

**IN THE SUPREME COURT OF THE UNITED KINGDOM**  
**ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)**

**B E T W E E N**

**ARON TRASK**

Appellant

**-and-**

**THE HOLBORN NHS TRUST**

Respondent

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**APPELLANT'S SKELETON ARGUMENT**

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Grounds of Appeal:

- (1) Duty of Care:** The learned judge was wrong to find that the Respondent did not owe the Appellant a common law duty to protect him from, and/or warn him of the risk of, the assault by its patient, Cal Trask. It is submitted that the novel circumstances of this case satisfy the three criteria for establishing a duty of care set out by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 ('*Caparo v Dickman*').
- (2) Article 3 ECHR:** The learned judge erred in finding that Respondent did not owe an operational duty to the Appellant under Article 3 ECHR, and/or that the Respondent would not have been in breach of the same. It is submitted that this duty was owed the Respondent was in breach of it for failing to protect the Appellant from its patient's criminal acts.

Ground 1:

First Submission

1. This is a case in which it is appropriate to consider the three criteria espoused in the case of *Caparo v Dickman*. Although the courts have since clarified that *Caparo v Dickman* 'does not provide a single tripartite test requiring consideration... in every case', it remains the relevant authority for considering whether a duty of care is owed in a 'novel type of case, where established principles do not provide an answer' (*ABC v St George's Healthcare NHS Trust* [2020] EWHC 455 (QB)- '*ABC v St George's*' - at [29]).

2. The learned judge was correct in his finding that the present case did not come within a recognised exception to the general rule against imposing duties of care owed towards third parties (in this instance, to a non-patient).
3. However, the learned judge erred in his conclusion that this was determinative of the matter. Given the novel circumstances of this case, and for the reasons outlined below, the learned judge should have considered the issue of duty of care with reference to the criteria in *Caparo v Dickman*.

#### Second Submission

4. In *Caparo v Dickman*, in his speech at pages 617-618, Lord Bridge stated that:

*“What emerges [from the case law] is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other”.*

5. The Appellant submits therefore that their Lordships in *Caparo v Dickman* held that, in the circumstances outlined in the First Submission, a duty of care will be owed if the three following criteria are satisfied:
  - a. The damage or loss suffered by the claimant was a reasonably foreseeable consequence of the alleged acts of the defendant.
  - b. There is sufficiently close proximity- in that there exists a legally significant relationship- between the defendant and the claimant.
  - c. In all the circumstances, it is fair, just and reasonable to impose a specific duty of care upon the defendant.

#### Third Submission

6. It is submitted that the facts of the present case satisfy the three criteria from *Caparo v Dickman* outlined above, and as such the learned judge was wrong in his finding that the Respondent did not owe the Appellant a duty of care.
7. With regards to the foreseeability of loss, in this present case the trial judge has already made a finding of fact that an assault on the Appellant was reasonably foreseeable following the Respondent’s discharge of the patient. The first criterion of *Caparo v Dickman* is satisfied.

8. With regards to the proximity between the parties, the Appellant accepts that the learned judge correctly held that healthcare providers do not, as a general rule, owe a duty of care to members of the public who may be harmed by psychiatric patients. However, it is submitted that he failed to acknowledge that ‘*the courts have been willing to recognise that a doctor or health authority may owe a duty of care [to third parties] where there is a close proximal relationship*’ (*ABC v St George’s* at [170]).
9. It is submitted that the parties’ relationship was sufficiently close, and that the Appellant was more than a member of the public:
  - a. The Respondent’s patient’s assault on the Appellant is what prompted him to be voluntarily admitted into the Respondent’s care.
  - b. The Respondent requested the Appellant’s attendance at therapy sessions in order to assist its patient’s recovery.
  - c. The patient had specifically informed the Respondent’s agent, Dr Nick Riviera, that he had continued desires to hurt the Appellant, and feared that, if he were discharged, he would arm himself and act upon them.
10. Therefore, it is submitted that the second criterion of *Caparo v Dickman* is satisfied.
11. In considering whether it is fair, just and reasonable to impose a duty of care upon the Respondent, the Appellant submits that the Respondent owed two concurrent duties:
  - a. A duty to prevent physical harm to the Appellant- as an identified intended target of the patient’s criminal desires- by ensuring that it treated the patient with all reasonable care and skill expected of a professional medical body.
  - b. A duty to warn the Appellant- as an identified intended target of the patient’s criminal desires- of the potential and reasonably foreseeable risk of physical harm to him from the patient upon his discharge from the Respondent’s care.
12. In the present case, it is submitted that it would be fair just and reasonable to impose the above duties of care upon the Respondent:
  - a. Although the duty of confidence owed to a patient is significant, it is not absolute, and has often been overridden where harm to a third party is foreseen (*ABC v St George’s* at [38]).
  - b. Although the information given to Dr Riviera by the patient was *prima facie* confidential, in this case it does not follow that there would have been a conflict of interest in its disclosure. The patient himself was concerned that he may arm himself and assault the Appellant if discharged too early.

