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Appraising Contractors' Tortious Liability Under the Tort of Negligence. Perspectives from Common Law and Civil Law Jurisdictions

Charles Gavamukulya, MCIArb ✉
School of Built Environment, Engineering and Computing,
Leeds Beckett University, United Kingdom

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ABSTRACT:

This article examines the tortious liability of contractors under the tort of negligence, comparing approaches in common law and civil law jurisdictions. It analyzes the key elements of negligence—duty of care, breach, and resulting damage—focusing on the contractor's liability for negligent acts and negligent advice on construction projects. The study highlights how common law jurisdictions impose liability based on established legal precedents while civil law systems, exemplified by the French Civil Code, adopt a broader codified approach. The article also explores how contractors may still be held liable beyond contractual limitation periods and how liability can arise even in the absence of a formal duty of care in civil law jurisdictions. Understanding these differences is crucial for contractors and employers operating in multiple legal frameworks.

Keywords: Contractor liability, Tort of negligence, Duty of care, Construction law, Common law vs. civil law, Negligent misstatements.

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INTRODUCTION

Negligence, as a key concept in tort law, provides a framework for holding individuals or entities accountable for harm caused by their failure to exercise reasonable care. In construction contracts, particularly those involving design and build obligations, the interplay between contractual and tortious liabilities often comes into sharp focus. This article explores the "*negligence equation*" within common law jurisdictions focusing on its three foundational elements: duty of care, breach of duty, and resulting damage. It examines the intricacies of a contractor's liability for both negligent acts and advice addressing the extent to which these liabilities may persist even beyond contractual limitation periods.

Furthermore, the article contrasts these principles with the approach under civil law jurisdictions, using France as a case study to highlight the broader scope of liability imposed under the French Civil Code [3]. Through this comparative lens, the article evaluates the practical implications for contractors and employers shedding light on the evolving landscape of liability in construction law which is of particular importance to contractors operating in different jurisdictions.

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THE NEGLIGENCE EQUATION IN COMMON LAW JURISDICTIONS

For a successful claim in the tort of negligence, the claimant-often the Employer, must show: (1) that the Contractor owed them a duty of care; (2) that there was a breach of that duty; and (3) this breach resulted in recoverable damage. This is referred to as the negligence equation. It is important for all the components of this negligence equation to be satisfied in order for such a claim to succeed.

While assessing the first limb of this negligence equation, consider the leading case of *Donoghue v Stevenson* [1] where it was held that a manufacturer of goods owed a duty of care to their final consumer. This case established the '*neighbour principle*' which determines whether a duty of care is owed by the defendant in any given situation. In his *obiter*, Lord Atkin defined a neighbour in the law as a "*person who is 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*." Consequently, the requirements of foreseeability and proximity set out in the neighbour principle form the basis of finding duty of care. The fundamental concept of the neighbour principle underwent reformulation in *Caparo Industries v Dickman* [2]. In this case, there was introduction of the consideration of whether the existence of a duty would be fair, just and reasonable. With this, *Caparo* [2] introduced a third requirement that extended beyond the two earlier criteria that were set by *Donoghue* [1] [4].

In the appraisal of a Contractor's negligence, it is important to examine both negligent actions and negligent advice. Appraising negligent advice has particular application on design and build projects where the contractor has the obligation to prepare design reports for instance. When determining the duty of care for negligent misstatements or advice, reference is made to the case of *Hedley Byrne v Heller* [5] where it was held that a duty of care could exist concerning a statement leading to pure economic loss, if the parties were in a 'special relationship'. Such a special relationship arises, in part, when one party exercises skill and judgement and the other party acts in reliance of this skill and judgement as can be the case in design and build contracts where the Employer can act in reliance to a report drawn by the Contractor [4].

Given that the Contractor is a neighbor to the Employer, the Contractor often owes the Employer a duty of care for negligent acts and negligent advice in some cases. This is important even when defects occur almost six years after the completion date which would ordinarily be statute barred under claims in contract in the UK and in Uganda, claims in tort can be brought forward. This was established in the case of *Dutton v Bognor Regis UDC* [6] where claims that were previously time barred by limitation were allowed [7].

