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Part I: Commentaries and Reflections

THE DUTY OF CARE AFTER *ROBINSON v CHIEF CONSTABLE OF WEST YORKSHIRE POLICE*

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1 Introduction

How a court determines whether a duty of care was owed in a negligence case is a question that continues to attract considerable judicial and academic attention. On the one hand, this is not altogether surprising. After all, negligence is by far the most important cause of action in tort, and the duty of care element plays a central role in negligence law, marking out as it does the limits of liability for negligent conduct that causes damage. Furthermore, the approach the courts take to the determination of the duty question has important implications not only for the scope of negligence liability – with some approaches tending towards expansionist outcomes, and others more restrictive ones – but also for the extent to which the courts higher up in the hierarchy can exercise control over those lower down. On the other hand, it will be argued in this chapter that the approach that the courts ought to take to deciding duty cases is really quite straightforward, and can best be understood as the application of ordinary common law reasoning to the issues such cases raise. This insight clears the path towards a more predictable and more coherent law of negligence, in which duty questions are resolved in a reasoned and transparent way.

The focus of this chapter is on the recent decision of the UK Supreme Court ('the Supreme Court') in *Robinson v Chief Constable of West Yorkshire Police* ('*Robinson*'),[1] where Lord Reed gave a leading judgment that represents a golden opportunity to place future duty of care reasoning on a secure, settled and defensible footing. An attempt will be made in this chapter to demonstrate that Lord Reed's approach to the duty question is not only the

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[1] [2018] UKSC 4, [2018] AC 736.

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best of the alternatives available, but the only approach that is consistent with common law method and the rule of law. The real question, it will be argued, is not whether the decision in *Robinson* marks a welcome return to orthodoxy, but whether courts at all levels will be prepared to abandon other ways of reasoning that in recent years have become embedded in the thinking of judges, practitioners and academics, with regrettable results. As Lord Reed said in the opening paragraphs of his judgment in *Robinson*:

> Most of [the issues raised in these proceedings] can be decided by applying long-established principles of the law of negligence. The fact that the issues have reached this court reflects the extent to which those principles have been eroded in recent times by uncertainty and confusion.[2]

2 The facts of *Robinson* and the decisions below

The litigation in *Robinson* arose out of a routine drug bust on the streets of Huddersfield. One of the police officers involved had seen the suspect apparently dealing drugs in a park and called for backup with a view to making an arrest. By the time the backup arrived, the suspect was standing in a busy street in front of a bookmakers he had just visited. Two of the four officers now on the scene attempted to effect an arrest, but the suspect resisted, and in the ensuing tussle, the claimant passer-by, a 'relatively frail' woman of 76, was knocked over and injured.[3]

The claimant brought a negligence claim for her personal injuries against the police, which was dismissed by the Recorder. The Recorder found that the officers' conduct had exposed the claimant to a foreseeable risk of injury, and also that the officers had acted negligently in carrying out the arrest. Nevertheless, the Recorder held that the police were not liable, since the decision of the House of Lords in *Hill v Chief Constable of West Yorkshire* ('*Hill*')[4] had conferred on them an immunity from suit in negligence, which extended to the facts of this case.

The claimant's appeal was dismissed by the Court of Appeal. Lady Justice Hallett applied the so-called '*Caparo* test', derived from the speech of Lord Bridge in *Caparo Industries plc v Dickman* ('*Caparo*'),[5] on the footing that this test should be used in all negligence claims. The third stage of that test (requiring that it be 'fair, just and reasonable'[6] to impose a duty of care)

[2] ibid [3].
[3] ibid [1].
[4] [1989] AC 53.
[5] [1990] 2 AC 605, 617-18.
[6] ibid 618 (Lord Bridge).

meant, Hallett LJ said, that a court would 'only impose a duty where it considers it right to do so on the facts'.[7] And this would rarely be the case where the police were sued for negligence in respect of their conduct 'in the course of investigating and suppressing crime and apprehending offenders', since the courts had concluded that the interests of the public would not be best served by the imposition of a duty of care in such cases.[8] Furthermore, Hallett LJ argued, 'provided the police act within reason, the public would prefer to see them doing their job and taking drug dealers off the street', and any risk thereby imposed on passers-by such as the claimant was 'trumped by the risk to society as a whole'.[9]

It is worth pausing at this point to notice two things about the core reasoning of Hallett LJ in the Court of Appeal. The first is that the *Caparo* test is used to justify what appears to be an untrammelled negative discretion, whereby a court (seemingly at any level) can simply refuse to impose a duty of care on the grounds that it considers it 'right to do so' on the facts. Where, we might ask, does this leave the doctrine of precedent? And the other thing that we can observe in this reasoning is the use of an appeal to public sentiment, albeit one that does not seem to be based on any empirical evidence. It should immediately be apparent that something has gone very wrong here. A law-abiding citizen injured through the alleged negligence of police officers while going about her daily business is, in effect, told that she is not entitled to compensation since the court takes the view that imposing liability on the facts would be a bad thing to do, and that the court of public opinion would (if asked, though it has not been) take the same view.

Naturally, this is an over-simplification of Hallett LJ's reasoning and, in reality, the Court of Appeal also appealed to precedent in support of their conclusion that no duty of care was owed, relying, as had the Recorder, on a supposed 'immunity' for the police from negligence liability recognised in the *Hill* case. Lady Justice Hallett accepted that there were a number of possible exceptions to the no-duty rule laid down in *Hill* – namely, cases of outrageous negligence, cases which did not relate to core police functions, and cases where the police had assumed a responsibility towards the claimant – but considered that none of them applied on the facts, which she described as a 'paradigm' case for the application of the immunity rule.[10]

In addition to the alleged immunity based on the *Hill* decision, the Court of Appeal also prayed in aid a number of supplementary arguments to justify

7 *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15, [40].
8 ibid [46].
9 ibid [47].
10 ibid [51].

their conclusion that the claimant's appeal should be dismissed. One was that the claimant had in fact been hurt by the suspect, and that any fault of the officers lay in their failing to prevent him from injuring her, so that in reality this was an omissions case, rather than a positive conduct case. Another was that there was no 'proximity' between the officers and the claimant (this being a reference to the second stage of the *Caparo* test[11]), notwithstanding the court's acceptance of the Recorder's finding that injury to the claimant had been a reasonably foreseeable risk of the officers' decision to effect an arrest. And finally, the Court of Appeal disagreed with the Recorder on the issue of breach of duty, taking the view that the officers had acted reasonably in attempting to arrest the suspect at the time and place in question.

3 *Michael v Chief Constable of South Wales Police*

A considerable time elapsed between the decision of the Court of Appeal in *Robinson* and the hearing of the claimant's appeal from that decision by the Supreme Court. In the meantime, the Supreme Court decided another police negligence case of great significance, namely *Michael v Chief Constable of South Wales Police*.[12] The claim in *Michael* arose out of the murder of a young woman by her former partner, which it was alleged could have been prevented if the police had responded appropriately to an emergency call the deceased had made shortly before she died. The Supreme Court agreed with the Court of Appeal in *Michael* that a negligence claim against the police forces involved should be struck out, although an alternative claim under the Human Rights Act 1998 was allowed to proceed to trial. Although the facts of the two cases were very different, the reasoning in *Michael* cast significant doubt on the Court of Appeal's decision in *Robinson*, for two main reasons.

The first reason was that in the majority judgment in *Michael* the late Lord Toulson poured cold water on the idea that duty of care questions could be resolved by the application of a general formula or test, saying:

> From time to time the courts have looked for some universal formula or yardstick [for determining duty of care issues], but the quest has been elusive. And from time to time a court has used an expression in explaining its reasons for reaching a particular decision which has then been squashed and squeezed in other cases where it does not fit so aptly.[13]

[11] C*aparo* (n 5) 618.
[12] [2015] UKSC 2, [2015] AC 1732.
[13] ibid [103].

