

# *Barlow: Duty of Care*

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- *Barlow v Minister for Communications, Marine & Natural Resources, The Registrar General of Fishing Boats, Ireland and the Attorney General* [2025] IESC 14
- Leave to Appeal: whether the defendants, as public bodies exercising a public function, were liable to the plaintiffs in the tort of negligence for mismanagement of the State's mussel seed resource.

# *Barlow*

- Alleged Breach of Duty
- Basis of Duty of Care?
  - Assumption of Responsibility: Course of Dealing
  - State's Legal Control over mussel seed resource

# *Barlow*

- the authority will generally be acting in furtherance of a public duty and function.
- it will often be doing so on foot of (and within the constraints imposed by) a specific statutory scheme.
- the injury that the authority is alleged to have caused will sometimes arise from a failure to exercise a power (rather than from its actual exercise).
- the alleged harm will sometimes be a failure to confer a benefit rather than the infliction of a direct injury in the sense of making matters worse for the plaintiff than they would be had the defendant not acted as it did.
- there are issues of policy in the review by the courts of some decisions entrusted by law to the discretion of the Executive, particularly in adjudicating on the legality of *bona fide* decisions made in the allocation of financial resources as between competing claimants.
- the law provides an avenue of recovery for losses sustained as a consequence of certain types of administrative action in the form of the tort of misfeasance in public office.
- there are available unique remedies against public bodies that have acted unlawfully in the form of the various reliefs available by way of judicial review.
- in some cases, the losses in issue will be largely, if not purely, economic.

# Barlow

“...But it inevitably means that as a matter of principle, in some circumstances certain actions of the State can never attract liability in negligence because they simply have no plausible analogue in private law. A member of the public who stands to benefit from the exercise of a discretionary statutory power in their favour cannot, without considerably more, point to any remotely similar private law relationship in which the common law of negligence would attach a duty of care. ...” (§152)

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- *The decision of Keane CJ in Glencar should not be viewed as prescribing a 'test' to be rehearsed in all cases in which a duty of care is asserted and disputed. The three limbs identified in that decision – foreseeability of loss, proximity, and whether it is just and reasonable to impose a duty of care – are uncontroversial but useful descriptions of the features that must be present before such a duty will be found. However, the first two are pitched at a level of generality that renders them of limited practical use as a 'test'.*
- *Instead, the first reference point in any contested duty of care should be whether the existing case law provides a binding precedent that mandates the conclusion that the relationship between the parties in issue is such that the defendant owes the plaintiff a duty of care not to cause the plaintiff, or to protect them from, particular harm...*
- *If there is no such binding precedent, it is appropriate to address whether such a duty of care should be imposed by reference to the essential characteristics of the case viewed in the light of the principles governing the law of negligence as developed in the decided authorities (the 'legally significant features of the situations with which the earlier authorities were concerned'). Foreseeability of loss and proximity are central features of that analysis.*

## *Barlow: Duty of Care*

- *If a given case presents a situation that is truly analogous to one in which a duty of care has been imposed, it will usually be because there is a sufficient relationship of proximity and there is sufficient foreseeability of loss*
- *In those cases in which the court is finding a duty of care by analogy with the principles identified in earlier authority it is additionally appropriate to consider broader policy implications of such an extension of liability. ...I think it helpful to retain the language that has been applied in this jurisdiction in that regard since the decision of Costello J in Ward, and to consider whether it is just and reasonable to impose such a duty.*

# *Barlow*

- *Just and Reasonable Component*
- *Assumption of Responsibility*

# *Barlow*

- Availability of Judicial Review
- Public Law/Private Law

# Barlow: Exercise of Statutory Discretion

- Firstly, he said that if the effect of an asserted duty of care is to require the defendant authority to act in breach of its public law obligations, or the imposition of such a duty would be inconsistent with, or is such as might lead to the non-exercise of the public law obligation, *'there is a coercive reason for concluding that it is not just or reasonable to impose such a duty'*. (§213).
- Certain cases where a Court is asked to adjudicate on an issue that *'is clearly one of such high level policy that it would not be justiciable in any claim and thus cannot be smuggled into a private law action for damages'*.
- Policy decisions the legality of which can be determined by a court and there is no reason in respect of those decisions why they should not be justiciable also in a private law claim provided the conditions otherwise attending a duty of care are established and it is, otherwise, just and reasonable to impose such a duty

# *Barlow: Exercise of Statutory Discretion*

- “(i) In cases in which there is a clear, simple and direct analogy to be drawn between the activities of private actors and of public authorities, the public authority is liable in negligence for those activities in the same way as a private actor, save where the public authority enjoys the benefit of an express or necessarily implied statutory immunity for such a suit.*
- (ii) The mere fact that the exercise of a statutory power by a public authority may confer a benefit on a person of which they would otherwise be deprived or otherwise prevent a harm to that person does not of itself generally give rise to a duty of care at common law.*
- (iii) Public authorities can come under a private law duty to confer benefits or protect from harm in circumstances where the principles applicable to private parties would impose such an obligation. This includes where a public authority assumes a responsibility to confer a benefit on, or protect a person from harm. Once again, this is subject to statute not being expressly or impliedly inconsistent with the assumption of such a responsibility.*

# *Barlow: Exercise of Statutory Discretion*

- (iv) ..., an assumption of responsibility may arise so as to result in the imposition of a duty of care on the public authority in the provision of information, or advice or in the undertaking of any task for which the public authority has assumed such responsibility. That responsibility may be impliedly assumed, and it can be deduced from the manner in which the public authority has behaved towards the plaintiff. While the operation of a statutory scheme does not in itself give rise to an assumption of responsibility for these purposes, it may do so if the conditions generally applied by the general law are met.*

# *Barlow: Exercise of Statutory Discretion*

- (v) The fact that the decision, act or omission of a public body said to ground an action in negligence might also be amenable to judicial review is not in itself a basis on which a finding that the defendant does not owe a duty of care in negligence should generally be made.*
- (vi) There is no a priori rule that a public body enjoys an immunity from liability in negligence in respect of its actions in the exercise of statutory discretionary powers. A duty of care in the exercise of these powers may arise if the dealings between the parties are such that, on conventional principles or by reference to established authority, the law would otherwise impose such a duty. However, in determining whether to impose such a duty, the court must be satisfied that it is just and reasonable to do so. It will not be just and reasonable to require a public body to act in a manner prohibited by statute, nor will it be just and reasonable to impose a duty of care where to do so would inhibit the exercise of a statutory power.*

# *Barlow: Exercise of Statutory Discretion*

- (viii) Where the negligence alleged against a public authority comprises decisions made by a public authority in choosing between various options in accordance with the parameters of a discretionary power vested in it by statute, the standard of care is directed to whether the action was outside the range of choices that a reasonable body charged with the activity concerned could have made. This should be viewed as equivalent to the standard of unreasonableness as developed in administrative law’.*

# *Barlow: Exercise of Statutory Discretion*

## *Application to Plaintiffs' Claims?*

- *Defendants actively solicited investment*
- *Plaintiffs' involvement was necessary to achieve Defs objective*
- *Plaintiffs – with Defs' knowledge- making significant investment*
- *Open to Def to disclaim responsibility*