BREACH OF DUTY

After confirming the existence of a duty of care, the next step in proving negligence involves demonstrating a breach of that duty. To ascertain breach of duty of care, it is necessary first to identify the standard of care and then determine if this standard was met in the given circumstances. The standard of care, as established in *Blyth v Birmingham Waterworks* [8], is that of the 'reasonable man'. This is a legal abstraction which represents an average person who was further described by Greer LJ in *Hall v Brooklands Auto-Racing Club* [9] as *'a man on the Clapham omnibus'* [7].

However, if the defendant presents themselves as possessing specific professional skills, the applicable standard of care must be determined by comparing them with others in the same profession. In *Bolam v Friern Hospital Management Committee* [10], it was held that the '*test is the standard of the ordinary skilled man exercising and professing to have that special skill*'. For the context of a Contractor on a project, the Contractor holds themselves out to the Employer as possessing particular professional skills to execute a design and build project or simply a build only project and therefore this is the standard of care to which they must adhere.

The legal burden to prove breach of duty is on the Employer in this case and this must be established on the balance of probabilities. The Employer can rely on the maxim *of res ipsa loquitur.* With this, in the absence of convincing evidence to the contrary, the court will give the Employer the benefit of doubt by inferring negligence from what is known. This was shown in *Scott v London & St. Katherine*

Docks [11] where it was held that a claimant will be assisted by *res ipsa loquitur* if the thing causing damage is under the control of the defendant or someone for whose negligence the defendant is responsible and that the accident is such as would not normally occur without negligence.

When examining a Contractor's liability to the Employer, further reference is made to *Gee v Metropolitan Railway Co* [12] where the train doors were presumed to have been the sole responsibility of the train company and therefore it was liable. Where structural failure/defects are due to design and construction solely done by Contractor, and without any evidence to the contrary, the Employer can be assisted by the maxim of *res ipsa loquitur*. As such, where the standard of care is not reached in the respective duty stations, it can be said that there is a breach of duty.

DID THE BREACH OF DUTY RESULT IN LOSS?

After establishing that there was breach of duty, the next key question would be whether or not the breach of duty resulted in loss. The general test used by the courts to determine the factual causation is the "but for" test, where the key question is whether, but for the defendant's breach of duty, the loss or damage would have occurred. For instance, Lord Denning stated in *Cork v Kirby Maclean Ltd* [13] that *"…if the damage would not have happened but for a particular fault, then that fault is the cause of the damage; if it would have happened just the same, fault or no fault, the fault is not the cause of the damage."*

The two types of damage under consideration are physical damage and pure economic loss. In *Spartan Steel v Martin* [14], it was held that financial loss not directly stemming from physical damage is too remote to be compensable in negligence. As such, the law of negligence concerns actual damage, usually in the form of physical injury to persons or property [7].

The courts have adopted different approaches to pure economic loss resulting from a negligent action and pure economic loss caused by negligent advice. This can be shown in *Murphy v Brentwood* [15] where it was held that pure economic loss arising from a negligent act is not recoverable. As such, Employers cannot claim for pure economic loss resulting from Contractor's negligent acts.

Appraising negligent advice, on the other hand, requires establishment of a special relationship between the parties which causes reliance of one party on another. In the case of *Henderson v Merrett* [16], it was held that when one party undertakes to provide professional or quasi-professional services for another, this commitment, if relied upon by the person on whose behalf these services are performed, may be adequate to establish a duty of care in tort, irrespective of the contractual relationship between the parties. According to *Henderson* [16], the existence of contractual relationships between the parties did not exclude the possibility of a duty of care in negligence. Moreover, the special relationship extended beyond advice to also include the provision of services.

In *Hedley Byrne* [17], it was held that a duty of care could exist concerning a statement leading to pure economic loss if the parties were in a special relationship such as that one discussed above in *Henderson* [18]. Therefore, in contrast to non-recovery of pure economic loss arising from a negligent act as mentioned above, pure economic loss arising from negligent advice is recoverable [19]. Consider a design and build project where the Contractor recommends the use of a wall of contiguous piles which is later discovered to have been under-designed for their length and load bearing requirements. It can be considered that the Contractor provided negligent advice to the Employer thereby entitling the Employer to claim for pure economic loss resulting from this negligent advice.

