Professional negligence: a comparative view

Erwin Deutsch*

The recent Court of Appeal decision on medical responsibility, Namsivayam Yogasakaran, *stimulated this reflective comment by Professor Deutsch.*

I ORIGIN OF NEGLIGENCE

Negligence, as the English term implies, was first known in Roman law. Negligence has been no instant invention; it took about a thousand years to develop. Negligence, the foremost concept of private responsibility, spread over nearly the whole time of Roman law. It all started with the *XII Tables*, an old statute of responsibility. Following doubtlessly even older rules, the distinction there is between the intentional tort and harm unintentionally inflicted. In dealing with arson *tabula VIII* part 10 distinguishes between the *sciens prudensque* and the person *qui casu comiserit*. Hundreds of years later the eminent Roman lawyer Gaius added: *Id est negligentia.*[1] This may have been a misinterpretation of the original statute, but it shows that negligence was a recognized institution of law in later times.

There was another statute, the *lex Aquilia* from the third century before Christ, dealing with harm done to things. It required *damnum iniuria datum*. The common interpretation at the end of the Roman Republic had come to be that *iniuria* meant *culpa*. Here for the first time there was responsibility for *dolus malus* and *negligentia* and, more important, there was usually no action for *casus*.

The next step by the Roman lawyers was the discovery of a duty of care. Under the influence of Greek social ethics the standard applied to the duty of care was the behaviour of the diligent *paterfamilias*.[2] Obviously the standard was an objective one. Personal shortcomings were not taken into account; they did not release the tortfeasor from the responsibility. There are a few phrases in the *Corpus Iuris Civilis* which are attributed to Celsus, Ulpian and Gaius, where *imperitia* and *infirmitas* (incompetence and infirmity) are placed side by side with negligence.

---

* Professor of Law and Director of the Institute of Medical and Pharmaceutical Law, University of Göttingen; Judge of the Court of Appeal at Celle; Visiting Fellow, Victoria University of Wellington 1990.

1 D 47, 9, 9.

2 See W Kunkel "Diligentia", Zeitschrift der Savingy-Stiftung, 47, 344ff; M Kaser *Römisches Privatrecht*, § 36 IV 2.

Negligence having been an institution for about two thousand years found a place easily in the codifications in Western Europe. Only the German Civil Code tried to define negligence, with remarkable success. Diligence was not to be measured according to what an ordinary prudent man might have done, but what was the task to perform. Negligent was the man or woman who did not provide the care necessary under the circumstances.[3] The other codifications did not attempt to define negligence. The French Penal Code, however, went so far as to equate negligence with the "inobservation des réglements".[4]

In Common Law negligence has been used in a very general sense to describe the breach of any legal obligation or to designate a mental element, usually one of inadvertence or indifference while committing another tort.[5] Some writers, even in this century, maintained that negligence was merely one way of committing another tort and in itself it had no particular legal significance.[6] Some courts even spoke of "negligent battery".[7] Nowadays, it is generally recognized that negligence is an independent basis of liability differing from intention on the one hand and strict liability on the other.[8]

II FUNCTION AND RELATIVITY OF NEGLIGENCE

The function of negligence has always been determined by its place between intention as a major tort and strict liability as a minor one. Gaius had had to fit negligence in between *sciens prudensque* and *qui casu comiserit* and decided that it was similar to the latter. Even today we read that "negligent liability often is strict liability in everything but name".[9] But the German legislature had other intentions. It chose negligence as the expression of culpable behaviour as opposed to strict liability. The function of negligence was to give everyone freedom of movement as long as he or she kept within the range of expected behaviour. That behaviour was determined by statutory duty, respect of other persons, danger, and ordinary expectations.[10] Diligence appears to be the opposite of negligence. The diligent person is protected against unwanted liability.

Recent publications have shown that there are two very distinct types of diligence, one concerns the behaviour of a person, the other a state of mind. They

---

3 *German Civil Code*, § 276 sec 1, subs 2.

4 Article 319 Code Pénal: "Quiconque, par maladresse, imprudence, inattentation, negligence ou inobservation des réglements, aura commis involontairement un homicide ...".

