捕约克郡碎尸狂归案，最后一个受害者的母亲试图起诉警方存在过失。法院发现在警方和受害者之间并不存在特殊的关系，因此他们之间没有产生义务。法院认为，使警方负有这种义务将会对警察的职务执行产生损害：他们将会以如何最好地避免民

① 在英国指有资格在任何法庭作辩护的专门律师。(译者注)

② 在英国指承办案件起诉、辩护及其它法律事务的初级律师。(译者注)

how they could best avoid civil liability, rather than on the basis of their professional judgment.

The immunity was even held to apply in the case of *Osman v Ferguson* (1992), even where it was known to the police that the plaintiff was being harassed by an identified individual. A school teacher had become obsessed with one of his pupils. He had threatened to do a 'thing like the Hungerford massacre' because of the obsession. Complaints had been made by the plaintiff's family to the police. The same individual eventually shot and injured the plaintiff and also killed his father but there was no duty on grounds of public policy immunity.

However, the police may be liable where there is a special relationship between the police and an informant (*Swinney v Chief Constable of Northumbria Police* (1996)). The police do not have a blanket immunity; there are other considerations of public policy which also carry weight. Hirst LJ gave examples such as the need to protect springs of information, to protect informers, and to encourage them to come forward without an undue fear of the risk that their identity will become known to the suspect or to his associates. The facts of the case were that the plaintiff passed on to the police certain information concerning the unlawful killing of a police officer. The suspect was known to be violent. The informant requested that contact with her be made in confidence. The document containing the information supplied, together with the informant's name, was left in an unattended police car. The vehicle was broken into and the suspect obtained the document. It was arguable that a special relationship existed. But, in *Swinner v Chief Constable of Northumbria (No 2)* (1999), it was held that a duty of care was owed to an informant to take reasonable steps to preserve his confidentiality. However, in the circumstances, there had been no *breach* of that duty.

事责任为基础来调度警力，而不是根据自己的专业判断来调度警力。

免责甚至被适用到 Osman 诉 Ferguson(1992 年)一案中，即使该案中，警方已经知道原告正被某个身份明确的人所骚扰。一个学校教师为他的一个学生神魂颠倒，由于神志不清，他曾威胁说要做作像"亨格福特大屠杀"一样的事出来，原告的家人向警方投诉了此事。最后，这个教师射伤了原告，并杀死了他的父亲，但是根据公共政策免责理论，警方不用负责任。

不过，在警方与举报人之间，由于存在特殊关系，警方可能负有责任[Swinney 诉 Chief Constable of Northumbria Police (1996 年)案]。警方并不享有万能的免责事由，其他的公共政策考虑因素也相当有分量。赫斯特法官举了一些例子，比如保护线索来源的需要，保护举报人的需要等，以此鼓励他们勇敢地报警，而不至于因为存在嫌疑人或其同伙知道其身份的风险而过度畏惧。此案的事实是：原告向警方举报了某警官滥杀无辜的消息，警方已知嫌疑人很残暴，而且举报人要求警方与她联络必须保密。但是，警方把含有这些信息以及报告人姓名的文件放在一辆无人看护的警车上，嫌疑人打破车窗，拿到了文件。关于此案，就是否存在特殊关系，法院意见不一。但是，在 Swinney 诉 Chief Constable of Northumbria(第 2 号)(1999 年)一案中，法院认为，警方对举报人负有采取合理措施以保证其隐蔽性的谨慎义务。但是，在这一案件中，警方并没有违反这项义务。

In the absence of such exceptional circumstances, an immunity did not arise in *Welton v North Cornwall District Council* (1996). An environmental health officer, acting on behalf of a local authority, negligently required the owner of food premises to undertake extensive works to comply with the Food Act 1990. It was argued that the officer exercised a police or quasi-police function and there should be an immunity. This was rejected as the officer had assumed responsibility and, hence, a duty of care was owed.

The same public policy immunity for the discharge of public duties, unless responsibility had exceptionally been assumed to a particular defendant, also applies to the Crown Prosecution Service (*Elguzouli-Daf v Commissioner of Police of the Metropolis* (1994)) and the fire brigade (*Church of Jesus Christ of Latter Day Saints (Great Britain) v Yorkshire Fire and Civil Defence Authority* (1996); *John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority* (1996); *Nelson Holdings Ltd v British Gas plc* (1996)). However, a distinction was made between a positive act of negligence for which there would be liability on the part of the fire brigade and a negligent omission for which there would be no liability in *Capital Counties plc v Hampshire County Council* (1996). A fire officer at the scene of the accident had ordered that a sprinkler system be switched off in a burning building. The result was the fire spread and caused more damage.

In *Harris v Evans* (1998), it was held that the inspector of the Health and Safety Executive did not owe a duty of care to the owner of a business when making recommendations as to whether a particular activity should be authorised under the Health and Safety at Work Act 1974.

Phelps v Hillingdon London Borough Council (2000) concerned the negligence of educational psychologists employed by local authorities. The House of Lords held that, although it might not be possible to sue the authorities directly for the