

Establishing a Duty of Care

Professor James Goudkamp

Professor James Goudkamp is Professor of the Law of Obligations at the Faculty of Law at the University of Oxford. He conducts research in the area of tort law although his interests extend to other parts of the law of obligations and to civil procedure. Professor Goudkamp's research was recently cited in a landmark Supreme Court ruling regarding the duty of care element of the tort of negligence.

In *Darnley v Croydon Health Services NHS Trust* the claimant, who had sustained a head injury in an assault, was misinformed by a hospital that he attended about the period of time for which he would need to wait before being seen by a doctor. The claimant consequently went home instead of waiting at the hospital. He suffered brain damage which could have been avoided had he been promptly treated.



The question of whether the hospital owed the claimant a duty of care was tried as a preliminary issue. Both the first instance judge and the Court of Appeal held that the hospital did not owe the claimant a relevant duty of care. An appeal to the Supreme Court was unanimously allowed. The Supreme Court held that the case fell within an established duty category. In reaching that conclusion, the Supreme Court was influenced by an analysis of the Court of Appeal's decision that James Goudkamp published in the *Cambridge Law Journal*.

Lord Lloyd-Jones, who gave reasons with which the other members of the Supreme Court agreed, wrote:

"... I should record that in considering the issue of duty of care I have been greatly assisted by a case note on the decision of the Court of Appeal in the present case by Professor James Goudkamp ([2017] CLJ 481). He considers that the parties were within an established duty category and that the only question, relevantly, was whether the defendant breached that duty. He observes that discussion as to what the reasonable person would have done in the circumstances in question indicates that the dispute is about the breach element, that being the only element of the cause of action in negligence that is concerned with the satisfactoriness of the defendant's conduct. He concludes:

"Accordingly, on traditional principles, Darnley is not, in fact, a duty of care case at all. Rather, properly understood, the issue was whether the defendant had breached its duty in giving, by its receptionist, inaccurate information to the claimant." (at p 482)

Darnley is an important decision in a series of recent Supreme Court cases that have ushered in a new approach to the duty of care element of the tort of negligence. Pursuant to the new jurisprudence, the *Caparo* formula has been decisively rejected and the search for a universal test for the existence of a duty of care has been called off. Rather, if the case falls within an established duty category it is impermissible for a duty of care to be denied by reference to policy considerations, and if the case is a novel one, a duty of care should be recognised only if to do so would amount to an incremental extension of the law. Professor Goudkamp's research thus informed a pivotal case regarding a cause of action that is important in the medical and many other contexts.