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Particular Issues Concerning the Duty of Care

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In Chapter 8 the concept of a duty of care was introduced through the case of *Donoghue v Stevenson*. This case highlighted the importance in the Scots law of delict, and the English law of tort, of the duty owed to our neighbours to use reasonable care. This chapter deals with the different types of situations where this duty is to be found, and also the circumstances where there is no duty, and therefore, no claim in delict.

Pure omissions

In Scots Law there is no general legal duty to warn someone of a potential danger, or to rescue that person from harm. In other jurisdictions, such as New York state, in the USA, there may be a possible prosecution under criminal law for 'depraved indifference' if a person fails to act in a situation where it is clear that serious harm will be suffered by a victim.

There are exceptions to these general rules:

- 1 Where there is a sufficiently close degree of proximity, between the parties; **or**
- 2 Where it is the person who is creating the danger who fails to warn the victim.

Nervous shock

The duty to cause no harm through negligence is not limited to physical harm, but also covers situations where the pursuer is suffering from mental health problems as a result of the delictual event. However, the courts have put strict limits on the situations where a duty of care can be said to exist to prevent nervous shock, despite the advances in the medical recognition of the effects of Post-Traumatic Stress over the past one hundred years.

If the pursuer who is suffering from nervous shock was also at risk of physical harm as a result of the defender's carelessness, the claim may succeed.

If the pursuer in this situation was not at risk of physical harm in circumstances where someone else was injured due to the defender's negligence the claim will only succeed, if the following three tests can be satisfied:

- 1 There were 'close ties of affection' between the pursuer and the actual victim; **and**
- 2 The pursuer witnessed the incident or its immediate aftermath; **and**
- 3 The pursuer saw or heard the effects of the incident on the victim.

The three leading cases on nervous shock all arose from disasters which would, in all likelihood, have resulted in ongoing mental health issues for the pursuers/claimants, yet none of them succeeded in satisfying the three tests. They are:

Alcock and Others v Chief Constable of South Yorkshire [1991] 4 All E.R. 907 (H.L.)

This case arose out of the tragedy at the Sheffield Wednesday football ground in April 1989, when the police allowed late arrivals to enter a part of the stadium that was already full, with the result that 96 Liverpool fans at the front were pushed into the security fencing and crushed to death. The match was being televised live and many of the claimants who sought damages had seen the event on TV. Because they had not been present at the event, their claims failed.

Robertson v Forth Road Bridge Joint Board 1994 S.L.T. 56

This claim failed the close ties of affection test. *Alcock* had decided that those who qualified for this test should not be limited to parents and children and husbands and wives, but could include fiancées. The court did

not extend the class of potential claimants to a brother or brother-in-law, so it was not surprising that the court in *Robertson* did not allow a claim by a workmate, even one of twenty years' close friendship with the victim.

McFarlane v E. E. Caledonia Ltd [1994] 2 All E.R. 1

This case arose out of the explosion of the Piper Alpha oil rig in the North Sea. The pursuer was on a supply vessel some distance from the rig when it exploded killing 167 workers. This claim also failed the close ties of affection test.

Economic loss

If the pursuer's case is based on the loss of money alone, no matter that the sum may be large, the courts will not usually allow the claim. A possible reason for this is that the loss may have been insurable. In these circumstances the courts will not allow a legal claim, where there is already a practical solution. Another possible reason is that it would give rise to too much potential liability. A good example of this is this English case:

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] 1 Q.B. 27; [1972] 3 All E.R. 557.

The claimants had a stainless steel factory in Birmingham, England. Its electricity supply came directly from the power station. The defendants were doing work outside the factory with an excavator and negligently damaged the cable. The cable was the property of the power company. As a consequence of the defendants' negligence, the factory was without power for 15 hours. This resulted in:

- 1 physical damage to the factory's furnaces and metal;
- 2 lost profit on the damaged metal; and
- 3 lost profit on the metal that was not processed during the time the power was off.

The claimants claimed for all three heads of damage and succeeded under heads (1) and (2), but not under head (3). The reasoning of the court was that head (1) related to physical damage and head (2) was directly consequential on head (1), but the profits lost during the outage were "pure economic loss", in other words, only money. There was an acceptance by the court that the defendants did owe a duty of care to the claimants, and the damage