DAMAGE SUFFERED

The final limb of the negligence equation involves determining the extent of the damage suffered by the claimant which should be attributable to the defendant. In the *Wagon Mound (No.1)* [20] case, it was held that the appropriate test for remoteness is reasonable foreseeability of the kind or type of

damage suffered by the claimant. Applying the *Wagon Mound* [20] test in *Hughes v Lord Advocate*, [21], it was held that it is only the type of damage which must be reasonably foreseeable and not the manner in which it occurs or its extent. Where there is physical damage due to a breach of duty of care and it is reasonably foreseeable that the Employer would suffer this loss as a result of the Contractor's negligence, this limb which is essential in proving negligence is satisfied.

HOW DIFFERENT WOULD THE CONTRACTORS TORTIOUS LIABILITY BE UNDER A CIVIL JURISDICTION?

A Case study of France

While considering how this appraisal might be differently addressed in a Civil Code Country, reference is made to the French Civil Code [3]. The structure of French tort law is such that it does not spell out the different torts like negligence, trespass and nuisance but rather provides for them generally in Articles 1240 to 1245 of the Civil Code. There is no limitation on the type of wrong which may arise under these articles since they are drafted to be very wide.

Article 1245-8 provides that the claimant must demonstrate the harm, the defect and the causal relationship between the defect and the harm. These constitute the three elements of the claimant's burden of proof in order to prove liability. Therefore, there is no need for a duty of care as would have been required by common law. Additionally, there is no need of application of the neighbour principle under French law. The claimant needs to prove the defect and the damages that he is pursuing. The French Civil code [3] does not show how this link between defect and harm should be assessed but it must be direct causal link between the harm and the defect.

Based on this, using an example of an Employer on a building project that has suffered structural failure due to defects in construction and (or) design, could prove that the defect in the design and (or) construction of the Works caused failure of the structure and the Contractor would be liable under French law. Once the claimants (the Employers in this case) ably prove fault, damage and the causal link between the fault and the damage, they can win all their compensation.

Article 1241 provides that an individual is responsible for harm caused not only by their actions but also by their failure to act or exercise due care. This provision allows one to be liable for one's omissions which is a departure from common law where in *Stovin v Wise* [22] it was held that the law does not recognize a duty of care owed to the whole world to take positive action to prevent harm. In *Caparo* [23] terms, imposing such a general duty would be unfair, unjust or unreasonable. Referring to the instant facts, a Contractor would be liable to an Employer for actions that led to structural failure. Additionally, a Contractor would be liable to an Employer due to their inaction or lack of care in ensuring that the structure that was handed over was not under designed and improperly constructed.

Article 1242 provides that one is not only liable for the harm resulting from one's actions but also for harm caused by the actions of those for whom they are responsible or by things under their care. From this, where a contractor has subcontractors on site, it can be considered that the Contractor is responsible for the Subcontractor's actions. The Contractor would be open to multiple fronts of liability as a result depending on the different parties that are affected by the different subcontractor's actions.

Article 1244 provides that a building owner, referred to as the Employer in this article, is liable for the harm caused by its collapse when that resulted from a lack of maintenance or construction defect. This indicates that liability arises from lack of maintenance or construction defects even when the owner of the building is not responsible for the cause of the defects. This is a departure from common law where a Contractor would instead be liable under public nuisance.

CONCLUSION

The negligence equation in common law jurisdictions provides a structured framework for determining liability in cases of negligent acts or advice. By establishing a duty of care, proving a

breach of that duty, and demonstrating resulting damage, claimants, such as Employers in construction contracts, can seek redress for harm caused by contractors. Landmark cases such as *Donoghue v Stevenson*, *Caparo Industries v Dickman*, and *Hedley Byrne v Heller* illustrate the nuanced development of these principles particularly in distinguishing between physical damage and recoverable pure economic loss.

In contrast, civil law jurisdictions, exemplified by the French Civil Code [3], adopt a broader approach to liability. The absence of a duty of care requirement and the imposition of additional liabilities such as employer responsibility for building defects, demonstrate significant differences in the burden of proof and scope of accountability. These distinctions highlight the need for contractors and employers to understand the legal frameworks applicable to their projects especially when operating across jurisdictions.

Finally, contractors must recognize that their liability extends beyond contractual obligations and can persist through tortious claims even beyond limitation periods in some cases in common law jurisdictions. This awareness underscores the importance of adhering to professional standards and exercising due care in both actions and advice, safeguarding against liabilities that may arise under both common law and civil law systems.

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