

# Developments in the law of negligence and third-party liability

Claims involving duty of care when damage is caused by a third party are at the fore of developments in the law of negligence, as **Barry Hembling** of **Watson, Farley & Williams LLP** reports in this analysis of recent court cases.

## KEY POINTS

- Three important construction cases from early 2021 clarify when a duty of care arises that permits claims where there is no contract.
- The guidance provided by the three cases is timely because claims based on a duty of care where damage was caused by a third party are currently at the forefront of the developing law of negligence.
- The cases give guidance from a private and public law perspective regarding when a duty of care will be imposed.
- The courts said no duty of care arose in two of the cases and in the third case it was a triable issue that could only be decided on the facts.
- The cases clarify the legal principles when a duty of care will be imposed, confirm when a duty of care can be assumed by conduct and affirm the importance of a close relationship before any duty of care will be found to exist.

Three important construction cases from early 2021 have clarified when the courts are willing to find the existence of a duty of care in tort. Establishing a duty of care is the essence of the tort of negligence and must be established prior to considering breach, causation and loss. The courts use various tests to determine whether a duty of care is owed but the boundaries of proximity and the imposition of that duty continue to be tested. These cases are significant because they provide new

perspectives from a private and public law context as to when a duty of care will be imposed.

## Facts

These are the main facts from the three cases:

1. **Multiplex v Bathgate**<sup>1</sup>, concerned the extent to which a third-party design checker was liable to a main contractor in tort for design defects. The design checker was engaged by a sub-contractor who owed full design responsibility to Multiplex. There was no contractual link between Multiplex and the design checker. Due to the sub-contractor's solvency and the potential risk of non-recovery of any judgment against it, Multiplex commenced proceedings directly against the design checker for negligence claiming recovery of costs incurred in having to remedy the defective design. For that claim to succeed Multiplex had to establish that the design checker owed Multiplex a duty of care. Multiplex argued the design checker had assumed responsibility to them because they knew or ought to have known that Multiplex would rely on their design check certificates. The claim by Multiplex failed because design checker did not owe Multiplex a duty of care.
2. The second case, **Anchor v Arcadis**<sup>2</sup>, arose from works to divert a river and create a culvert to

1. *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd (Formerly Dunne Building & Civil Engineering Ltd) (In Administration) (2) BRM Construction LLC (3) Argo Global Syndicate 1200 (2021)*
2. *Anchor Hanover Group v Arcadis Consulting (UK) Ltd (2021)*

allow a shopping centre to be built. Following completion of the works, neighbouring properties were flooded after debris became trapped against the bars of a trash screen over the mouth of the culvert. The occupiers commenced proceedings against the Environment Agency for negligence as there was no contractual relationship between them. It was said that the Agency had consented to the river being diverted and had approved flood risk hydraulic modelling from the second defendant surveyors. It was also alleged that the design and installation of the culvert mouth and the trash screen increased the risk of flooding. The Agency was said to have been negligent in accepting the hydraulic modelling, approving an inadequate trash screen design, and failing to ensure the implementation of an adequate maintenance regime to keep the trash screen clear of debris. The risk of the trash screen becoming blocked and causing flooding was said to be reasonably foreseeable and the Agency had assumed responsibility by previously clearing the trash screen. Following commencement of proceedings, the fourth defendant applied to strike out the claim against it and/or for summary judgment on the basis that the pleading disclosed no reasonable grounds for bringing the claim, had no real prospect of success and there was no other compelling reason for a trial. The court held that while the Agency's actions in commenting, approving and consenting to the proposed diversion works, would not by itself give rise to a duty of care at common law, the hydraulic modelling used in the design of the diversion works went beyond the Agency's statutory duties. That could suggest that a common law duty of care was owed to the claimants. As the court could not exclude the possibility that its conduct gave rise to a duty of care, the strike out application would fail with the matter proceeding to a full trial when the court would be able to determine whether the circumstances gave rise to a common law duty of care by the Agency to the claimants.

3. In *Beattie v Canham*<sup>3</sup>, two claimants brought proceedings for breach of contract and professional negligence against the defendant engineer. It was claimed that it had been

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<sup>3</sup>. (1) *Beattie Passive Norse Limited, and (2) NPS Property Consultants Limited v Canham Consulting Limited* [2021] EWHC 1116

<sup>4</sup>. *Caparo Industries v Dickman* [1990] 1 All ER 568

necessary to demolish and rebuild an ultra-low energy building due to defects with the design and construction of the building's foundations for which the engineer had been responsible. Due to a complicated project structure, the first claimant benefitted from a contractual link with the defendant but the second defendant, NPS, did not. The court had to decide whether the claim by NPS could succeed in negligence in the absence of a contractual relationship. The court held the engineer did not owe a duty of care to NPS and that their claim was therefore unsuccessful. In relation to the first defendant's claim, the court held the engineer was only liable to a modest extent because the defects to the building were not caused by the engineer's negligence.