Furthermore, after referring to the passage in the speech of Lord Bridge in *Caparo* from which the 'three-stage test' is said to be derived, Lord Toulson commented that '[p]aradoxically, this passage in Lord Bridge's speech has sometimes come to be treated as a blueprint for deciding cases, despite the pains which the author took to make clear that it was not intended to be any such thing'.[14] By explicitly repudiating the use of the three-stage test to determine the existence of a duty of care, Lord Toulson had completely undermined the foundations of the Court of Appeal's decision in *Robinson*.

The second reason that *Michael* cast doubt on the Court of Appeal's dismissal of the *Robinson* appeal was that the decision that no duty of care had been owed in *Michael* was premised on the assumption that as far as the law of negligence was concerned, public defendants and private defendants were essentially subject to the same liability regime. In *Michael*, this approach had favoured the defendants, the reasoning being that (applying the omissions rule) no liability would attach to a private individual for not helping the murdered woman, and hence no liability attached to the police either, at least in the absence of an assumption of responsibility. However, this 'equality principle' cuts both ways, and on the facts of *Robinson* it appeared to favour the claimant – assuming it was a positive conduct case – since of course a private citizen who carelessly collided with a passer-by in the street would potentially be subject to negligence liability for any injury that resulted. What is more, while Hallett LJ had relied on the idea that in *Hill* the House of Lords had conferred on the police a broad immunity from negligence liability, in *Michael* Lord Toulson expressly denied this. On the contrary, Lord Toulson said that in *Hill* Lord Keith had 'recognised that the general law of tort applies as much to the police as to anyone else',[15] and that although he had admittedly used the language of 'immunity', this turn of phrase had been 'not only unnecessary but unfortunate'.[16] This was because:

> The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime […] does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public […] The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of com-

[14] ibid [106].
[15] ibid [37].
[16] ibid [44].

> mon law principles which would cover the facts of the present case.[17]

Following *Michael*, a successful appeal to the Supreme Court in *Robinson* therefore looked to be on the cards, but it was by no means a foregone conclusion. After all, the decision to strike out the negligence claim in *Michael* was made by only a 5-2 majority, and in his dissenting judgment Lord Kerr had used the *Caparo* test to reach the conclusion that a duty of care had been owed, and had said that in the context of the appeal he did 'not consider it particularly relevant' whether any finding that the police were not liable was based on an immunity or not.[18] Although Lord Kerr's analysis was geared towards making the police accountable in negligence for their mistakes, there was at least a possibility that on the facts of *Robinson* an approach along similar lines would generate a very different kind of outcome.

4 Duty in general

In general terms, the principal significance of the *Robinson* decision undoubtedly lies in Lord Reed's analysis of the method a court should use to determine whether a duty of care was owed in a negligence case. Although, as we have seen, Lord Toulson touched upon this issue in *Michael*, the discussion in *Robinson* of the correct approach to duty questions is both more sustained and more forceful. Indeed, I would go so far as to claim that it is the most important case on this question since the decision in *Caparo* almost three decades ago.

Lord Reed distinguished in his analysis of the duty question between cases covered by established principles and novel cases. With regard to cases of the former type, he said that 'there are many situations in which it has been clearly established that a duty of care is or is not owed', giving as examples the duties of care owed by 'motorists to other road users, by manufacturers to consumers, by employers to their employees, and by doctors to their patients'.[19] In such cases, once the decision has been made that a duty of care is owed, then that decision will apply to all future cases of the same kind. Furthermore, since in cases of this type 'a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles' it is 'unnecessary and inappropriate to reconsider

[17] ibid [115]-[116].
[18] ibid [151].
[19] *Robinson* (n 1) [26].

whether the existence of the duty is fair, just and reasonable', unless, that is, the court has been invited to depart from an established precedent.[20]

> Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty […].[21]

As for novel cases, where the courts must go beyond established principles to determine whether a duty of care was owed:

> Following the *Caparo* case, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case.[22]

Taking the two types of case together, then, the overall approach that the courts should take in deciding whether or not a duty of care was owed is as follows:

> In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.[23]

[20] ibid.
[21] ibid.
[22] ibid [27].
[23] ibid [29].

Furthermore, Lord Reed could not have been clearer in his rejection of the idea that the courts should use a three-stage test of foreseeability, proximity and 'fair, just and reasonableness' based on Lord Bridge's speech in *Caparo*:

> The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in [*Michael*], that understanding of the case mistakes the whole point of *Caparo*, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.[24]

The popularity of the *Caparo* test means that it is important to emphasise that Lord Reed was not merely rejecting the notion that (as Hallett LJ had held in the Court of Appeal) the three-stage test should be used to decide all duty cases. Rather, Lord Reed made it crystal clear, drawing on the judgment of Lord Toulson in *Michael*, that he disapproved of the very idea that Lord Bridge had intended to lay down a 'test' at all, or that the supposed test could be of use in deciding *any* duty case. For example, in response to the fact that Hallett LJ had relied on the use of the three-stage test by the Supreme Court in *Smith v Ministry of Defence*[25] and by Lord Steyn in *Marc Rich & Co v Bishop Rock Marine Co*,[26] Lord Reed pointed out that these cases had raised novel or contentious duty questions, but added that '[i]t was *in any event* made clear in *Michael* that the idea that *Caparo* established a tripartite case is mistaken'.[27] Like Lord Toulson in *Michael*, Lord Reed pointed to the fact that in *Caparo* Lord Bridge had been at pains to deny that a single general principle could provide a practical test to determine whether a duty of care was owed, and considered it 'ironic that […] Lord Bridge's speech has been treated as laying down such a test'.[28] On the contrary, Lord Bridge had adopted 'an incremental approach, based on the use of established authorities to provide guidance as to how

[24] ibid [21].
[25] [2013] UKSC 41, [2014] AC 52.
[26] [1996] AC 211.
[27] *Robinson* (n 1) [28] (emphasis added).
[28] ibid [24].

novel questions should be decided', and 'it was that approach, and not a supposed tripartite test' which Lord Bridge had then used to decide the case.[29] Incremental reasoning, by analogy from existing authority, was the *true Caparo* approach, and 'the existence of a duty of care does not depend on the application of a "*Caparo* test" to the facts of the particular case'.[30]

In a commentary on the *Michael* decision, James Goudkamp stated that the case 'arguably signals a major shift in the approach to determining when a duty of care exists generally',[31] but expressed doubts as to the implications of Lord Toulson's analysis for the continued use of the *Caparo* test:

> It is rather difficult to know what to make of Lord Toulson's remarks [about the *Caparo* 'test'], which are extremely brief. One possibility is that his Lordship thought that the *Caparo* test should be abandoned. A less radical way of reading Lord Toulson is as saying that the *Caparo* test should be applied much more cautiously than it has been to date. Either way, Lord Toulson's comments in this regard […] have given the *Caparo* test a very significant knock.[32]

While I agree with Goudkamp that the brevity of Lord Toulson's comments limits their impact, it seems clear to me from the force with which he expressed himself on the issue that the more radical interpretation of those comments is the correct one. Be that as it may, what is surely beyond doubt is the import of Lord Reed's more extended, but equally forceful, observations in *Robinson*. To adapt Goudkamp's metaphor, even if in *Michael* Lord Toulson only put the *Caparo* test on the ropes, in *Robinson* Lord Reed has surely delivered the knockout blow.

