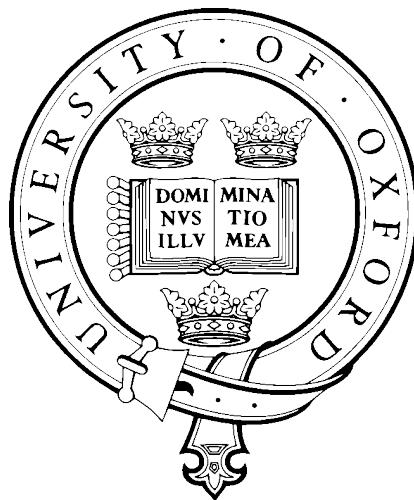


THE DUTY OF CARE: A COMPARATIVE COMMON LAW ANALYSIS



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Abstract

The general aim of this thesis is to provide a detailed overview of the duty of care enquiry, drawing on both academic analyses and judicial experience in leading common law systems. The thesis starts by exploring the history of the duty concept, including how it first came to be an element of the negligence enquiry, and how it later came to be determined via the use of a general formula. The thesis then explores and analyses the various methods through which the existence of a duty of care has been determined. Having provided an overview of the development of the duty concept, it is then argued that the duty of care is best understood as consisting of two discrete parts: a factual aspect and a notional aspect. It is suggested that the factual aspect of the duty enquiry is superfluous and should be abandoned so that the duty enquiry is a notional issue only. It is then argued that the notional aspect of the duty enquiry is best understood as consisting of two separate types of determinations: those relating to broad situations, and those based on assumptions of responsibility. Both of these types of notional duty determinations are explored in detail. The propriety of basing situational notional duty determinations on considerations of policy, and the necessity of notional duty, are also considered. Finally, the thesis provides an overview of an empirical study of ultimate appellate court duty decisions, investigating, among other things, whether the understanding of duty provided in the thesis is consistent with the practice of the courts.

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Table of Contents

<i>Acknowledgements</i>	vi
<i>Table of abbreviations</i>	vii
<i>Table of cases</i>	viii
<i>Table of statutes</i>	xv
<i>Table of diagrams and tables</i>	xvi
1. Introduction	1
I. Introduction	1
II. Making sense of the duty of care.....	2
III. The aim of this thesis	3
IV. The structure of this thesis	4
V. Scope and terminology	5
2. The Historical Foundations of the Duty of Care.....	7
I. Introduction	7
II. The Beginnings of the Duty of Care	8
A. Duty Enters Relationship Negligence: From Contract to Tort and the Elevation of Duty	10
B. Duty Enters Non-Relationship Negligence.....	14
C. Duty as an Element of the Action for Negligence.....	18
III. Towards a General Conception.....	22
A. <i>Heaven v Pender</i>	25
B. The Twentieth Century and the Ever-Changing Role of Foreseeability.....	29
C. <i>Donoghue v Stevenson</i>	36
IV. Conclusion.....	39
3. The Methods for Determining the Existence of a Duty of Care	41
I. Introduction	41
II. The aftermath of <i>Donoghue v Stevenson</i>	42
III. The staggering march of negligence	46
IV. The ‘rise and fall’ of <i>Anns v Merton</i>	52
V. <i>Caparo</i>	55
A. Foreseeability.....	57
B. Proximity	57
C. Policy considerations and what is fair, just and reasonable	62
VI. Canada and the ‘two stage’ test	65
VII. Assumption of responsibility and the ‘extended’ <i>Hedley Byrne</i> principle.....	67
VIII. Australia and the ‘salient features’ test	75
IX. Pockets.....	81
X. Incrementalism	85
XI. Conclusion.....	89

4. Factual Duty	92
I. Introduction	92
II. The Dual Function of Duty	92
A. The attack on duty	92
B. Factual and notional duty	95
III. Factual duty, fault, and remoteness	98
A. Factual duty and fault	99
B. Factual duty and remoteness	101
IV. Factual duty and the problem of the unforeseeable plaintiff	104
A. <i>Palsgraf</i> , <i>Bourhill</i> and <i>Re Polemis</i>	105
B. The duty of care is a 'real' duty.....	109
C. The problem of the unforeseeable plaintiff goes to culpability, not compensation.....	112
i. The distinction is arbitrary.....	113
ii. Foreseeability of harm to the plaintiff cannot be distinguished from foreseeability of the kind of harm	115
iii. We must simultaneously accept contradictory rationale.....	122
V. Why factual duty entered the duty enquiry and why it remains	123
VI. Why does it matter?	126
VII. Conclusion	127
5. Notional Duty	129
I. Introduction	129
II. The 'categorical' nature of notional duty	130
A. Notional duty situations are both inclusionary and exclusionary	133
B. The 'relationship' and 'interest' views of notional duty.....	136
C. The level of generality of the notional duty situation	141
D. Notional duty situations and questions of fault	144
E. The 'scope' of the duty.....	150
III. Assumptions of responsibility.....	154
A. A distinctive type of justification	155
B. Criticism	156
C. How assumptions of responsibility fit into the notional duty enquiry	159
IV. The use of policy considerations.....	162
A. Judges are not qualified to rely on policy considerations	164
B. The policy-based approach requires the balancing of incommensurables	170
C. The use of policy considerations violates the rule of law	171
D. The use of policy-based arguments makes the law less coherent	175
E. Summary	178
V. The need for notional duty	178
A. Attacks on notional duty.....	179
B. Why is the notional duty enquiry so broad?.....	182
C. Comparison to other legal systems	183
D. Is notional duty necessary?	187
VI. Conclusion.....	188

6. Comparing the Duty Methodologies of Australia, Canada, and the UK	191
I. Introduction	191
II. The study.....	193
III. The Competing Methodologies	196
A. A brief overview of the data	196
i. Kinds of damage	196
ii. Nature of the decision being appealed	197
iii. The number of substantive opinions per case.....	198
iv. Success rates of claimants and defendants	199
v. The number of duty determinations	202
B. The use of general duty tests.....	203
i. Methodology	201
ii. The results.....	204
iii. Analysis	204
C. Determining the existence of a duty without general tests	209
i. Methodology	210
ii. The results.....	210
iii. Analysis	211
iv. Some additional commentary.....	217
D. Do the courts approach the notional duty enquiry in a categorical or fact specific manner?	219
i. Methodology	219
ii. The results.....	221
iii. Analysis	221
E. To what extent do courts rely on policy considerations?	227
i. Methodology	228
ii. The results.....	231
iii. Analysis	231
F. To what extent do courts rely on academic literature?	235
i. Methodology	236
ii. The results.....	238
iii. Analysis	238
IV. Conclusion.....	240
7. Conclusion.....	244
I. Introduction	244
II. Overview of main conclusions and findings.....	245
III. Conclusion.....	248
Appendices.....	250
Bibliography	253