5 J H Wigmore "Responsibility for Tortious Acts, Its History" (1894) 7 Harvard LR 315, 441, 453.

6 See J Salmond *Law of Torts* (6 ed, 1924) 21-26.

7 See the cases cited by W P Keeton (ed) *Prosser and Keeton on The Law of Torts* (5 ed, 1984) 30.

8 P H Winfield "The History of Negligence in the Law of Torts" (1926) 42 LQR 184; *Prosser and Keeton*, above n7, p 161.

9 B S Markesinis *The German Law of Torts* (1986) 45.

10 Protocols of the second reading of the draft of the German Civil Code, vol II, p 569.

are sometimes called "the outer and inner diligence". Negligence is only attributable to a person if both outer and inner diligence are lacking.[11] If, for example, a driver was supposed to stop but he was unaware of the obligation because he was from out of town and because the stop signal was obscured by a van, he acted against the law, but not in culpable fashion. On the other hand a bad state of mind alone does not give rise to a claim. A person who drives carefully though intoxicated is not liable if because of some outer influence an accident happens.[12] The inner diligence is especially important if there is a statutory duty to perform. Here the laws differ. According to the English notion of statutory negligence and the American theory of negligence per se the unlawful act itself constitutes negligence.[13] Similarly eminent French writers feel that since laws and règlements are deemed to be known, the pure fact of not following them constitutes faute. Only an act of God or the absence of causal relation could work as a defence.[14] Conversely the German Civil Code requires a culpable act even if a statutory protective provision has remained unobserved.[15] But intent or negligence are required as to the existence and the applicability of the statute.

III STANDARD OF CARE, TYPE OF CARE

Roman law left us with the diligence of the *bonus paterfamilias*, a creation of Greek social philosophy. In Common Law it became the reasonable man of ordinary prudence.[16] All agree that this version is not real, but of an abstract interpretative character. In fact, it was once referred to as *homunculus*.[17] The ordinary prudent man assumes totally different characteristics according to the position he takes. In the profession the reasonable man becomes the average member of the profession in good standing.[18] Then suddenly some special abilities are expected of the professional, ie knowledge, skill and care. There again we can see the two sides of diligence - internal care represented by "knowledge", external care by skill and care in general.

The professional standard is not so much measured by what the professional in general represents, but how the professional would act or react under certain circumstances. Therefore, circumstances, natural or personal surroundings are the first step in defining professional diligence.

---

11 German Federal Supreme Court, Versicherungsrecht 1986, 766; E Deutsch *Unerlaubte Handlung and Schadensersatz* (1987) 64 ff.

12 Swiss Federal Court, BGE 84 II 295.

13 E R Thayer "Public Wrong and Private Action" (1913) 27 Harvard LR 317; *Salmond and Heuston on the Law of Torts* (17 ed, 1977) chap 10.

14 Planiol-Ripert-Esmein, *Droit Civil* VI 1 Nr 521.

15 *German Civil Code*, § 823 sec 2, subs 2.

16 First used in *Vaughan* v *Menlove* (1837) 3 Bing NC 468; 132 ER 490.

17 Brodmann, AcP 99, 327.

18 *Prosser and Keeton*, above n7, 186 ff.

Buddle Findlay Library
WELLINGTON

The professions, be it engineering, medicine, accounting or law, deal with particular problems in life that need the specific attention of a trained person. The surroundings of the situation, the position occupied by the professional and the expectations as to his or her acts, are the bases on which diligence rests. Therefore, a sketch of the factors influencing the type of the standard of care should contain the following: situation of the person calling on the professional; danger to that person or his or her dependants; status of the professional; position occupied by the professional; normal expectations of the client or patient; explicit or implied promises by the professional. Some of the above named factors can overlap, eg status and position occupied. A lawyer who undertakes specialised work in the field of patents and trademarks rises, by that fact, above his normal status.

Medical malpractice has created some recognised types of negligence which are still general but help somewhat with classification. The most obvious form of malpractice is omission, not rendering care at all. The doctor may absent himself at an undue moment or he may not diagnose an obvious illness. The second form of malpractice consists of unusual treatment. In most cases there simply is not enough care or not the right care. In some others an alternative or a new form of treatment might be tried out on the patient without his or her consent. There is a third category of overtreatment, mostly consisting of overdosing a medication. Finally, there are accompanying failures, maybe leaving some object in the patient during surgery. As far as the distinction of outer and inner diligence is concerned, there is the wrong diagnosis, mostly a matter of internal care. It is universally accepted that minor errors in judgment while formulating a diagnosis do not constitute negligence.[19] Since the standard of care is set up mostly by the medical profession itself and because of the latitude that is given to alternative forms of treatment some French courts in the thirties held that doctors were liable only in a case of gross negligence.[20]

IV LEGAL CONSEQUENCES: CIVIL LIABILITY, CRIMINAL PUNISHMENT, DISCIPLINARY MEASURES

Liability in tort as well as in contract is the consequence most often imposed because of professional negligence. The liability already existing in Roman times[21] has measurably increased in the United States and Central Europe in the last twenty years. Even in New Zealand, where medical misadventure falls under accident compensation, there is responsibility for professional negligence for purely economic loss and for professional negligence in the other professions. After the successful Products Liability Directive of the EC[22] the European Community is working on another directive concerning the liability of the professions. The

---

19 All the different types of medical misadventures with many examples are treated by *Prosser and Keeton*, above n7, 188 ff.