Lady Hale and Lord Hodge agreed with Lord Reed in *Robinson*, while Lord Mance and Lord Hughes delivered concurring judgments. In his judgment, Lord Mance was notably less dismissive of the *Caparo* three-stage test than Lord Reed. He accepted that it was 'unnecessary in every claim of negligence to resort to the three-stage analysis', but said that this was because there were 'well-established categories, including (generally) liability for causing physical injury by positive act', where the elements of proximity and 'fair, just and reasonableness' are 'at least assumed'.[33] And while Lord Mance agreed with Lord Reed that outside these categories

[29] ibid [25].
[30] ibid [30].
[31] James Goudkamp, 'A Revolution in Duty of Care?' (2015) 131 LQR 519, 520.
[32] ibid 521-522.
[33] *Robinson* (n 1) [83].

the law proceeded 'incrementally', he tied this process of incremental development to the *Caparo* test, saying that in such cases 'all three stages of the *Caparo* analysis will be material'.[34] In his concurring judgment, Lord Hughes was more ambivalent, for while he expressed his agreement with Lord Reed's discussion of the *Caparo* decision, the gist of his analysis is conveyed in relatively conservative terms, as limited to excluding the use of the three-stage test in cases covered by established precedent (an interpretation that, with respect, I have argued is unsustainable).[35]

Nevertheless, it is submitted that the unequivocal rejection of the *Caparo* test in the leading judgment in *Robinson*, particularly when considered alongside the critical remarks of Lord Toulson in *Michael*, amounts to a clear signal from the Supreme Court to courts at all levels that the three-stage test should no longer be used to determine the existence of a duty of care in any negligence case.

5 Public authority negligence liability in general

Robinson is a less significant case on public authority negligence liability than it is on the determination of the duty of care, since Lord Reed's analysis of the former question closely tracks earlier case law, and in particular the *Michael* decision. Then again, *Robinson* represents yet another strong endorsement by the UK's highest court of the equality principle in the negligence context and is also significant for clarifying that that principle cuts both ways. Earlier cases applying the principle – such as *Gorringe v Calderdale Metropolitan Borough Council* ('*Gorringe*')[36] and *Michael* – concerned omissions, so that the import of the principle was *against* the imposition of a duty of care, on the footing that since a private party would not be subject to negligence liability for failing to act in the circumstances in question, a public authority should not be so liable either. However, *Robinson* was a positive conduct case, and so here the equality principle *favoured* the imposition of a duty, with the reasoning being that since this time a private party *would* be liable in negligence, the police should be liable as well. Although in recent times this positive aspect of the equality principle has been less prominent than its negative aspect, it is a well-established implication of the ideal of equal treatment of public and private parties, and its powerful reiteration by the Supreme Court is to be welcomed.

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[34] ibid.
[35] ibid [100].
[36] [2004] UKHL 15, [2004] 1 WLR 1057.

The equality principle itself is usually traced back to the writings of AV Dicey, who considered it to be one of the three pillars of the rule of law. According to Dicey:

> [W]hen we speak of the 'rule of law' as a characteristic of our country, [we mean] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[37]

For a good example of the operation of that principle, we need look no further than *Mersey Docks and Harbour Board Trustees v Gibbs*,[38] where a ship had been damaged when it collided with a mud bank at the entrance to the defendants' dock. The defendants were held liable for the damage in negligence and appealed to the House of Lords on the ground that they were a public body entrusted by Parliament with the task of maintaining the docks. The House held that the defendants' status did not absolve them from their common law duty to exercise reasonable care. According to Blackburn J, who delivered the opinion of the learned judges advising the House:

> [T]he proper rule of construction of such statutes is that, in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things.[39]

In *Robinson*, Lord Reed began his discussion of public authority liability with a forthright expression of the positive aspect of the equality principle:

> At common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies […] Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious

[37] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 114.

[38] (1866) LR 1 HL 93.

[39] ibid 110. Of course, there were exceptions to the positive aspect of the equality principle, most notably Crown immunity, but even that immunity was largely abrogated by the Crown Proceedings Act 1947.

> if committed by a public authority […] It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.[40]

This positive aspect of the equality principle went hand in hand with its negative aspect, however, with the result that 'public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm',[41] and in the absence of circumstances in which *any* party would come under a duty of care to prevent the occurrence of harm – such as cases where the defendant has created the danger, or assumed a responsibility for the claimant's safety – 'public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body'.[42] And this same principle of equal treatment of public defendants applied even where a public authority had statutory powers or duties 'enabling or requiring it to prevent the harm in question',[43] unless, that is, the statute in question gave rise to a private right of action in the tort of breach of statutory duty. As Lord Reed pointed out, after what he termed a 'period of confusion' following the decision of the House of Lords in *Anns v Merton London Borough Council* ('*Anns*'),[44] there had been a 'return to orthodoxy' in this respect in *Stovin v Wise*[45] and then, 'more fully and clearly', in the *Gorringe* case.[46] The end result of applying both aspects of the equality principle in this context was a simple rule, namely that 'the law of negligence generally applies to public authorities in the same way that it applies to private individuals and bodies'.[47]

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40 *Robinson* (n 1) [32]-[33].
41 ibid [34].
42 ibid [35].
43 ibid [36].
44 [1978] AC 728.
45 [1996] AC 923.
46 *Robinson* (n 1) [31]. For discussion of the 'return to orthodoxy', with particular reference to the *Gorringe* decision and its implications, see Donal Nolan, 'The Liability of Public Authorities for Failing to Confer Benefits' (2011) 127 LQR 260. It should be noted (though nothing really turns on it) that in his discussion of these developments, Lord Reed fell into error when he said (at [39]) that in *Gorringe* it was made clear that 'the principle which had been applied in *Stovin v Wise* in relation to a statutory duty was also applicable to statutory powers', since in fact it was the other way round: *Stovin* concerned a statutory power (Highways Act 1980, s 79), whereas *Gorringe* concerned a statutory duty (Road Traffic Act 1988, s 39).
47 *Robinson* (n 1) [40].

6 Police liability in negligence

Turning to the negligence liability of the police in particular, Lord Reed again reiterated that the equality principle applied, so that 'as one would expect, given the general position of public authorities' as he had explained it, 'the police are subject to liability for causing personal injury in accordance with the general law of tort'.[48] It followed, with reference to negligence in particular, that the police were 'generally under a duty of care to avoid causing personal injury where such a duty would arise according to ordinary principles of the law of negligence',[49] a conclusion that he considered to be consistent not only with Lord Toulson's judgment in *Michael* but also with the *Hill* case, where Lord Keith had said that there was no question that a police officer 'like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions'.[50] Hence, the police could be liable in negligence where by their positive conduct they had caused reasonably foreseeable personal injury or property damage, as in, for example, *Knightley v Johns*,[51] *Rigby v Chief Constable of Northamptonshire*[52] and *Attorney General of the British Virgin Islands v Hartwell*.[53]

Then again, here as elsewhere the equality principle cut both ways, and so it followed that in the absence of special circumstances (such as an assumption of responsibility) the police's public duty to enforce the law and investigate crime did not generate a private law duty to protect individual members of the public from the criminal conduct of third parties. Furthermore, it was this rule, generated by the combination of the equality principle and the general negligence law governing omissions, that explained the ruling in the *Hill* case that the officers investigating a serial killer had not owed a duty of care to his potential future victims to take reasonable care to catch him. Lord Keith's endorsement of public policy objections to liability in *Hill* had therefore been unnecessary to the decision in the case, which Lord Reed observed had 'now to be understood in the light of the later authorities' reiterating the equality principle.[54] It followed that *Hill* was not 'authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime'.[55] Lord Reed summed up his discussion of the negligence liability of the police as follows:

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48 ibid [45].
49 ibid [67].
50 *Hill* (n 4) 59.
51 [1982] 1 WLR 349.
52 [1985] 1 WLR 1242.
53 [2004] UKPC 12, [2004] 1 WLR 1273.
54 *Robinson* (n 1) [54].
55 ibid [55].