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Table of Abbreviations

B&M	Baker JH, <i>Baker and Milsom Sources of English Legal History: Private Law to 1750</i> (2nd edn, OUP 2010)
SS	Selden Society
OUP	Oxford University Press

Table of Cases

Australia

Agar v Hyde (2000) 201 CLR 552	216
Annetts v Australian Stations Pty Ltd	43, 135, 140, 214
Barclay v Penberthy (2012) 246 CLR 25	214, 223
Brodie v Singleton Shire Council (2001) 206 CLR 512	88, 200
Brookfield Multiplex v Owners – Strata Plan No 61288 (2014) 88 ALJR 911.....	82, 111, 214, 223, 225
Bryan v Maloney (1995) 182 CLR 609	76, 85, 87, 227
Burnie Port Authority v General Jones (1994) 179 CLR 520	76, 205
CAL No 14 Pty Ltd v Motor Accidents Insurance Board (2009) 239 CLR 390.....	142, 216, 225
Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad” (1976) 136 CLR 529.....	78
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649.....	79
Chapman v Hearse (1961) 106 CLR 112	102
Chester v Waverly Corp (1939) 62 CLR 1`	93
Cole v South Tweed Heads Rugby League Football Club Ltd (2004) 217 CLR 469.....	152, 217, 224
Cook v Cook (1986) 162 CLR 376	76
Crimmins v Stevedoring Committee (1999) 200 CLR 1.....	80, 82, 85, 137, 214, 216, 218
Czatyрко v Edith Cowan University (2005) 214 ALR 349.....	193
Dovuro Pty Ltd v Wilkins (2003) 201 ALR 139	103
Minster Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd [1983] 2 NSWLR 268	102
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg) (1997) 188 CLR 241.....	175, 206
Gala v Preston (1991) 172 CLR 243	76, 216, 227
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540.....	78, 89, 148, 152, 214, 216, 244
Groves v The Commonwealth (1982) 165 CLR 113.....	135
Hackshaw v Shaw (1984) 155 CLR 614	75
Harriton v Stephens (2006) 226 CLR 52.....	78, 111, 140, 206
Hawkins v Clayton (1988) 164 CLR 539	60, 206, 208
Hill v Van Erp (1997) 188 CLR 159	60, 70, 76-77, 135, 223, 227
Hunter and New England Local Health District v McKenna (2014) 89 AJLR 39	216
Imbree v McNeilly (2008) 236 CLR 510	194
Jaensch v Coffey (1984) 155 CLR 549	58, 75, 76, 85, 137, 195, 204-205, 227
John Pfeiffer Pty Ltd v Canny (1981) 148 CLR 218.....	111
Jones v Bartlett (2000) 205 CLR 205	151
Kenny & Good Pty Ltd v MGICA (1999) 199 CLR 413	224
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361.....	137, 142, 146, 215
Leichhardt Municipal Council v Montgomery (2007) 230 CLR 22	194
Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1	216
March v (E & M) Stramare Pty Ltd (1991) 171 CLR 506.....	194
McPhersons Ltd v Eaton & Ors [2005] NSWCA 435	147
Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd (1999) 9 NTLR 82	77, 205
Miller v Miller (2011) 242 CLR 446	216
Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254.....	137, 152, 216
Mulligan v Coffs Harbour CC (2005) 223 CLR 486.....	145, 147, 151, 217
Nagle v Rottneest Island Authority (1993) 177 CLR 423	151
Neindorf v Junkovic (2005) 222 ALR 631	142-143, 144, 146, 152, 196
New South Wales v Bujdoso (2005) 227 CLR 1	193
New South Wales v Fahy (2007) 236 ALR 406	194
New South Wales v Lepore (2003) 212 CLR 511	194

Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313	142
Perre v Apand Pty Ltd (1999) 198 CLR 180	62, 77, 78, 80, 82, 88, 90, 132, 195, 205, 212-213, 216-217
Pyrenees Shire Council v Day (1998) 192 CLR 330	62, 77, 211-212, 214, 218
Road Traffic Authority of NSW v Dederer (2007) 324 CLR 330	150
Romeo v Conservation Commission (NT) (1998) 192 CLR 431	148, 151, 152, 200, 224
San Sebastian v Minister (1986) 162 CLR 340.....	76
Seale v Perry [1982] VR 193	65
Shaw Savill & Albion Co Ltd v The Commonwealth (1940) 66 CLR 344	50, 135
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16	76, 204-205
Stuart v Kirkland-Veenstra (2009) 237 CLR 215	213-215
Sullivan v Moody (2001) 207 CLR 562	78, 137, 205
Sutherland Shire Council v Heyman (1985) 157 CLR 424	52, 58, 61-62, 65, 76-77, 85-86
Tame v New South Wales (2002) 211 CLR 317	43, 135, 140
Thompson v Bankstown Municipal Council (1953) 87 CLR 619	49
Vairy v Wyong Shire Council [2005] 223 CLR 422	137, 145, 224
Waller v James (2006) 226 CLR 136	213
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515	78, 214, 227
Wyong Shire Council v Shirt (1980) 146 CLR 40.....	75

