

Towards a Tort of Political Negligence: Political Deceit, Political Misrepresentation and the Brexit Conundrum

Introduction

The tort of negligence can be defined as negligently or carelessly causing damage or injury to someone, who may in turn hold the perpetrator liable for such injury or damage. In 1932, the historical case of *Donoghue v Stevenson*¹ marked the birth of the modern tort of negligence. In this case, the House of Lords (HL) had identified that the doctrine of *privity*² in contract law prevented Mrs Donoghue from initiating a claim against the defendant in contract, hence, the formulation of the *neighbour test* (discussed below) and the *tort of negligence*.

To initiate a claim for negligence, the claimant must satisfy the test that was established in *Donoghue* namely:

1. Defendant owed victim a Duty of care
2. Defendant breached that Duty of Care
3. Causation – the defendant’s breach of duty of care *in fact* or *legally*, caused the claimant’s damage or harm.

The HL established in *Donoghue* that some professionals or classes of peoples owe a duty of care to other people who are proximate to them or their services. For example, medical professionals owe a duty of care to their patients,³ employers owe a duty of care to their employees,⁴ manufacturers owe a duty of care to customers / consumers,⁵ as well as occupiers to patrons⁶ among others. This begs the question, do politicians owe a duty of care to voters or electorates?

This post discusses the current political debate born out of Brexit and the plethora of discontent voiced by voters.⁷ It will conclude by calling for the introduction of the tort of political negligence such that politicians, like other professionals can be held liable in tort of negligence for bad faith misstatements, misrepresentation of facts or political lies they make during political campaigns that influence voters to vote in favour of their political ambitions.

Do Politicians Owe a Duty of Care to Voters (Society at Large)?

One may argue that politicians do not owe a duty of care to voters, as there’s no valid established duty of care arising out of either case law or statute. However, in *Caparo v Dickman*,⁸ the HL established a 3 Part test that must be satisfied if a duty of care is to be established.

¹ *Donoghue v Stevenson* [1932] UKHL 100.

² The doctrine of privity of contract is a common law principle which provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract.

³ *Montgomery v Lanarkshire NHS Board* [2015] UKSC 11.

⁴ *Wilsons & Clyde Coal Co v English* [1938] AC 57.

⁵ *Grant v Australian Knitting Mills* [1936] AC 85.

⁶ *Glasgow Corp v Muir* [1943] AC 448.

⁷ For example, T. Sampson, ‘Brexit: The Economics of International Disintegration’ (2017) 31(4) *Journal of Economic Perspectives*, 163 – 184.

⁸ *Caparo v Dickman* [1990] UKHL 2.

1. Reasonable foreseeability of the damage / harm.
2. Proximity.
3. Fair, just & equitable to impose liability.

In light of the above test, three questions need answering in order to support a claim for the introduction of the tort of political negligence. In order to inform context, the “three - part test” established *Caparo* is applied to the ‘Brexit’ conundrum as a case study below:

The Brexit Conundrum: The “three - part test”

1. Was it reasonably foreseeable that the statements (factual / false) from the leave campaigners would influence the voters during the Brexit campaign to vote in their favour?
2. How close / proximate i.e., (in terms of trust / influence) were the voters and the leave campaigners?
3. Would it be fair, just and equitable to hold the leave campaigners liable for negligently misleading / influencing the voters?

Reasonable Foreseeability of the Harm arising out of Negligent Statements

The reasonable foreseeability element (also known as the ‘neighbour’ principle’) in the tort of negligence relates to the rule that ‘you must not injure your neighbour’. But who then, in law, is my neighbour? ‘*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 and omissions which are called in question*’.⁹ This entails ensuring that you maintain the standard of care expected of you as a ‘reasonable person’.

It should be noted that the standard of care in negligence cases is objective; that is, the *reasonable man test* first formulated in *Blyth v Proprietors of the Birmingham Waterworks*.¹⁰ Therefore, the court may consider several factors, such as the magnitude of the risk or likelihood of harm.¹¹ On this note, the question that follows on is that: Did the leave campaigners fall below the standard of care expected of them towards their voters through false / nonfactual statements?

Since the referendum results were announced, followed by the triggering of Article 50 of the Treaty of the European Union by the Prime Minister that officially commenced the withdrawal proceedings of the UK from the EU, several concerns via political platforms, whistleblowing platforms,¹² among other platforms have been voiced. These relate especially to the authenticity of the literature, funding sources, advertisements and campaign manifesto used by leave campaigners.

⁹ Per Lord Atkin in *Donoghue v Stevenson* [1932] UKHL 100 at [580].

¹⁰ *Blyth v Proprietors of the Birmingham Waterworks* (1856) 11 Exch 781.

¹¹ This test was applied in the cases of *Bolton v Stone* [1951] AC 850 HL and *Miller v Jackson* [1977] QB 966 (CA).