> [T]here is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise.[56]

The principle that, as far as the law of negligence is concerned, the police are subject to the same liabilities as everyone else is a simple one, but reconciling it with all the earlier case law was less straightforward. *Hill* can indeed readily be explained as an omissions case, and the same is true of *Smith v Chief Constable of Sussex Police*,[57] where the House of Lords held that the police did not owe a duty of care to a person who had informed them that he had received threats of violence, in circumstances where it seems the House took the view that there had been no assumption of responsibility.[58] However, another House of Lords decision, *Brooks v Commissioner of Police of the Metropolis* ('*Brooks*'),[59] posed more difficulties. The claimant in *Brooks* had brought a negligence action for psychiatric harm he had allegedly suffered as a result of his insensitive treatment by the police officers investigating a notorious racist attack in which he had been assaulted and his friend had been killed. The House of Lords held that on these facts it was not arguable that the police had owed the claimant a duty of care, relying on the public policy objections to police liability that had been articulated by Lord Keith in *Hill*. Lord Reed's attempt in *Robinson* to explain this decision by reference to ordinary negligence principles was, with respect, unpersuasive. According to Lord Reed, even though *Brooks* was a positive conduct case, and not an omissions case,[60] the police had owed the claimant no duty of care because '[o]n ordinary principles, behaviour which is merely insensitive is not normally actionable, even if it results in a psychiatric illness'.[61] However, while this might seem like a sensible rule, it is unclear what the authority for it is. Two subsequent passages in Lord Reed's judgment strongly suggest that in his eyes the explanation for the *Brooks* ruling lay in the fact that the harm was psychiatric rather than physical. First of all, he denied that Lord Steyn had said anything in his judgment in *Brooks* to cast doubt on the proposition that the police owed potential claimants 'a duty of care to avoid causing *physical*

[56] ibid [70].
[57] [2008] UKHL 50, [2009] 1 AC 225.
[58] See ibid [122] (Lord Brown).
[59] [2005] UKHL 24, [2005] 1 WLR 1495.
[60] See *Robinson* (n 1) [69].
[61] ibid [60].

harm'[62] in accordance with ordinary negligence principles. And secondly, he said that in *Brooks* the claimant had 'sought to have the police held liable for a mental illness which they had caused by treating him inconsiderately'.[63] But again it is unclear what the authority is for distinguishing between mental and physical harm in a case of this kind. Of course, the courts have since *Alcock v Chief Constable of South Yorkshire Police* ('*Alcock*')[64] applied special restrictions to negligence claims for psychiatric illness brought by so-called 'secondary victims', but the claimant in *Brooks* was not a secondary victim in this sense, and although the issue is not beyond doubt, the general understanding seems to be that in other types of case the courts do not subject psychiatric injury claims to special rules at the duty stage of the negligence enquiry.[65] Furthermore, as Lord Mance pointed out in *Robinson*, the House in *Brooks* clearly did not decide the case on the basis of the distinction between physical and psychiatric injury,[66] and indeed there is no mention of that distinction in Lord Steyn's judgment in that case.

7 Disposal of the appeal on the facts and the concurring judgments

Application of the principles that Lord Reed had identified to the facts of *Robinson* led to the conclusion that the police were liable to the claimant for her injuries. Although the Court of Appeal had taken the view that the case was concerned with an omission rather than a positive act, Lord Reed disagreed. The claimant's argument was 'not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured'.[67] This clearly seems right. A rule of thumb that is useful in identifying a true omissions case is to ask whether, if the defendant were removed from the situation altogether, the claimant would still have suffered the damage. Clearly that test was not satisfied here: had the officers not sought to arrest the suspect, the tussle would not have happened, and the claimant would not have been hurt. Furthermore, it was reasonably foreseeable that the suspect would try to evade arrest and that in the course of his doing so passers-by such as the claimant might be knocked into and injured. And as this was a case of positive action causing physical injury that

[62] ibid [62] (emphasis added).
[63] ibid [69].
[64] [1992] 1 AC 310.
[65] See, for example, the cases on stress at work, such as *Barber v Somerset CC* [2004] UKHL 13, [2004] 1 WLR 1089. For a useful discussion of the general issue flagged in the text, see *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 All ER 215, 227-29 (Brooke LJ).
[66] *Robinson* (n 1) [93].
[67] ibid [73].

was sufficient, applying orthodox negligence principles, to establish that the officers had owed pedestrians in the immediate vicinity a duty of care. As for the breach of duty question, Lord Reed agreed with the Recorder that this was made out, on the basis that the officers should have noticed the claimant walking past and delayed the arrest until she was out of harm's way.[68]

Lord Mance and Lord Hughes agreed with Lord Reed that the appeal should be allowed, although as we shall see some important differences of emphasis are observable in their judgments. Lord Mance said that a duty of care was owed because:

> [W]e should now recognise the direct physical interface between the police and the public, in the course of an arrest placing an innocent passer-by or bystander at risk, as falling within a now established area of general police liability for positive negligent conduct which foreseeably and directly inflicts physical injury on the public.[69]

As for Lord Hughes, he was sceptical of Lord Reed's assumption that the case could be disposed of by reference to the act/omission distinction and considered that the *Hill* case was good authority for a policy-based rule that police officers engaged in the investigation and prevention of crime owed no duty of care towards victims, suspects or witnesses. However, the present case did not fall within this rule, and since there remained 'a duty of care imposed on police officers not by positive action to occasion physical harm or damage to property which ought reasonably to be avoided',[70] on the facts a duty of care had been owed to the claimant. On the question of breach, both Lord Mance and Lord Hughes were more inclined towards the Court of Appeal's view than Lord Reed, but both ultimately deferred to the Recorder's finding that the police had been careless. Lord Hughes said that he had 'pondered hard' about the breach issue but emphasised the importance of appellate courts not second-guessing 'trial judges who have had the opportunity to hear the witnesses in person'.[71] Lord Mance also confessed to doubts about the Recorder's conclusion but did not on balance consider that this was a case where an appellate court should interfere.[72]

[68] ibid [79]-[80].
[69] ibid [97].
[70] ibid [120].
[71] ibid [123].
[72] ibid [82].

8 The role of public policy

The discussion that follows will primarily be concerned with the general question of how the courts should determine whether a duty of care is owed in a particular case. However, before I turn to consider that question there are some other aspects of Lord Reed's duty of care analysis in *Robinson* that ought to be highlighted, the first of which is the way that Lord Reed downplays the role of public policy arguments in the duty enquiry.

Although the *Hill* case had widely been interpreted as laying down a policy-based immunity for the police in negligence cases concerned with the prevention and investigation of crime, Lord Reed instead chose to explain that decision (as had Lord Toulson in *Michael*) as a simple application of the omissions rule, so that resort to policy was not required to justify the outcome. Once it was understood that public authority defendants were to be treated the same as private parties in negligence, there was no need to have recourse to public policy to justify their non-liability, and since *Gorringe* 'a public authority's non-liability for the consequences of an omission' could generally be justified by reference to the omissions principle.[73] And in a section of his judgment in which Lord Reed responded to some of Lord Hughes's observations, he made some more general comments about the role of policy in negligence adjudication:

> [I]t is important to understand that [discussions of policy considerations] are not a routine aspect of deciding cases in the law of negligence, and are unnecessary when existing principles provide a clear basis for the decision, as in the present appeal […] The absence of a duty towards victims of crime, for example, does not depend merely on a policy devised by a recent generation of judges in relation to policing: it is based on the application of a general and long-established principle that the common law imposes no liability to protect persons against harm caused by third parties, in the absence of a recognised exception such as a voluntary assumption of responsibility.[74]

At the same time, Lord Reed made it clear that he was not saying that policy concerns had no place in the duty of care enquiry: on the contrary, while the courts were not 'policy-making bodies in the sense in which that can be said of the Law Commission or government departments', he accepted that

[73] ibid [40].
[74] ibid [69].

'the exercise of judgement about the potential consequences of a decision' had a part to play when a court was asked to decide whether a novel duty of care existed,[75] at least where 'established principles' did not provide a clear answer to the duty question.[76] We can, therefore, extrapolate from Lord Reed's discussion of policy three separate, but related, points:

(1) although policy considerations do have a role to play in the duty enquiry, this is limited to novel cases;

(2) the role of policy arguments in novel cases is secondary to the role of established principles; and

(3) many existing authorities which have been justified on policy grounds are better explained as applications of those established principles.