Canada

B (KL) v British Columbia (2003) 230 DLR (4th) 513	194
BDC Ltd v Hofstrand Farms Ltd (1986) 26 DLR (4th) 1	65, 206
BG Checo International Ltd v British Columbia Hydro and Power Authority (1993) 99 DLR (4th) 577	215
British Columbia v Imperial Tobacco Canada Ltd (2011) 335 DLR (4th) 513	201
Brown v British Columbia (Minister of Transportation and Highways) (1994) 112 DLR (4th) 1	214
Canadian National Railway Co v Norsk Pacific Steamship Co (1992) 91 DLR (4th) 289	59, 60, 65, 86, 88
Central Trust Co v Rafuse (1986) 31 DLR (4th) 481	215
Childs v Desormeaux (2006) 266 DLR (4th) 257	66, 82-83, 84, 206, 213
City of Kamloops v Nielsen (1984) 10 DLR (4th) 641	65, 195
Clark v Canadian National Railway (1988) 54 DLR (4th) 679	194
Clements (Litigation Guardian of) v Clements (2012) 346 DLR (4th) 577	194
Cooper v Hobart (2001) 206 DLR (4th) 193	65, 129, 132, 137, 209, 213
Crocker v Sundance Northwest Resorts Ltd (1988) 51 DLR (4th) 321	214
D(B) v Children's Aid Society (2007) 284 DLR (4th) 682	66, 209
Design Services Ltd v Canada (2008) 293 DLR (4th) 437	132
Dobson (Litigation Guardian of) v Dobson (1999) 174 DLR (4th) 1	65, 135
Galaske v O'Donnell (1994) 112 DLR (4th) 109	149
Hall v Hebert (1993) 101 DLR (4th) 129	206, 227
Hill v Hamilton-Wentworth Regional Police Services Board (2007) 285 DLR (4th) 620	66, 137, 166, 200, 209
Jordan House Ltd v Menow (1974) 38 DLR (3rd) 105	214
Just v British Columbia (1989) 64 DLR (4th) 689	214
London Drugs Ltd v Kuehne & Nagel International Ltd (1992) 97 DLR (4th) 261	215
Mustapha v Culligan of Canada Ltd (2008) 293 DLR (4th) 29	200
Odhavji Estate v Woodhouse 233 DLR (4th) 193	43, 66, 137, 209

Perez v Galambos Michael (2009) 312 DLR (4th) 220	194
Resurface Corp v Hanke (2007) 278 DLR (4th) 643	194
Rothfield v Manolakos (1989) 63 DLR (4th) 449	65
Stewart v Pettie (1995) 121 DLR (4th) 222	200
Swinamer v Nova Scotia (1994) 112 DLR (4th) 18	214
Walker Estate v York-Finch General Hospital (2001) 198 DLR (4th) 193	194
Winnipeg Condominium Corp No 36 v Bird Construction Co (1995) 121 DLR (4th) 193	135, 225

Ireland

Ward v McMaster [1988] IR 337.....	88
------------------------------------	----

United Kingdom

Abbot of Stratford v Hubbulthorn (1529).....	8
Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310 (HL)	60, 76, 81, 135, 195-196, 212-213
Andrews v Hopkinson [1957] 1 QB 229 (QB)	42
Anns v Merton LBC [1978] AC 728 (HL)	4, 52-55, 57, 63, 65-67, 75, 87, 89, 126, 195, 203, 205-209, 211-212, 215, 222, 227, 232,
Anon (1582) B&M 624.....	8
Ansell v Waterhouse (1817) 6 M&S 385, 105 ER 1286	13
Arthur JS Hall & Co v Simons [2002] 1 AC 615 (HL)	213, 239
Barret v Ministry of Defence [1995] 1 WLR 1217 (CA)	155
Barrett v Enfield [2001] 2 AC 550 (HL)	201
Battley v Faulkner (1820) 3 B & Ald 288, 106 ER 668	12
Beamish v Beamish (1861) 9 HL Cas 274, 11 ER 735	46
Beaulieu v Finglam (1401) B&M 610	8
Beneyt v Brokkere (1358)	8
Blakemore v Bristol & Exeter Railway (1858) 8 E&B 1035, 120 ER 385	23
Blyth v Birmingham Waterworks (1856) 11 Ex 781, 156 ER 1047..	32, 99
Bolton v Stone [1951] AC 850 (HL)	100
Boorman v Brown (1842) 3 QB 511, 114 ER 603.....	13
Bourhill v Young [1943] AC 92 (HL)	35, 42, 93, 104-109, 115-116, 117-118, 121, 123, 125-126, 128, 143
Bretherton v Wood (1821) 3 Brod & Bing 54, 129 ER 1203	13
British Railways Board v Herrington [1972] AC 877 (HL)	49
Brooks v Commissioner of Police of the Metropolis [2005] 1 WLR 1495	214
Brown v Cotterill (1934) 51 TLR 21.....	42
Buckner v Ashby & Horner Ltd [1941] 1 KB 321 (CA)	45
Bukton v Tounesende (Humber Ferry Case) (1348) B&M 399	7-8
Cairns v St Marylebone BC (1954) The Times, 8 December 1954 (QB)	44
Caledonian Railway v Mulholland (1898) AC 216 (HL)	27
Candler v Crane, Christmas & Co [1951] 2 KB 164 (CA)	30, 38, 44, 47-48
Cann v Wilson (1888) 39 ChD 39	28
Caparo Industries plc v Dickman [1989] QB 653 (CA).....	56, 58
Caparo Industries plc v Dickman [1990] 2 AC 605 (HL)	4, 53-56, 58-64, 66-67, 72-74, 76-77, 80-82, 86, 89-90, 94, 144, 203-209, 212-13, 219-220, 222, 227-228, 232-233, 246
Cattle v Stockton Waterworks (1875) LR 10 QB 453	48
Cavalier v Pope [1906] AC 428	45
Collis v Selden (1868) 3 CP 495	20