### The Law

The success of all three cases was dependent on whether a duty of care could be established in the absence of contractual relationships. The law regarding whether a duty of care exists is complicated but thankfully three themes run through the judgments which assist our understanding of when a duty of care will be found to exist:

#### A: Clarification of legal principles

1. **Objective test:** Establishing a duty of care remains an objective test. The state of mind of a defendant is irrelevant. What matters is what was said or done, whether by the defendant or on its behalf.
2. **No single test to establish if a duty exists...:** All three cases confirm the no single test principle continues to apply to private and public law claims. The courts will consider for consistency the closest analogies from existing case law but must also weigh up the reasons for and against imposing a duty of care in deciding whether it would be just and reasonable to find one. It is insufficient to ask whether one party owed a duty of care to another but necessary to determine the scope of the duty by reference to the type of damage from which care must be taken to prevent harm.
3. **...but the three-part test remains influential:** Although there remains no single test for establishing a duty of care, it is still helpful to consider whether damage is foreseeable, whether there is a sufficiently proximate relationship and whether it would be fair, just and reasonable to impose a duty.<sup>4</sup> However, the judgments recognised that this test is not always determinative.

**B: The assumption of a duty of care by conduct**

**4. Conduct can give rise to an assumed duty:**

A duty of care does not depend upon what a defendant intended but upon what could objectively be inferred by their conduct. This means it is not necessary for a defendant to knowingly and deliberately accept responsibility. In *Anchor* for example, hydraulic modelling and debris clearance were all activities beyond the Agency's statutory responsibilities which suggested a duty of care had been assumed.

- 5. No duty for fulfilling usual responsibilities.** For a duty of care to be objectively assumed, a party must be seen to go beyond what they are required to do in any event. In *Anchor*, the court concluded that public authorities do not owe a common law duty to private individuals or bodies simply by exercising their statutory powers. Although the Agency provided comments, approval and consent to the river diversion works, these were activities part of its usual statutory duties and were insufficient to establish a common law duty of care. The hydraulic modelling and debris clearance activities referred to above were determinative. Similarly, in *Beattie*, the fact that NPS paid some of the engineer's invoices, and that the first claimant (who benefitted from a contractual link with the engineer) sometimes used an NPS e-mail address was insufficient to establish a duty of care between NPS and the engineer.

**C: The importance of a contractual relationship to establish a duty of care**

- 6. Contractual relationships can give rise to a duty of care in tort...:** Although a contractual relationship is not determinative to establishing a duty of care in tort, it remains a highly relevant feature. The closer the situation in tort to a business-like relationship governed by contractual terms, the more likely a court will find that a duty of care exists.
- 7. ...but can also negate the assumption of a duty:** In both *Multiplex* and *Beattie*, the absence of contractual relationships with the respective defendants were influential in establishing that no duties of care existed. The courts concluded that construction professionals would expect a framework of carefully organised contractual obligations to govern their legal relations. In *Multiplex*, the contractual relationship was between Multiplex and its sub-contractor. Multiplex had no contractual link with the design

checker who performed their duties under the relevant British Standard. Multiplex had not been involved in the selection of the design checker and did not know which documents had been reviewed when the design checks were performed. It would be inconceivable that a reasonable businessman would consider the design checker had voluntarily assumed unlimited third-party responsibility in the absence of a contractual relationship. Similarly, in *Beattie* there was no reason to extend the scope of the engineer's responsibility and to include a separate duty directly owed to NPS. The parties had chosen to conduct their business interests through the first claimant rather than through NPS. In the circumstances, it would be artificial to extend a duty of care to NPS.

**Conclusion**

Many duty of care cases arise from construction projects and these three cases are but the latest examples. The triangular project structure, such as between main contractor, sub-contractor and third-party consultant (as in *Multiplex*), provides a model that is ripe for exploring issues such as duty of care, negligence and limitation. *Multiplex*, *Anchor* and *Beattie* are the latest cases arising from that structure.

It would be too simplistic to interpret either *Multiplex* or *Beattie* as general authority for no third-party liability in the absence of a contractual relationship. This is because the Court of Appeal has already said that a contract structure may not be enough to protect from third party liability<sup>5</sup>. However, *Multiplex* and *Beattie* are a reminder of the difficulties of establishing a duty of care in tort in the absence of contractual liabilities. The decision in *Anchor* is also important as it is the first authority on whether a duty of care arose in such circumstances.

While the clarity gained from the themes arising from these three cases is to be welcomed, claims based on a duty of care where damage was caused by a third party remain at the forefront of the developing law of negligence. Accordingly, this remains an area where we should expect to see the law develop and evolve, especially where the boundaries of a duty of care continue to be tested. **CL**

(Additional research by Tim Goyder)

<sup>5</sup> *Riyad Bank and others v Ahli United Bank (UK) plc* [2006] EWCA Civ 780