It was this aspect of Lord Reed's analysis that provoked the strongest reactions from Lord Mance and Lord Hughes. According to Lord Mance, it would be 'unrealistic to suggest that, when recognising and developing an established category [of negligence liability], the courts are not influenced by policy considerations', and the reality was that 'in recognising the existence of any generalised duty in particular circumstances they are making policy choices'.[77] Furthermore, in the particular context of this case, close consideration of the existing authorities showed that it was 'not possible to state absolutely that policy considerations may not shape police or [Crown Prosecution Service] liability in a context where the conduct of the police may perfectly well be analysed as positive, rather than simply as involving some form of omission'.[78] Similarly, Lord Hughes said that earlier judicial reliance on policy considerations was 'simply too considered, too powerful and too authoritative in law to be consigned to history', and that it was not possible to treat such considerations as 'no more than supporting arguments'.[79]

When considering the tensions between Lord Reed's approach to the role of policy and that of the two concurring justices, we can distinguish the 'is' question of the extent to which the courts have in fact relied on policy considerations to decide duty cases, and the 'ought' question of the extent to which it is appropriate for them to base duty decisions on such

[75] ibid.
[76] ibid [42].
[77] ibid [84].
[78] ibid [94].
[79] ibid [113].

considerations. On the 'is' question, my view is that Lord Reed's take on the authorities is more convincing overall, but that on occasion it would have been better to concede that a given case was decided on policy grounds than to seek an explanation for it in 'established principles'. The particular significance of Lord Reed's analysis of the authorities lies in his acknowledgment that many of the cases in which policy considerations were mentioned by the judges either were, or could have been, decided in the same way by reference to general negligence principles, so that the discussion of policy was otiose. This is an important insight, which is borne out by recent empirical research by James Plunkett into the use of policy reasoning by the House of Lords/Supreme Court in the period 1985-2015, which shows that only in a small minority of duty of care cases in which reliance was placed upon policy considerations were they solely determinative of the outcome of the duty enquiry.[80] Perhaps the best example of this phenomenon is the *Hill* case itself, which is easily explicable by reference both to the omissions principle and to the separate principle that 'A is not ordinarily liable to victim B for injuries […] deliberately inflicted by third party C',[81] and where the discussion of policy in Lord Keith's speech consists of one paragraph, which begins with the words '[t]hat is sufficient for the disposal of the appeal'.[82] On the other hand, Plunkett's research also accords with Lord Mance's observation in *Robinson* that there are undoubtedly *some* earlier cases at the highest level where it was accepted that a duty of care could be denied on policy grounds, even if established principles pointed to the existence of a duty. A good example of such a decision is *Smith v Ministry of Defence*,[83] where all the seven Law Lords who sat in the case upheld the existence of a 'combat immunity' applicable to anything done in the course of military operations against an enemy, an immunity justified on the grounds that the existence of a duty of care might hamper the conduct of the military in wartime. This immunity means that even in cases where a defendant combatant causes foreseeable physical injury or physical damage to property by their positive conduct (and where one would therefore expect there to be a duty of care in accordance with the general principles upheld in *Robinson*) no liability in negligence can arise. With respect, therefore, Lord Reed's dismissal of *Smith* as a case that raised 'a novel legal issue' and which 'did not concern an established category of liability'[84] rings rather hollow. As for the 'ought' question, Lord Reed's treatment of policy concerns as legitimate, but of secondary significance, accords with much current academic thinking on

[80] James Plunkett, *The Duty of Care in Negligence* (Hart Publishing 2018) 203 (Table 13).
[81] *Mitchell v Glasgow CC* [2009] UKHL 11, [2009] 1 AC 874 [81] (Lord Brown).
[82] *Hill* (n 4) 63.
[83] *Smith v Ministry of Defence* (n 25).
[84] *Robinson* (n 1) [28].

that question,[85] and although the concurring justices clearly considered that a more significant role for policy was appropriate, in the case of Lord Mance the strength of this argument was perhaps undermined by the very expansive meaning that he seemed to attach to the concept of 'policy'.[86]

9 Two further issues

Two further issues raised by the judgments in *Robinson* should also be noted. The first is that, while Lord Reed downplayed the importance of policy in the duty of care enquiry, he played up the distinction between acts and omissions. He said:

> The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies).[87]

As with other parts of his judgment, this focus on the act/omission distinction was consistent with Lord Toulson's approach in *Michael*, albeit that there the focus on the distinction had militated against liability, whereas here it militated in its favour. This time it was Lord Hughes who reacted the more strongly against Lord Reed's analysis. In particular, while Lord

[85] See, eg, Stephen Perry, 'The Role of Duty of Care in a Rights-Based Theory of Negligence Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing 2009) 83-91; Andrew Robertson, 'Justice, Community Welfare and the Duty of Care' (2011) 127 LQR 370 and 'Rights, Pluralism and the Duty of Care' in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing 2012); Nicholas J McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson Education 2018) 83. For the contrasting view that it is illegitimate to take policy considerations into account at all, see Robert Stevens, *Torts and Rights* (OUP 2007) ch 14; and Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007). And for a helpful overview of the issue, see Plunkett (n 80) 151-64.

[86] See, in particular, *Robinson* (n 1) [84].

[87] ibid [69].

Hughes acknowledged the significance of the act/omission distinction, he considered that it could not explain the absence of a duty of care in a case like *Hill* for two reasons: first, because there were exceptions to the no-liability for omissions rule; and, second, because 'there is no firm line capable of determination between a case of omission and of commission'.[88] With respect, however, these are not convincing objections. The existence of exceptions to a no-liability rule does not necessarily (or even presumptively) rob the rule of force in cases which do not fall within the exceptions. For example, the outcome of a case can plausibly be explained by reference to the general rule against recovery of pure economic loss in negligence even though the rule is not absolute. And the idea that there is not a workable distinction between positive conduct cases and omissions cases, and that 'the great majority of cases can be analysed in terms of either'[89] is, with respect, simply implausible. On the contrary, once it is understood that the distinction in play here is between making things worse for the claimant and not making them better, the distinction works perfectly well in the vast majority of cases.[90]

The other issue that deserves a mention is the idea bubbling beneath the surface in *Robinson* that victims of psychiatric injury may not be as well protected by negligence law as those who have suffered injury of a physical kind, even outside the category of so-called 'secondary victims' whose claims are subject to the restrictions imposed in *Alcock*.[91] As *Robinson* was not itself a psychiatric injury case, it would be a mistake to read too much into these runes, but it is nevertheless noteworthy that in all three judgments significance seems to have been attached to the distinction between the two different types of harm, either in the discussion of the earlier authorities or in the formulation of general liability principles.[92] Lord Hughes was particularly explicit on this point when he said that 'no duty of care towards victims of crime, witnesses or suspects' could be 'erected on the back of foreseeability of psychiatric harm' for policy reasons.[93]

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88 ibid [117].

89 ibid.

90 See further, Nolan, 'The Liability of Public Authorities for Failing to Confer Benefits' (n 46).

91 *Alcock* (n 64).

92 See *Robinson* (n 1) [69] (Lord Reed, discussing *Brooks* (n 59)), [94] (Lord Mance, stating that 'any otherwise generally established category' of negligence liability concerning the police or Crown Prosecution Service did not encompass 'extended detention and psychiatric injury'), [101] (Lord Hughes, limiting the scope of police liability to positive negligent acts causing *physical* harm to individuals or damage to property).

93 ibid [119].