Cooke v Midland Great Western Railway of Ireland [1909] AC 229 (HL)	49
Coventry, Sheppard & Co v The Great Eastern Railway Co (1883) 11 QB 776 (CA)	27
Cox v Burbidge (1863) 13 CB NS 431, 143 ER 171	18
Critoft v Emson and Nicols (1506) B&M 619	8
Cunnington v The Great Northern Railway Co (1883) 49 LT 392 (QB)	25
Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181 (HL)	41, 56, 58, 62, 71-74, 89-90, 157-158, 161, 206
D v East Berkshire Community Health NHS Trust [2005] 2 AC 373 (HL)	129, 216, 233
D&F Estates v Church Commissioners [1989] 1 AC 177 (HL)	54, 81, 83, 215, 225
Dale v Hall (1750) 1 Wils KB 281, 95 ER 619	11
Daniels v Potter (1830) 4 C&P 262, 172 ER 697	14
Deane v Clayton (1817) 7 Taunt 489, 129 ER 196	24
Degg v Midland Railway Company (1857) 1 H&N 773, 156 ER 1413.....	18
Denny v Supplies & Transport Co [1950] 2 KB 374 (CA)	45
Derry v Peek (1889) 14 AC 337 (HL)	28, 44, 48
Donoghue v Stevenson [1932] AC 562 (HL)	23, 34, 36-38, 41-47, 51-52, 56, 57, 62, 71, 75, 89, 92, 107, 127, 129, 137, 148, 204, 214, 215, 246
Dransfield v British Insulated Cables Ltd [1937] 4 All ER 382 (KB)	45
Drew v New River Co (1834) 6 C&P 754, 172 ER 1449	15
Dulieu v White & Sons [1901] 2 KB 669 (KB)	33-35
Dutton v Bognor Regis Urban DC [1972] 1 QB 373 (CA)	49
Dyer's Case (1414) YB Pas 2 Hen V, fo 5, pl 26	63
Dyster v Battye (1820) 3 B & Ald 448, 106 ER 727	12
East Suffolk Rivers Catchment Board v Kent [1941] AC 74 (HL)	44, 50
Edwards v Railway Executive [1952] AC 737 (HL)	44
Egerton v Brownlow (1853) 4 HL Cas 1, 10 ER 359	64, 169
Farr v Butters Bros [1932] KB 606 (CA)	43
Farrant v Barnes (1862) 31 LJCP 137.....	24
Farrugia v Great Western Railway [1947] 2 All ER 565 (CA).....	57
Forward v Pittard (1785) 1 TR 27, 99 ER 953.....	11
Fraser v Swansea Canal Navigation Co (1834) 1 Ad & El 354, 110 ER 1241	12
Gautret v Egerton (1867) 2 CP 371	24
George v Skivington (1869) 5 LR Ex 1, 39 LJ Ex 8	23
Gibbon v Paynton (1769) 4 Burr 2298; 98 ER 199.....	11
Goodwill v British Pregnancy Advisory Service [1996] 1 WLR 1397 (CA)	86
Gorham v British Telecommunications plc [2000] 1 WLR 2129 (CA)	86
Gorringe v Calderdale MBC [2004] 1 WLR 1057	81, 215
Governors of the Peabody Donation Fund v Sir Lindsay Parkinson [1985] AC 210 (HL)	54, 58, 195
Govett v Radnidge (1802) 3 East, 62, 102 ER 520	13
Grant v Australian Knitting Mills Ltd [1936] AC 562 (PC)	42
Greenland v Chaplain (1850) 5 Ex 243, 155 ER 104	31
Greenwell v Prison Commissioners (1951) 101 LJ 486 (CC)	51
Griffiths v Arch Engineering Co Ltd [1968] 3 All ER 217 (Newport Assizes)	50
Grill v General Iron Screw Colliery Co (1866) 1 CP 600 (CP)	18
Guybon v Palmer (1516)	8
Hambrook v Stokes Brothers [1925] 1 KB 141 (CA).....	34-36
Haseldine v C A Daw and Son Ltd [1941] 2 KB 343 (CA)	42, 45
Heaven v Pender (1883) 11 QB 503 (CA)	3, 25-30, 35, 37, 43, 57
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 (HL)	47, 48, 52-54, 58, 63, 67-68, 70, 72-73, 83, 86, 143, 154-157, 222
Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 (HL)	68-70, 73, 158

Herschtal v Stewart & Ardern Ltd [1940] 1 KB 155 (KB)	42
Hill v Chief Constable of West Yorkshire [1989] AC 53 (HL)	55, 59, 64, 80-81, 131, 166, 175, 213-214
Home Office v Dorset Yacht Co Ltd [1970] AC 1004 (HL)	50, 52, 63, 135
Hughes v Lord Advocate [1963] AC 837	123
Hulle v Orynge (The Case of Thorns) (1466) B&M 369	8
Hurst v Taylor (1885) 14 QB 918 (CA)	27
Indermaur v Dames (1866) 1 CP 274 (CP)	23-24
Indermaur v Dames (1866-67) 2 CP 311 (Ex)	23
Jackson v Metropolitan Railway Co (1877) 2 CP 125	24
Jones v Kaney [2011] 2 AC 398 (HL)	212-213
Junior Books Ltd v Veitchi Co Ltd [1982] 1 AC 520 (HL)	53-54
Kent v Griffiths (No3) [2001] QB 36 (CA)	135
King v Phillips [1953] 1 QB 429 (CA)	103
Kuwait Airways Corp v Iraq Airways Co (No 6) [2002] 2 AC 883 (HL)	124
Lane v Cox [1897] 1 QB 415 (CA)	28
Langridge v Levy (1837) 2 M&W 519, 150 ER 863	16, 23, 35, 105
Latham v Johnson [1913] 1 KB 398 (CA)	44
Latimer v AEC Ltd [1953] AC 643 (HL)	100
Le Lievre v Gould [1893] 1 QB 491 (CA)	1, 28, 37, 44, 48, 57
Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] AC 785 (HL).....	53, 55
Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd [1985] QB 350 (CA)	111
London Graving Dock Co v Horton [1951] AC 737 (HL)	45
London Street Tramways Co Ltd v London CC [1898] AC 375 (HL)	46
London Transport Executive v Betts [1959] AC 213 (HL)	47
Lowery v Walker [1911] AC 10 (HL)	49
Luxford v Large (1833) 5 C&P 421, 172 ER 1036	15
Macfarlane v Tayside Health Board [2000] 2 AC 59 (HL)	166, 194, 227
Marc Rich & Co v Bishop Rock Marine Co Ltd [1996] AC 211 (HL)	60
Marfell v The South Wales Railway Co (1860) 8 CB NS 525, 141 ER 1271	18
Mason v Keeling (1700) 1 Ld Raym 606, 91 ER 1305	8-9
McGhee v National Coal Board [1973] 1 WLR 1 (HL)	110
McLoughlin v O'Brien [1983] 1 AC 410 (HL)	58
Merrett v Babb [2001] QB 1174 (HL)	74
Michael v The Chief Constable of South Wales Police [2015] 2 WLR 343 (HL)	59, 62, 136, 155, 213
Mitchell v Allestry (1676) 1 Vent 295, 86 ER 190; (1675) 3 Keb 650, 84 ER 392	9
Mitchell v Glasgow City Council [2009] 1 AC 87 (HL)	155
Morgan Crucible Co v Hill v Samuel & Co [1991] Ch 295 (CA)	175
Morgan v The Vale of Neath Railway Co (1865) 1 QB 149 (Ex)	21
Mulcahy v Ministry of Defence [1996] QB 732 (CA)	135
Murphy v Brentwood DC [1991] 1 AC 398 (HL).....	43, 50, 52, 54-55, 58, 86, 215
Mutual Life & Citizens Assurance Co Ltd v Evatt [1971] AC 793 (HL)	67
Navenby v Lasseks (1368) B&M 603	11
Nocton v Lord Ashburton [1914] AC 932 (HL)	157
Old Gate Estates Ltd v Toplis & Harding & Russell [1939] 3 All ER 209 (KB).....	45, 48
Otto v Bolton [1936] 2 KB 46 (KB)	45
Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound No 1) [1961] AC 388 (PC)	101, 123-125
P Perl (Exporters) Ltd v Camden LBC [1984] QB 342 (CA)	103
Page v Smith [1996] 1 AC 155 (HL)	135, 211
Paris v Stepney BC [1951] AC 367 (HL)	100
Pearson v Lambeth LBC [1950] 2 KB 353 (CA)	49