¹² See, for example, John Lichfield, “Boris Johnson’s £350m claim is devious and bogus” *The Guardian*, 18 September 2017 at <<https://www.theguardian.com/commentisfree/2017/sep/18/boris-johnson-350-million-claim-bogus-foreign-secretary>> (accessed December 2018).

Among those concerns was the fact that the Leave Campaigners relied more on the amount of money (i.e., £350 Million sent to Brussels on a weekly basis by the UK Government), yet actual figures were not authenticated in any certified reports.¹³ From the above concerns, reasonable foreseeability of harm in the tort of negligence may be inferred. Arguably, the Leave Campaigners ought to have contemplated that false, nonfactual and uncertified statements in their campaign adverts, may be relied upon by some voters to in favour of their political opinions.

Proximity – Closeness between Politicians and Voters: (Trust and Influence)

Negligent misrepresentation is a type of misrepresentation at common law that if proven amounts to the tort of deceit. In *Derry v Peek*,¹⁴ Lord Herschell established that:

‘Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth or (iii) recklessly, whether it be true or false.’

Moreover, unreasonableness provides evidence of dishonesty on the part of the maker of the false statement. In *Polhill v Walter*,¹⁵ the representor knew that his statement was false but his motive in making the false statement was to benefit his principal not himself; yet, despite his intentions, he was liable in the tort of deceit.

In *Hedley Byrne v Heller*,¹⁶ the House of Lords widened the scope of liability for negligent misrepresentation. One of the approaches to analysing this wider scope is via the concept of a ‘special relationship’ between the *claimant* and the *defendant*, which has been argued, to be the key to *Hedley Byrne*. This ‘special relationship’ is premised on the notion of voluntary assumption of responsibility by the defendant and foreseeable detrimental reliance by the claimant.

It may be argued that from this formulation in *Hedley Byrne*, politicians assume voluntary assumption of responsibility when they take political offices. Consequently, they are expected to discharge their duties of representing the electorates at different levels of political spectrum with honesty and fairness. This is a form of fiduciary relationship, which in turn creates an implied duty of care arising out of the ‘special relationship’ which ought to be maintained by not falling below the standard of care expected of them.

Due to proximity between politicians and voters, issues of trust and influence are key to persuading the electors to vote in a certain way or the other. Therefore, it may be argued that leave campaigners’ relationship (closeness) to their voters may have influenced the voters due to trust and influence underpinnings yet (based on negligent, non factual statements).

¹³ Ibid.

¹⁴ *Derry v Peek* [1889] 14 App Cas 337.

¹⁵ *Polhill v Walter* [1832] 3 B & Ad 114.

¹⁶ *Hedley Byrne v Heller* [1964] AC 465.

Would it be fair, just and equitable to Impose Liability for Political negligence?

The role of liability in tort is either deterrent or punishment. Where liability is imposed, the main remedy is damages. However, injunctions are also remedies in tort. The argument is therefore, that where the court is satisfied that liability should be imposed for tort of political negligence / deceit, either prohibitory injunctions or mandatory injunction may be granted to the victims. Prohibitory injunctions would prevent politicians from continuing the course of their conduct of falsely misleading voters. Mandatory injunctions would require politicians to rectify the situation (perhaps by telling the voters that they were misled during campaigns). This may arguably bring fairness and justice to the voters whose decisions to vote in one way or the other were influenced by political misrepresentation of facts or misstatements.

Policy Considerations – Potential Floodgates Argument

Sometimes courts are concerned with opening the floodgates of litigation. They are reluctant to impose liability where doing so might encourage large numbers of claims on the same issue. This would ‘flood’ the courts, possibly to such an extent that the courts could not cope. In *Ultramares Corporation v Touche, Niven & Co*,¹⁷ the court was of the view that “the law should avoid imposing ‘crushing liability’: ...liability in an indeterminate amount for an indeterminate time to an indeterminate class.” From this point of view, it may be a concern that if courts were to impose liability in tort for political negligence / deceit, numerous claims from voters may be initiated, especially in the aftermath of Brexit.

Of course making it too easy to sue may make us a litigious society. However, as per the opinion in *Smolden v Withworth and Nolan*,¹⁸ the benefits of imposing a duty of care for future conduct might lead to people being more careful in the future. The floodgate argument is the least morally justifiable argument under judicial policy consideration as sometimes, it constricts fundamental underpinnings of justice and fairness. Therefore, to avoid future political conundra such as Brexit, we should consider the introduction of the tort of political deceit / negligence via common law and statute to regulate politicians in our societies as they are key to the direction of societal governance and other social welfare imperatives.

¹⁷ *Ultramares Corporation v Touche, Niven & Co*, 159 F2d 169 (2 Cir 1947).

¹⁸ *Smolden v Withworth and Nolan* [1997] PIQR PL133.