10 Determination of the duty of care: back to basics

The chief importance of the *Robinson* decision lies in the approach that the Supreme Court lays down for the determination of the duty of care issue. As Lord Bridge pointed out in *Caparo*, 'there has for long been a tension between two different approaches' to this question.[94] Under what he called the traditional approach, 'the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics', whereas under 'the more modern approach', a single general principle is sought 'which may be applied in all circumstances to determine the existence of a duty of care'.[95] Unsurprisingly Lord Bridge traced the 'modern approach' to the speech of Lord Atkin in *Donoghue v Stevenson*,[96] and indeed the enunciation of Lord Atkin's famous 'neighbour principle' can (and has been) interpreted as a 'single general principle' of this kind. In truth, however, it seems unlikely that Lord Atkin meant the principle to operate as a general duty test, and in the decades that followed *Donoghue* the courts do not seem to have treated it as such. The real significance of *Donoghue* lay elsewhere, namely:

(1) in the clear judicial recognition of negligence as a tort, rather than simply a means of committing one, a proposition that (though controversial) gained swift general acceptance; and

(2) in the fact that over time *Donoghue* came to stand for the proposition that there was a presumption that a duty of care was owed in cases where a negligent *act* of the defendant had caused physical injury to the claimant or their property – precisely the 'established principle' on which Lord Reed based the duty of care in *Robinson*.

By contrast, the broader proposition that the neighbour principle could operate as a general test of duty was really untenable, since it was impossible to square with established authorities limiting liability for, among other things, omissions and pure economic loss.[97]

Nevertheless, the seed of the general duty test had been sown and in the 1970s it began to germinate. The first clear sign came in *Home Office v Dorset Yacht Co*, where Lord Reid said that the time had come 'when we can

[94] *Caparo* (n 5) 616.
[95] ibid.
[96] [1932] AC 562.
[97] See WE Peel and J Goudkamp, *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) para 5-016 ('little reliance was placed upon this generalised concept'). See also Plunkett (n 80) 39.

and should say that [the neighbour principle] ought to apply unless there is some justification or valid explanation for its exclusion'.[98] Although in the same case Lord Diplock gave a classic exposition of the more traditional approach, focused on the 'kinds of conduct and relationships which have been held in previous decisions […] to give rise to a duty of care',[99] eight years later, in *Anns v Merton LBC*, Lord Wilberforce drew upon Lord Reid's dictum when he laid down a general two-stage test for the determination of the duty issue which marked the high point of the 'modern approach' to the duty enquiry.[100] Unfortunately, the *Anns* test was interpreted (doubtless wrongly) to mean that the lower courts were no longer constrained by precedent, but were instead free to expand the boundaries of negligence law as and how they wished.[101] It did not take long for the House of Lords to realise that the genie needed to be put firmly back in the bottle, and so began the 'retreat from *Anns*', which culminated in the abandonment of the *Anns* test in *Caparo* and the reaffirmation of the orthodox approach (now christened 'incrementalism', following the influential judgment of Brennan J in *Sutherland Shire Council v Heyman*[102]).

However, even in *Caparo* the tension between the two approaches was evident. On the one hand, both Lord Bridge and Lord Oliver emphasised that the key to the duty question lay in what Lord Bridge called 'the more traditional categorisation of distinct and recognisable situations',[103] and that the search for a general duty test was pointless and detrimental – a pursuit of a 'will-o'-the wisp', according to Lord Oliver, which served 'not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense'.[104] And yet at the same time Lord Bridge could not resist the temptation to identify three 'necessary ingredients' for a duty of care to arise, namely foreseeability, 'proximity' and that it be 'fair, just and reasonable' for a duty of care to be imposed.[105] Despite the fact that Lord Bridge *specifically denied* that the latter two concepts were 'susceptible of any such precise definition as would be necessary to give them utility as practical tests',[106] these three ingredients led in time to the resurrection of the general test approach, under the guise of a so-called 'three-stage test' named (paradoxically) after the case which had so forcefully sought to restore the traditional approach. Unlike the *Anns* two-stage test, the *Caparo*

[98] [1970] AC 1004, 1027. See also at 1054 (Lord Pearson).
[99] ibid 1058.
[100] *Anns* (n 44) 751-52.
[101] See Plunkett (n 80) 45.
[102] 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories …' ((1985) 157 CLR 424, 481).
[103] *Caparo* (n 5) 618. See also at 628 (Lord Roskill).
[104] ibid 633.
[105] ibid 617-18.
[106] ibid 618.

three-stage test was a slow burner, as one can see from the way it only gradually insinuated itself into the standard textbook discussions of the duty question in the years that followed the *Caparo* decision.[107] And also unlike *Anns*, the three-stage test failed to achieve real dominance, particularly at the level of the House of Lords/Supreme Court, where it was used in only 30 per cent of duty of care determinations in the quarter century after *Caparo* was decided.[108] Nevertheless, the *Caparo* test was widely relied upon lower down the judicial hierarchy, and even at the ultimate appellate level the test was described as '[c]urrently […] the most favoured test of liability'[109] and 'the starting point' for determination of the duty question,[110] a view shared by the authors of *Clerk & Lindsell on Torts*.[111]

Although this story is well-known, it is worth repeating it in order properly to contextualise the very strong reaction against the *Caparo* 'test' in *Michael* and *Robinson*. Only for a few years after *Anns* has our highest court thrown its full weight behind any general test for the determination of the duty of care, and yet the tendency towards reliance on this approach in the courts below has been persistent, with the ultimate irony being that a House of Lords decision that explicitly disavowed general tests came itself to be regarded as the source of such a test. *Robinson* in particular seems to represent a concerted effort to stamp out the general test approach once and for all, and it will surely be very hard for the lower courts to ignore it, not least because the Supreme Court has unanimously endorsed Lord Reed's analysis in two subsequent cases.[112] Indeed, arguably for a lower court to employ the *Caparo* test after *Robinson* would amount to nothing short of *lèse-majesté*.

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[107] Compare WVH Rogers, *Winfield & Jolowicz on Tort* (14th edn, Sweet & Maxwell 1994) 86-87 (a fleeting reference to what 'one member of the House of Lords' has said, which focuses on Lord Bridge's denial of the utility of the concepts as tests); WVH Rogers, *Winfield & Jolowicz on Tort* (15th edn, Sweet & Maxwell 1998) 97ff (an extended discussion of the three – or possibly four – separate steps that 'seem' to make up the duty enquiry); and WVH Rogers, *Winfield & Jolowicz on Tort* (16th edn, Sweet & Maxwell 2002) 112 ('The leading case [on duty of care] is now [*Caparo*] … There are now three separate steps or issues in the [duty] enquiry').

[108] See Plunkett (n 80) 186. See also Keith Stanton, 'Decision-making in the Tort of Negligence in the House of Lords' (2007) 15 Tort L Rev 93, 99 ('scarcely any use' made by the House of Lords of the *Caparo* test in the early years of this century).

[109] *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225 [42] (Lord Bingham).

[110] *Smith v Ministry of Defence* (n 25) [162] (Lord Carnwath).

[111] '[T]he accepted test for the existence of a notional duty' (Michael A Jones (ed), *Clerk & Lindsell on Torts* (22nd edn, Sweet & Maxwell 2018) para 8-16).

[112] See *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 WLR 4021, [23] (Lord Lloyd-Jones); and *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2018] 2 WLR 54, [15]-[16] (Lord Lloyd-Jones).

11 Why general tests of duty are doomed to fail

It seems to me to be no coincidence that it is the ultimate appellate court that has been so resistant to the use of a general test of duty, and that the use of such tests has been more prevalent in lower-level courts. In this section of my chapter I will seek to show why it is that general tests of duty inevitably fail, and why, therefore, the only plausible approach to the duty of care question is the traditional one.

The key to understanding the superiority of the traditional approach lies in the recollection that the notional duty question is a question of law,[113] and that this marks a critical difference between the duty enquiry and, say, the breach or factual causation enquiries, which are of course questions of fact. Where the court in a negligence case is faced with a question of fact, it makes perfect sense for that question to be resolved by a one-size-fits-all test, which asks, for example, whether the conduct of the defendant fell below the standard of the reasonable person, or whether the defendant's fault was a but-for cause of the claimant's injury. Indeed, how else could a court decide such a question, when by definition earlier decisions on questions of fact are not precedents, and so cannot be followed? By contrast, when it comes to notional duty, earlier decisions are binding on the court, and hence a quite different kind of reasoning is required. The reasoning in question is standard common law reasoning,[114] working with the relevant authorities to determine whether the case is covered by binding precedent, and, if not, reasoning by analogy and by reference to relevant considerations in order to decide whether or not a duty of care is owed.[115] While that process may be more or less straightforward in a particular case, and there may be legitimate disagreement about the considerations a court should take into account, there is nothing remotely mysterious about what ought to be going on. In truth, the approach that courts take to determining the duty of care question should be thoroughly predictable, and really rather uninteresting. It is a sad reflection of how unsophisticated common law thinking on negligence remains that pages and pages of the textbooks are devoted to what ought to be a routine issue, and that our highest court should have had yet again to remind other judges and practitioners of what needs to be done.