Phelps v Hillingdon London BC [2001] 2 AC 619 (HL)	72, 158, 206
Practice Statement (HL: Judicial Precedent) [1966] 1 WLR 1234	48
Punjab National Bank v de Boinville [1992] 1 WLR 1138 (CA)	86
Re Polemis and Furness, Withy & Co Ltd [1921] 3 KB 560 (CA)	34, 94, 105-108, 114, 116-119, 121, 123, 125
Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309 (HL)	126, 166, 196, 213
Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360 (HL)	110
Rich v Kneeland (1613) B&M 614-15	11
Richardson v Mellish [1892] 2 Bing 229, 130 ER 294	163
Rigby v Hewitt (1850) 5 Ex 240, 155 ER 103	31
River Wear Commissioners v Adamson (1877) 2 AC 743 (HL)	24
Robert Addie & Sons (Collieries) Ltd v Dumbreck [1929] AC 358 (HL)	44
Roe v Minister of Health [1954] 2 QB 66 (CA)	103
Ross v Caunters [1980] Ch 297 (Ch)	53
Rowling v Takaro Properties Ltd [1988] AC 473 (PC)	54
Sam v Atkins [2005] EWCA Civ 1452	145
Schiffahrt & Kohlen GMBH v Chelsea Maritime Ltd (The Irene's Success) [1982] QB 481 (QB).....	53
Seton, Laing & Co v Lafone (1887) 19 QB 68 (CA)	27
Shipton v Dogge (no 2) (Doige's Case) (1442) B&M 434.....	8
Simpson v Thompson (1877) 3 AC 279 (HL)	48
Smith v Eric S Bush [1990] 1 AC 831 (HL)	67, 68, 72, 73, 76, 83, 156, 158, 160, 206, 212
Smith v Leech Brain & Co [1962] 2 QB 405 (QB)	123
Smith v Littlewoods Organisation Ltd [1987] AC 241 (HL)	53, 133, 154-155
Smith v London and South Western Railway Co (1870) 5 CP 98	25, 35, 93, 105
Smith v London and South Western Railway Co (1870) 6 CP 14	32
Smith v Ministry of Defence [2014] 1 AC 52 (HL)	135, 206, 213
Somerton v Colles (1433) B&M 427	8
South Australia Asset Management Corp v York Montague Ltd (SAAMCO) [1997] AC 191 (HL).....	102, 153
Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27 (CA)	63, 65, 111, 138-140
Spring v Guardian Assurance plc [1995] 2 AC 296 (HL).....	69, 135, 140, 160, 181, 223
Stansbie v Troman [1948] 1 KB 48 (CA)	154
Stapleton v Snayth (1354) YB Pas 19.....	8
Stennett v Hancock [1939] 2 All ER 578 (KB)	42
Stovin v Wise [1996] AC 923 (HL).....	59, 62, 163, 206, 216
Stubley v The London and North Western Railway Co (1876) 1 Ex 13 (Ex)	22
Sutradhar v Natural Environment Research Council [2006] PNLR 36 (HL)	195
Swan v North British Australasian Co (1862) 7 H&N 603, 158 ER 611	18
Thomas v Quartermaine (1887) 18 QB 685 (CA)	27
Thorogood v Van Den Berghs and Jurgens Ltd [1952] 2 KB 537 (CA)	114
Thrusell v Handyside & Co (1888) 20 QB 359 (QB)	27
Tomlinson v Congleton BC [2004] 1 AC 46 (HL)	100
Travers v Gloucester Corporation [1947] 1 KB 71 (KB)	45
Tremain v Pike [1969] 1 WLR 1556 (Exeter Assizes).....	115
Turberville v Stampe (1697) 12 Mod 152, 88 ER 1228	8
Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of Sussex Police [2009] 1 AC 225.....	166, 175, 213
Vaughan v Menlove (1837) 3 Bing NC 468, 132 ER 490.....	15
Vellino v CC of Greater Manchester [2002] 1 WLR 218 (CA)	126
Victorian Railways Commission v Coultas (1888) 13 AC 222 (PC)	32
Videan v British Transport Commission [1963] 2 QB 650 (CA)	49

Watson v British Boxing Board of Control [2001] QB 1134 (CA)	155
Watt v Hertfordshire CC [1954] 1 WLR 835 (CA)	100
Weaver v Ward (1616) B&M 375	8
Weld-Blundell v Stephens [1920] AC 956 (HL)	108
White v Chief Constable of South Yorkshire Police [1999] 1 AC 455 (AC)	214
White v Jones [1995] 2 AC 207 (HL).....	70-72, 86, 131, 134-135, 140, 156-157, 160-161, 181, 223
Wilkinson v Fairrie (1862) 1 H&C 633, 158 ER 1038	20
Williams v Cardiff Corp [1950] 1 KB 514 (CA)	49
Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830 (HL)	73, 159
Winterbottom v Wright (1842) 10 M&W 109, 109 ER 402	8, 16, 23, 38, 63
Woods v Duncan [1946] AC 401 (HL)	103, 108
X (Minors) v Bedfordshire County Council and Others [1995] 2 AC 633 (HL)	233
Yarmouth v France (1887) 19 QB 647 (CA)	28
Yuen Kun Yeu v Attorney-General of Hong Kong [1988] AC 175 (PC)	54, 58, 63, 65

United States

MacPherson v Buick Motor Co 111 NE 1050 (NY 1916)	25
Palsgraf v Long Island Railway Co (1928) 162 NE 99 (248 NY 339)	35, 93, 103-107, 109, 115-118, 121, 123, 125, 128, 142