20 See the French cases Trib Dijon 29.12.33 Gaz Trib 34.I.2.117; Cour d'appel Aix 12.7.37 Gaz pal 37.2.635.

21 Institutes 4, 3, 7; D 9, 2, 8 pr; 9, 2, 7, 8.

22 Directive No 85/374 concerning products liability.

preliminary draft obviously tries to impose strict liability for professional acts or omissions that constitute "defective service". Fortunately, that proposal has run into opposition within the European Commission itself. Were it to become law it would be disastrous for the professions because even the diligent member might have to shoulder responsibility for unfortunate results of his activity. Especially in pure economic loss the sums would be staggering.

In criminal law negligence is not punishable per se. It has to relate to the death or injury of a person. In fact, it could be called again the relativité Aquilienne. Because of the personal consequences for the convicted person the penal law usually requires some personal attribution of negligence. There is the notion of criminal negligence in Britain[23] that somehow is related to aggravated or gross negligence. The laws under German influence profess to require what is called "Zurechnung", personal accountability for the act that could have easily been avoided.

In disciplinary law usually negligence is not expressly mentioned. As far as medical disciplinary actions in New Zealand are concerned, there are three categories of offences in descending order of seriousness: disgraceful conduct in a professional respect, professional misconduct, and conduct unbecoming a medical practitioner. Normally, medical negligence would rank as a middle offence, being professional misconduct. Sometimes, however, if the negligence somehow is thought to be aggravated, even disgraceful conduct could be invoked, as it is in the celebrated case of Professor Green.[24] But again disciplinary measures are deeply felt, especially if the censure is published including the name of the doctor concerned and particularly, if the doctor's name is struck from the register of medical practitioners. Therefore, as in all disciplinary measures, the professional's negligence has to be of a culpable nature for liability to be attributed to him or her.

V INTERRELATIONS BETWEEN THE LEGAL CONSEQUENCES

Professional negligence can have more than one, and perhaps many, legal consequences. Somehow they are interrelated. If there has been a criminal conviction this has to be taken into account at disciplinary proceedings[25] as well as in any issue about punitive damages.[26] If professional negligence has been apparent in one legal consequence this somehow influences the other. Does this notion apply also as far as the lack of a function is concerned? For example, if there is no civil liability, because compensation for medical misadventure is granted, there is the redressive element of civil liability missing. This brings us to the recent case of *R*

---

23 *R* v *Lawrence* [1982] AC 341; *Smith & Hogan on Criminal Law* (6 ed, 1988) 352-5.

24 See *Matheson* v *Green* [1989] 3 NZLR 564.

25 *R* v *Namsivayam Yogasakaran* (Unreported, Court of Appeal, CA 119/89, 21 Dec 1989) p 4: "that any authority dealing with him in any other context will note that the circumstances have been regarded by the Courts as so special that no sentence needed to be imposed".

26 See Court of Appeal Celle, Juristenzeitung 1970, 548, as to German law.

v *Namsivayam Yogasakaran*.[27] The New Zealand Court of Appeal held that for a criminal conviction for manslaughter it was not necessary to show that aggravated negligence or criminal negligence was present. Moreover, the "normal" lack of care required for professional negligence in the law of torts seemed to be sufficient for criminal liability. In this judgment the Court mentions that since 1972 negligence causing personal injury by accident has ceased to be actionable in civil law in New Zealand and adds: "But that development has no real bearing on the present question". One may, however, wonder whether the interrelating functions of professional negligence did not come into play here. Since accident compensation has superseded an action in tort, so now a criminal conviction because of manslaughter, even if no fine is imposed, might take over the function of redress inherent in an action in tort. Perhaps the rationale behind this decision of the Court of Appeal in New Zealand, which seems to be contrary to the world-wide trend, is that in New Zealand there is accident compensation and rarely, in cases of medical negligence, redress by the way of an action in tort. It would fit squarely with the assumption that there are interrelations between criminal and civil liabilities.

---

27 Above n24.