The same 'poverty of thought'[116] is responsible for the widespread belief

[113] Indeed, I have previously argued that this is one of only two defining characteristics of the notional duty concept: see Donal Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, 567-69.

[114] See Keith Stanton, 'Incremental Approaches to the Duty of Care' in Nicholas J Mullany (ed), *Torts in the Nineties* (LBC Information Services 1997) 39 ('incrementalism may be regarded as restoring a traditional method of adjudication to the tort of negligence').

[115] See also Plunkett (n 80) 71.

[116] See RFV Heuston, '*Donoghue v Stevenson* in Retrospect' (1957) 20 MLR 1, 23.

that a satisfactory answer to the notional duty question can be arrived at by the use of a general test of the kind used to determine questions of fact. There are two reasons why such a general test cannot work. The first is that in order to encompass the very wide range of different issues that fall under the notional duty umbrella, the concepts that make up a general duty test must by definition be so abstract ('neighbourhood', 'proximity' etc) that in themselves they provide little or no guidance to the court as to whether a duty of care ought to be recognised. And the other reason why such tests inevitably fail is that their relationship with precedent is problematic and obscure. Taken literally, they seem to leave no room for the doctrine of precedent at all. The judge simply applies the test to the facts, or the 'duty situation', and the test itself produces the right answer. Earlier authority simply goes by the board, as in the worst excesses of the *Anns* era. In practice, of course, a more nuanced approach is taken, but the basic question of how the general test is to be reconciled with the doctrine of precedent never receives a satisfactory answer, because no such answer can be given. Hence the use of a general test in combination with traditional precedent-based reasoning necessarily generates irresolvable tensions and the law inevitably becomes unclear and incoherent.

Suppose, for example, that we take seriously the proposition put forward by the Court of Appeal in *Robinson* that the *Caparo* three-stage test be used in every duty case. Where would this leave the complex web of duty rules that have developed to govern liability for psychiatric injury in cases like *Alcock*[117] and *Page v Smith*[118]? Does the court simply ignore these decisions, despite the fact that they appear to govern the claim in question, and apply the *Caparo* test instead? And if the answer is no, that in that type of case the precedents must be followed, then why not always do so, in which case the *Caparo* analysis in fact plays no role in the decision-making process, and is rendered superfluous? Nor is it an adequate response to this critique to say that the *Caparo* test is only to be used in 'novel' cases, whatever that might mean. Precedent-based reasoning is not some sort of on-off switch, whereby either the case is determined by precedent or precedent is irrelevant. Under the traditional approach to the duty question, the extent of the judge's discretion in deciding whether or not to recognise a duty of care is of course determined by the pertinence of the relevant authorities, but there always *are* relevant authorities. In an advanced system of precedent-based rules, there is simply no such thing as a jurisprudential vacuum, where a court is completely unconstrained by earlier case law. Analogies *always* exist.

[117] *Alcock* (n 64).
[118] [1996] AC 155.

Needless to say, when the theoretical underpinnings of general duty tests are this weak, their use inevitably leads to fundamental problems. Three in particular can be identified. The first is that the weakening of precedent and the increasing number of *ad hoc* decisions applying the test render the law uncertain and unstable. The outcome of cases becomes less predictable,[119] which in turn generates more litigation. With respect, Lord Bingham's suggestion (if that is what it was) that a general test of duty is required if the law is not to become a 'morass of single instances'[120] gets it precisely wrong: on the contrary, that is exactly what use of such a general test will produce.

A second shortcoming of general duty tests is that a judge who is both freed from the constraints of precedent and asked to apply a test made up of concepts so abstract as to be meaningless is essentially given *carte blanche* to decide the case however he or she wishes. Although this does not necessarily result in bad outcomes in individual cases, such an approach is antithetical to the philosophy of the common law and weakens the authority of the decisions that are made. As Lord Diplock pointed out in *Dorset Yacht*:

> The justification of the courts' role in giving the effect of law to the judges' conception of the public interest in the field of negligence is based upon the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances.[121]

Disregard that 'cumulative experience' by abandoning precedent-based reasoning for an *ad hoc* approach, and the justification falls away.

And a third difficulty caused by the use of a general test of duty is that it is likely to become impossible to reconcile the case law into a coherent body of rules. To give an example, in an earlier article on the duty of care concept, I showed how the Court of Appeal's reliance on the *Caparo* test in *Everett v Comojo (UK) Ltd (t/a The Metropolitan),*[122] led to it deciding the case without reference to highly pertinent House of Lords authority on the question of negligence liability for the deliberate criminal acts of third parties.[123]

[119] See Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2012) 114 (commenting on the difficulty of predicting the outcome of applying the *Caparo* three-stage test, and the 'conceptual uncertainty' that surrounds it). See also Jonathan Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 Professional Negligence 206, 217-18.

[120] *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181 [8].

[121] *Dorset Yacht* (n 98) 1058.

[122] [2011] EWCA Civ 13, [2012] 1 WLR 150.

[123] Nolan, 'Deconstructing the Duty of Care' (n 113) 584-85.

Although in this instance the outcome of the case was probably consistent with that earlier authority, one can easily imagine scenarios where a ruling made with the use of a general duty test is impossible rationally to reconcile with an earlier decision of a higher court, with the result that the law becomes incoherent, in the sense that it is not possible to expound or explain the law in an internally consistent way.

By way of contrast, the traditional approach of applying precedent and reasoning by analogy promotes consistency and predictability, restores authority to decisions on duty, and is at least capable of bringing about a high level of internal coherence. By reducing and constraining the degree of individual judgment involved in deciding cases, the traditional approach brings the law of negligence closer to the 'rule of law ideal where the outcome of the case does not depend upon the individual views of the particular decision-maker, but upon the common understanding of what the law requires'.[124] And by providing 'specific guidance for specific types of problem', the traditional approach is 'of considerably more use' to lower-level courts and practitioners.[125]

Faced with the overwhelmingly strong case against general tests of duty, one is forced to ask why they have proven so attractive to the lower courts. The most plausible answer is threefold: first, that the existence of general tests for questions of fact such as breach of duty and causation generates an expectation that the duty of care issue can be approached in the same way; second, that 'a judge may find it reassuring to be able to identify a general governing standard and explain his decision by reference to its terms';[126] and, third, that it is simply *easier* for an overworked and time-poor judge to decide such an issue by reference to an open-ended general test than by a careful analysis of the existing precedents and (where appropriate) policy considerations.[127] When considering the impact of the *Robinson* decision, it is important to bear these three considerations in mind. For while there is nothing remotely ambiguous about Lord Reed's disavowal of the *Caparo* test, the allure of general duty tests is such that some resistance to his message is to be expected.

[124] Grant Lamond, 'Analogical Reasoning in the Common Law' (2014) 34 OJLS 567, 576.
[125] Plunkett (n 80) 77.
[126] JA Smillie, 'Principle, Policy and Negligence' (1984) 11 NZULR 111, 144.
[127] As one commentator pointed out in the aftermath of *Anns*, an attraction of the general test approach is that 'the judge is spared the hard task of distinguishing or supplying convincing reasons for refusing to follow inconvenient precedents', and of identifying and weighing all the relevant arguments for and against liability: ibid, 145.