Table of Statutes

Australia

Privy Council (Appeals from the High Court) Act 1975 (Cth)	75
Privy Council (Limitation of Appeals) Act 1968 (Cth)	75

France

Code civil	185
Art 1382	185
Art 1383	185

Germany

Bürgerliches Gesetzbuch (BGB) (Civil Code).....	184-185, 187
§823(1)	184-185, 187
§823(2)	185
§826	185
§839	185

United Kingdom

Common Law Procedure Act 1852	19-20
Congenital Disabilities (Civil Liability) Act 1976	135
s. 1(1)	135
s. 2	135
Defective Premises Act 1972.	50
s. 4	50
Human Rights Act 1998	168-169
Schedule 1, Article 8.1	168
Occupiers Liability Act 1957	23, 50
s. 4	50
Unfair Contract Terms Act 1977	69, 156
s. 2(s)	69, 156

United States

Restatement of Torts: General Principles, Discussion Draft	94
§165.....	94
Restatement of Torts (1934)	94
§281.....	94
Restatement (Third) of Torts: General Principles, Discussion Draft No 2 (2000)	103
§6.....	103
Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).....	103-104, 131
§7.....	103-104, 131

Table of Diagrams and Tables

Table 1: Kinds of damage	197
Table 2: Nature of the decision being appealed	198
Table 3: The total number of substantive opinions	198
Table 4: Success rates of claimants and defendants	200
Table 5: The successful party	202
Table 6: The use of different duty tests	204
Table 7: Unsuccessful stages of <i>Caparo</i> and <i>Anns</i>	207
Table 8: Non-general test methodologies	210
Table 9: Whether notional duty determinations were categorical or fact-based	220
Table 10: Classification of fact-based notional duty determinations	222
Table 11: The use of policy	231
Table 12: The manner in which policy was relied upon	231
Table 13: The use of policy considerations excluding those based on indeterminate liability	234
Table 14: The use of academic literature in opinions	238

1. Introduction

A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

- Lord Esher, *Le Lievre v Gould* [1893] 1 QB 491, 497.

I. Introduction

The majority of the nominate torts offer only very narrowly defined levels of protection; that is, they protect only certain interests from interference caused by certain types of conduct. The law of private nuisance, for example, protects our interest in the peaceful use and enjoyment of our land; defamation protects our interest in our reputations from interference caused by another's representations; whilst false imprisonment protects our interest in freedom of movement from interference caused by another's physical restraint. Outside of these narrowly defined limits, the torts offer no protection at all. Negligence, on the other hand, the most commonly litigated of all torts, is defined purely by reference to the *quality* of the defendant's conduct. On its face, it is therefore capable of providing a practically limitless level of protection, ostensibly extending to *any* affected interest, caused by *any* carelessly performed activity. However, as Fleming has noted:

[T]o permit the imposition of liability for *any* loss suffered by *anyone* as the result of carelessness would ... [impose] too severe and indiscriminate a restriction on individual freedom of action by exposing the actor to the prospect of unpredictable liability.¹

Accordingly, the scope of the law of negligence does not extend quite so far, and does not impose liability for *all* carelessly caused harm; rather, the law of negligence only imposes liability in circumstances where the defendant owes the claimant a 'duty of care.' The duty of care therefore performs the central normative function within the law of negligence, demarcating the circumstances in which a defendant will be held liable for carelessly causing damage to

¹ JG Fleming, *The Law of Torts* (9th edn, Law Book Co 1998) 150.

another, from the circumstances in which he may do so with impunity. Howarth encapsulates the role of duty nicely:

The essence of a duty of care issue, as opposed to a causation, fault, or remoteness issue, is that the defendants are arguing that even though they were at fault, even though that fault caused the harm, even though the type of harm was foreseeable, even though the plaintiff was a foreseeable plaintiff and even though there were no intervening acts or events or any other reason to say that the damage was not caused directly by the defendant's fault, nevertheless the defendant should not be held liable in negligence.²

In the absence of a duty of care, carelessly caused injury is therefore *damnum absque injuria*.

II. Making sense of the duty of care

Despite its purpose being so simply stated, identifying a set of coherent principles that is capable of explaining why a duty is owed in one case and not another has proved to be stubbornly elusive. The difficulty has only increased as the 'staggering march'³ of negligence has continued throughout the twentieth and twenty-first century, and the range of circumstances that give rise to a duty of care has grown larger and larger. Indeed, it seems that just about any problem concerning the limits of the law of negligence can now be framed in terms of the defendant's duty of care. In response to the ever-increasing list of matters dealt with under the duty rubric, many of which involve entirely separate issues, the tendency has been for the courts to explain the existence or non-existence of a duty by reference to increasingly vague concepts, such as 'neighbourhood,' 'proximity,' and what is 'fair, just, and reasonable.' Of course, whilst such labels might have the benefit of reconciling the cases, they only do so in the most abstract sense, and so offer little-to-no guidance in individual fact scenarios. Where, by contrast, principles with some explanatory power have been identified, they have almost invariably proved to be highly controversial. Foreseeability of harm to the claimant, for example, has

² David Howarth, 'Duty of Care' in Ken Oliphant (ed), *The Law of Tort* (2nd edn, LexisNexis Butterworths 2007) 12.1. The claim that the issue of the 'foreseeable plaintiff' should not be a part of duty enquiry is a controversial one and so is discussed further in Chapter Four.

³ Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1999).

formed an integral element of every general duty test since *Heaven v Pender*,⁴ yet is frequently criticised for being superfluous. Assumptions of responsibility are also thought to provide a powerful explanation for the existence of a duty in certain circumstances, yet this explanation, too, is often criticised as being artificial. Perhaps the most controversial of all explanations, however, are those based on ‘policy,’ which, despite often appearing to offer concise and convincing justifications for why a duty should or should not exist, are thought by many to be highly inappropriate. There are also those who claim that the duty enquiry is little more than a ‘fifth wheel on the coach,’ performing no function not capable of being performed elsewhere in the negligence enquiry; in their opinion, we would be altogether better off without it. The apparent lack of any coherent understanding of the duty enquiry is no doubt one of the principal reasons Ibbetson feels confident in claiming, ‘That the tort of negligence is in a mess goes almost without saying.’⁵

III. The aim of this thesis

The general aim of this thesis is to provide a detailed overview of the duty of care enquiry, drawing on both academic analyses and judicial experience in leading common law systems. It is true that much has been written on the duty of care enquiry in the past, including countless articles and book chapters,⁶ a number of books on particular duty problems,⁷ and two monographs.⁸ The articles and book chapters, however, inevitably tend to be piecemeal, focussing only on narrow aspects of the duty enquiry, often making it difficult to see how they fit into the larger picture; the books on duty issues, whilst often highly insightful, again only focus

⁴ (1883) 11 QB 503 (CA).