- c. The Respondent possessed direct and specific knowledge of the patient's condition and the patient's continuing desire to harm the Appellant.
  - d. The means of preventing the assault on the Appellant were reasonably within the Respondent's power, and cannot be considered unduly burdensome.
  - e. The duties of care proposed by the Appellant are factually sensitive, and are restricted to the novel circumstances of the present case. It is submitted that the imposition of these duties will not 'open the floodgates' to masses of new litigation, nor will they unreasonably restrict the resources of healthcare bodies.
13. It is submitted therefore that the third criterion of *Caparo v Dickman* is satisfied.
14. All three criteria having been satisfied, the Appellant respectfully submits that the Respondent should be held to have owed a duty of care to the Appellant. The appeal should be allowed on the first ground.

## Ground 2

### First Submission

1. The Respondent held an absolute duty to protect the Appellant, a non-patient, from infringement of his Article 3 rights by a third party.
2. The fundamental basis for the Respondent's duty of protection is outlined in the Strasbourg decision *Osman v United Kingdom* (2000) 29 EHRR 245 at [115-6] ('*Osman*') (cited in *Rabone and another (Appellants) v Pennine Care NHS Trust (Respondent)* [2012] UKSC 2 at [12] ('*Rabone*')) which acknowledges that Article 2 of the European Convention of Human Rights (ECHR) "in "well-defined circumstances" the state should take "appropriate steps" to safeguard the lives of those within its jurisdiction including a positive obligation to take "preventative operational measures" to protect an individual whose life is at risk from the criminal acts of another".
3. Subsequent decisions highlight key factors that can contribute to a finding of an operational duty under the ECHR. However, the question of whether a duty arises is decided on a case-by-case basis (*Rabone* at [22-25]).
4. For the purposes of this appeal, it is submitted that the operational duties arising under Article 2 and Article 3 are the same (*Rabone* at [104]).
5. Furthermore, it is submitted that the duty owed applies to the Respondent in this case (*Selwood v Durham County Council* [2012] EWCA Civ 979 at [57]).

6. With reference to Article 3 it is submitted that an operational duty under arose due to the following factors:
  - a. The patient, Cal Trask, was voluntarily admitted to the Respondent's hospital for in-patient treatment.
  - b. The only threats and acts of violence committed by the patient were towards the Appellant.
  - c. The patient protested his arranged discharging from the Respondent Hospital.
7. In light of these factors, it is submitted that the NHS Trust did owe an operational duty to protect the Appellant from infringement of his Article 3 rights and therefore this case can be distinguished from *Griffiths v Chief Constable of Suffolk* [2018] EWHC 2538 (QB) [at 483-484], where the court held a duty to warn did not arise.

#### Second Submission

8. Having regard to the above, it is submitted that the Respondent breached the operational duty owed under Article 3 by failing to act within their power to mitigate or stop the act of violence committed against the Appellant by its patient.
9. According to *Osman*, “it must be established...that the authorities knew or ought to have known at the time of the existence of a **real** and **immediate** threat to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk....” (at [116])
10. The findings of the lower court already established that the risk of the patient threatening the Appellant's life was ‘**real**’. Therefore these submissions draw attention to the fact that threat was also ‘**immediate**’.
11. In *Rabone*, Lord Dyson established that the essence of the term ‘immediate’ was captured by the phrase ‘*present and continuing*’. It does not mean ‘imminent’ (at [39-40])
12. It is submitted that the threat to the Appellant's life was immediate for the following reasons:
  - a. The patient disclosed to Dr Riviera that he experienced a re-emergence of urges to harm the Appellant, stronger than ever before.
  - b. The patient told Dr Riviera that if discharged he feared he would find it difficult to comply with his medication regime, would arm himself, and would act on his violent urges.

13. Therefore, it is argued that the Respondent knew or ought to have known that there was a real and immediate risk to the Appellant’s life from the criminal acts of its patient.
14. Given the real and immediate threat to the Appellant’s life, it is submitted that the Respondent breached its operational duty by failing to take measures to avoid said risk.
15. According to Lord Dyson in *Rabone*, “*The standard demanded for the performance of the operational duty is one of reasonableness. This brings in “consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available”* (at [43]).
16. As stated by the learned Judge, it is submitted that the Trust fails the reasonableness test. The Respondent failed to carry out simple precautions that were available. They include the following:
  - a. Undertaking a full assessment of the patient.
  - b. Ensuring weekly out-patient appointments were arranged.
  - c. Ensuring the patient had a supply of medication.
  - d. Informing the Appellant that the patient had been discharged from the hospital.
  - e. Warning the Appellant about the disclosures made by the patient to Dr Riviera on 14.07.19.
17. The Respondent failed in its duty and in turn it is submitted that the Appellant’s Article 3 rights were breached. The appeal should be allowed on the second ground.

For the reasons set out above, it is submitted that the Court should find in favour of the Appellant and allow the appeal on either ground.

ANDREW DIXON  
SENIOR COUNSEL FOR THE APPELLANT

AFIYA AMESU  
JUNIOR COUNSEL FOR THE APPELLANT