12 Applying the traditional approach post-*Robinson*

To finish, it may be useful to consider how the courts should apply the traditional approach to duty in a particular case, and to dispel some myths about it.[128] If the general test approach represents a move away from precedent, the traditional approach puts it centre stage, so that the arguments of the parties, and the reasoning of the court, are firmly located within the context of the existing authorities. Hence, Lord Devlin's observation in *Hedley Byrne & Co v Heller & Partners Ltd* ('*Hedley Byrne*') that the first step in the duty enquiry 'is to see how far the authorities have gone',[129] and Lord Bridge's statement in *Caparo* that applying the traditional approach it was to the authorities 'directly relevant to this relatively narrow corner of the field' that the court should look to determine the duty question in that case.[130] In *Michael*, Lord Toulson summed up the approach to be taken in the following words:

> The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account.[131]

The breadth of the negligence cause of action means that the authorities must be organised into categories for this process to operate effectively.[132] To understand how the process of categorisation works, it is useful to think in terms of a number of key case types that fall outside the *Donoghue v Stevenson* paradigm of positive conduct directly causing physical harm (where a duty of care is presumed).[133] These key case types

[128] For a not dissimilar approach to the one advocated here, see Plunkett (n 80) 139-148.
[129] [1964] AC 465, 525.
[130] *Caparo* (n 5) 619.
[131] *Michael* (n 12) [102].
[132] See the reference by Lord Bridge in *Caparo* (n 5, 618) to the 'categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits' of the duties of care the law imposes. And see also *Markesinis and Deakin's Tort Law* (n 119) 116 (the courts 'approach the application of the law relating to duty of care by breaking it down into a series of categories, which give rise to distinct issues').
[133] See *Dorset Yacht* (n 98), where Lord Diplock (at 1061) identified 'two special characteristics' that differentiated the facts of the case from the facts of *Donoghue*, and then started his analysis of the duty question 'with an examination of the previous cases in which both or one of these special characteristics' was present.

concern omissions, deliberate intervening acts, psychiatric injury and pure economic loss. Although these four case types give rise to the most general categories of earlier authority, the process of categorisation does not stop there. In a psychiatric injury case, for example, different rules apply to primary victims, secondary victims, victims of work stress and so on. And where a case raises a duty issue that does not fall within any of the four key case types (such as the 'combat immunity' question), then a narrower line of authority relating to that particular problem will constitute the relevant body of case law. Like the law itself, the categories are dynamic. For example, if claims against public authorities are subject to special rules at the duty stage, a public authority category (or categories) is required, but if the equality principle is applied, as it now is, no such category is needed. Similarly, if the Supreme Court decided to abolish the duty-level limitations that currently govern claims for psychiatric injury, then cases that would previously have fallen into the psychiatric injury category would subsequently be encompassed by the *Donoghue v Stevenson* paradigm, and so the category would disappear.

Once the relevant category or sub-category has been identified, the judge turns to the case law in that category and the usual process of reasoning from precedent, and by the use of analogy, takes place. If a case falls into more than one category (for example, because it concerns an omission *and* pure economic loss), then the precedents in each category must be considered before a duty determination can be made. As McHugh J said in *Crimmins v Stevedoring Industry Finance Committee*, '[i]n determining whether the instant case is analogous to existing precedents, the reasons why the material facts in the precedent cases did or did not found a duty will ordinarily be controlling', and 'the precedent cases have to be examined to reveal their bases in principle and policy'.[134] To the extent that the precedents do not show the way forward, an exercise of judgment will need to be made as to whether negligence liability ought to be extended to the new situation. The result of employing this approach is that 'decisions in new cases can be more confidently predicted, by reference to a limited number of principles capable of application throughout the category'.[135] Other benefits of analogical reasoning include encouraging settlements, discouraging appeals and narrowing the range of evidentiary materials, thereby reducing the cost of litigation.[136] As is so often the case, an abstract exposition is less useful than looking at the best examples of the method

[134] (1999) 200 CLR 1 [72]-[73]. See also Stanton, 'Incremental Approaches to the Duty of Care' (n 114) 46 ('The underlying logic and policies of the recognised category of duty of care are identified in order to decide whether the case in issue is truly analogous').
[135] *Crimmins* (n 134) [77].
[136] ibid [76].

in action, such as the speeches of Lord Diplock in *Dorset Yacht* and Lord Bridge in *Caparo*. And since there is nothing particularly distinctive about the method as it is employed in the duty of care context, guidance can also be sought from more general discussions of analogical reasoning in the common law tradition.[137]

Three further points should be made. First, on the traditional approach to the duty question no sharp distinction can be drawn between novel cases and cases covered by authority, as the use of analogical reasoning blurs the boundary. Besides, it is only after the authorities have been fully considered that any assessment of the novelty of the claim before the court can be made, so the idea that a different approach (such as a general test) can be used *ab initio* in a 'novel case' makes little sense. Second, the idea that the traditional approach is just another 'test' for the existence of a duty of care (viz, the 'incremental test'[138]) is completely misguided, since the whole point of the traditional approach is that there is, and can be, no such thing.[139] And finally, the argument that is sometimes made against the traditional approach that it is stultifying and does not allow negligence to develop[140] is a caricature apparently borne of the failure to appreciate that this approach is just standard common law reasoning. After all, no-one could seriously suppose that the common law itself is incapable of development just because it is a system of rules based on precedent and reasoning by analogy. The label 'incrementalism' may be partly to blame for this misapprehension and is perhaps best avoided. In truth, analogical reasoning does not preclude radical decisions that significantly expand the boundaries of negligence liability.[141] *Hedley Byrne*[142] was such a decision, as was *Henderson v Merrett Syndicates* ('*Henderson*'),[143] where that case was extended from negligent statements to negligent services. Both are exemplars of the kind of common law reasoning that is being advocated, which (needless to say) focuses not just on the rules laid down in earlier cases, but also on the principles that underlie those rules, a point that comes through particularly clearly in Lord Goff's speech in *Henderson*.

[137] See, eg, Lamond (n 124).

[138] See, eg, *Customs and Excise Commissioners* (n 120) [7] (Lord Bingham). See also Stanton 'Incremental Approaches to the Duty of Care' (n 114) 50 (the 'test of incrementalism').

[139] See *Crimmins* (n 134) [73] (McHugh J): 'The policy of developing novel cases incrementally by reference to analogous cases acknowledges that there is no general test for determining whether a duty of care exists'. See also Stanton, 'Incremental Approaches to the Duty of Care' (n 114) 34 (describing 'incrementalism' as the 'antithesis' of a general duty test).

[140] See, eg, David Howarth, 'Negligence after *Murphy*: Time to Re-think' [1991] CLJ 58, 71.

[141] See Stanton, 'Incremental Approaches to the Duty of Care' (n 114) 54 ('incrementalism has not prevented the English courts from achieving more radical results than those which are found elsewhere').

[142] *Hedley Byrne* (n 129).

[143] [1995] 2 AC 145.

13 Conclusion

The decisions of the Supreme Court in *Michael* and *Robinson* have the potential to usher in a new era in the troubled history of the duty of care in negligence, an era marked by greater transparency, predictability and consistency. Four common themes run through the leading judgments in the cases, two more specific and two more general. The two more specific themes are the fundamental nature of the act/omission dichotomy, and the idea that no distinction ought generally to be drawn between private and public defendants at the duty of care stage of the negligence enquiry. The first more general theme is that, while policy arguments have a legitimate role to play in the duty enquiry, they are very much subsidiary to arguments from principle and precedent. And the second more general theme is that, when faced with duty of care issues, the courts should eschew the 'beguiling simplicity'[144] of general duty tests, and instead employ traditional common law methods, using analogical reasoning and reasoned argumentation to produce a 'pattern of liability as diversified as befits the complex society which [the law of negligence] serves'.[145] In this final respect, the message coming from the Supreme Court could hardly be clearer. It remains to be seen whether the rest of the profession is listening.

[144] MA Millner, *Negligence in Modern Law* (Butterworths 1967) 236.
[145] ibid 237.