⁵ David Ibbetson, ‘How the Romans Did for Us: Ancient Roots of the Tort of Negligence’ (2003) 26 UNSWLJ 475, 475.

⁶ Many of these are cited throughout the thesis.

⁷ See, for example, Christian Witting, *Liability for Negligent Misstatements* (OUP 2004); Cherie Booth and Daniel Squires, *The Negligence Liability of Public Authorities* (OUP 2006); Peter Handford, *Mullany and Handford's Tort liability for Psychiatric Damage* (2nd edn, Lawbook Co 2006); Claire McIvor, *Third Party Liability in Tort* (Hart 2006).

⁸ AJE Jaffey, *The Duty of Care* (Dartmouth 1992); Norman A Katter, *Duty of Care in Australia* (LBC Information Services 1999).

on narrow aspects of duty rather than on how those issues fit into a broader enquiry;⁹ and the existing monographs, aside from now being decades old, have tended to focus exclusively on the content of the law rather than providing an analysis of it. There is, then, no detailed overview and analysis of the duty enquiry as a whole. This thesis aims to remedy that deficiency. In particular, it aims to: provide a detailed overview of the history of the duty of care; bring together the disparate and often ostensibly unrelated commentary into a framework that provides a coherent picture of the concept as a whole; isolate and articulate the discrete problems dealt with under the (typically) singular duty rubric; provide original commentary and analyses of some of the existing debates; provide overviews and analyses of a number of often overlooked and under-analysed aspects of the duty enquiry; and, finally, explore whether there are any *practical* differences in how the courts in different jurisdictions approach the duty problem. Ideally we will then be able to see how we got into this ‘mess,’ and how we might be able to get out of it.

IV. The structure of this thesis

The thesis consists of seven chapters in total; an introduction (Chapter One), five substantive chapters (Chapters Two to Six), and a conclusion (Chapter Seven). Chapter Two, provides a historical introduction to the duty concept, beginning with an overview of how ‘duty’ first came to be an element of the negligence enquiry, and then moving on to the important period between the late-nineteenth and early-twentieth century, during which a general conception of the duty of care was sought and eventually achieved. Chapter Three then provides an overview of the various methods through which the existence of a duty of care has been determined, starting with the ‘neighbour principle,’ moving through to the *Anns* two-stage test, the *Caparo* three-stage test, the salient features test, and the pockets approach. An analysis of the benefits

⁹ This is in no way intended as a criticism, but merely to highlight that the aim of such books is entirely different to the aim of this thesis.

and difficulties of the various approaches is also provided. Chapter Four turns to the anatomy of the duty concept, and it is argued that duty is best understood as consisting of two discrete parts: factual duty and notional duty. It is then suggested that the factual aspect of the duty enquiry is superfluous and that things would be simpler without it. Chapter Five explores the notional aspect of the duty enquiry, which, it is suggested, is best understood as consisting of two separate types of determinations: those that relate to broad situations, and those based on assumptions of responsibility. Both of these types of notional duty determinations are explored in detail. The chapter then considers the propriety of basing notional duty determinations (relating to situations) on considerations of policy, and, finally, whether notional duty is necessary at all. Chapter Six changes focus again, moving to an empirical study of ultimate appellate court duty decisions, and explores whether the understanding of duty provided in the previous chapters is actually reflected in judicial decisions. The five substantive chapters can therefore be best understood as approaching the duty concept from three perspectives: the development of the duty concept (Chapters Two and Three), the anatomy of the duty concept (Chapters Four and Five), and an empirical analysis of the duty concept (Chapter Six).

V. Scope and terminology

The analysis presented in this thesis is not intended to be jurisdiction specific, although the principal focus is on Commonwealth legal systems, and, in particular, the common law of Australia, Canada, and the UK. Sources from these jurisdictions therefore tend to be more commonly used than sources from other jurisdictions, though sources from South Africa, New Zealand, and the United States are also relied upon. Chapter Two, however, which provides an overview of the history of the duty of care, inevitably relies almost exclusively on English sources. Given the differences in the different jurisdictions' terminology for the parties before the court, the neutral 'claimant' and 'defendant' will be adopted when speaking in the abstract, but 'plaintiff,' 'pursuer,' 'claimant,' 'defendant,' and 'defender' will be used as appropriate when

referring to specific parties. The 'plaintiff' terminology will also be used when discussing English cases decided prior to 26 April 1999, being the commencement date of the Civil Procedure Rules 1998. The thesis is also an exclusively *common law* analysis, and so the effect of any relevant legislation is not considered. For the avoidance of doubt, the common law of England and Wales, Northern Ireland and Scotland will be referred to collectively as the law of the UK.¹⁰ The terms 'duty' and 'duty of care' are used interchangeably to avoid the latter term becoming monotonous.

¹⁰ Indeed, as Stevens notes: 'In most, if not all, respects the law of torts as administered by the House of Lords is the law of the United Kingdom. This is so even if the body of law is given a different label (delict) north of the border. English and Scottish law have converged as a result of the House of Lords tying the two systems together in this area. Many of our leading torts cases come from Scotland, including, of course, the most well-known of all': Robert Stevens, 'Torts' in Louis Blom-Cooper, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords: 1876-2009* (OUP 2009) 629-30 (footnotes omitted).

2. The Historical Foundations of the Duty of Care

Gaius speaks of the need to get back to the beginning of things, and every good lawyer knows that to understand a topic in the law of one time, you need to begin from the preceding period. New solutions are always developed from old ones, and in the process ideas get pulled out. Legal history is indispensable.

- Peter Birks, 'The Roman Law Concept of Dominion and the Idea of Absolute Ownership' [1985] *Acta Juridica* 1, 3.

I. Introduction

The duty of care plays an important role in the negligence enquiry: it specifies the circumstances in which carelessly caused damage is actionable. Yet, notwithstanding that liability for carelessness has existed since at least the fourteenth century,¹ the duty of care is a relatively modern invention, only emerging as recently as the early nineteenth century. This is not to say, of course, that prior to this point *all* carelessly caused damage was actionable; this has never been the position of the common law and limits on recoverability have always existed. It is the aim of this chapter to explore how those limits came to be determined via the idea of a 'duty of care.' In particular, the first part of the chapter brings together the existing commentary to provide an overview of how the duty of care first came to be an element of the negligence enquiry. The second part of the chapter moves on to the period between the late-nineteenth and early-twentieth century about which surprisingly little has been written at all. It is during this important period that a general conception of the duty of care, with which we are familiar today, was sought, and eventually achieved.

¹ In particular, though liability for negligence under 'trespass on the case,' which has existed since the fourteenth century (see, for example, *Bukton v Tounesende* (1348) B&M 399, better known as the *Humber Ferry Case*), appears to have been fault based from the beginning (see David Ibbetson, 'How the Romans Did for Us: Ancient Roots of the Tort of Negligence' (2003) 26 UNSWLJ 475 501), it is arguable that early liability under trespass *vi et armis*, which has existed since the thirteenth century, *also* required that the harm was caused carelessly (JH Baker, *An Introduction to English Legal History* (4th edn, OUP 2007) 403).

II. The Beginnings of the Duty of Care

The term 'duty' has been used for centuries, and it is not unusual to find obligations described as 'duties' in medieval cases. A 'duty' to keep one's fire safely, for example, can be traced back to the early fifteenth century.² However, prior to the emergence of an independent action for negligence, 'duty' was little more than a word, and played no analytical role in the determination of questions of liability. Indeed, 'negligence,' too, was little more than a word under the early common law, merely being a way in which a number of discrete wrongs could be committed; a pleader's adverb³ rather than a wrong in itself. For example, actions were available for: the negligent mis-performance of an undertaking;⁴ the negligent non-performance of an undertaking;⁵ the negligent loss of control of dangerous forces, such as fires⁶ animals,⁷ or water;⁸ and the negligent causing of harm through the application of force to the plaintiff's land, goods, or person.⁹ Without any suggestion that negligence itself gave rise to liability outside of these discrete situations, a duty of care type device was hardly needed, as the discrete situations in which negligence was an ingredient served precisely the same purpose as the

² *Beaulieu v Finglam* (1401) B&M 610.

³ Vernon Palmer, 'Why Privity Entered Tort - an Historical Examination of *Winterbottom v Wright*' (1983) 27 *Am J Legal Hist* 85, 87. In addition to 'negligently', adverbs such as 'improvidently', 'unskillfully', 'carelessly' were also used to describe the defendant's conduct: JH Baker, 'Trespass, Case and the Common Law of Negligence 1500-1700' in Schrage EJH (ed), *Negligence The Comparative Legal History of the Law of Torts (Comparative Studies in Continental and Anglo-American Legal History; CSC 22)* (Duncker & Humblot 2001) 53.

⁴ *Bukton v Tounesende* (1348) B&M 399.

⁵ *Somerton v Colles* (1433) B&M 427; *Shipton v Dogge (no 2)* (1442) B&M 434 (also known as *Doige's Case*).

⁶ *Beaulieu v Finglam* (1401) B&M 610; *Critoft v Emson and Nicols* (1506) B&M 619 (41); *Anon* (1582) B&M 624; *Turberville v Stampe* (1697) 12 *Mod* 152, 88 *ER* 1228.

⁷ *Beneyt v Brokkere* (1358) cited in Robert C Palmer, *English Law in the Age of the Black Death: 1348-1381* (University of North Carolina Press 1993) 239, 371; *Mason v Keeling* (1700) 1 *Ld Raym* 606, 91 *ER* 1305. The action, known as *scienter* (knowingly), was used where the claimant had knowingly retained an animal with dangerous propensities.

⁸ *Stapleton v Snayth* (1354) *YB Pas* 19, 32b-33a, [49] cited in *ibid* 398 and AKR Kiralfy, *The Action on the Case* (Sweet & Maxwell 1951), 210; *Guybon v Palmer* (1516) cited in Baker, 'Trespass, Case and the Common Law of Negligence 1500-1700' (n 3) 62(fn 66); *Abbot of Stratford v Hubbulthorn* (1529) cited in *ibid*.

⁹ Whilst it is true that the action trespass *vi et armis* had no formal requirement of fault, and cases such as *Hulle v Orynge* (1466) B&M 369, 370-71 ('*The Case of Thorns*') (Choke J) and *Weaver v Ward* (1616) B&M 375, 376 (Hobart CJ) appear to impose strict liability, the action nevertheless does not seem to have been actionable in the absence of negligence: Baker, 'Trespass, Case and the Common Law of Negligence 1500-1700' (n 3) 65, and DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 61.

modern duty of care: to identify those circumstances in which the law imposed an obligation to avoid negligently causing damage to another.

By the end of the seventeenth century, however, negligence was coming to be seen as the basis for an independent wrong in itself, based on the defendant's failure to take reasonable care.¹⁰ Indeed, by 1700 plaintiffs were arguing that 'a man shall be answerable for all mischief proceeding from his neglect or his actions, unless they were of unavoidable necessity,'¹¹ and by the middle of the century, a chapter of the influential textbook *An Institute of the Law Relative to Trials at Nisi Prius* was titled 'Of Injuries Arising from Negligence or Folly,'¹² which suggested that:

Every man ought to take reasonable care that he does not injure his Neighbour; therefore wherever a Man receives any Hurt through the Default of another, though the same were not wilful, yet if it be occasioned by Negligence or Folly, the law gives him an Action to recover Damages for the injury so sustained.¹³

This conceptual shift from discrete actions in which negligence was an ingredient to a single action based on negligence alone, however, presented a potentially major problem: whilst other wrongs were confined to the invasion of a particular interest,¹⁴ there were no obvious confines on liability for the potentially limitless consequences of negligent behaviour. To modern eyes this might seem to have provided the ideal catalyst for the development of a duty type control device on the otherwise unbounded action for negligence. Yet, this was not the case at all, as notwithstanding its potential, the early actions for negligence were not common,¹⁵ and so there was no immediate need to limit its scope. On the contrary, the idea of duty first emerged not as

¹⁰ Many credit this shift as commencing with *Mitchell v Allestry* (1676) 1 Vent 295, 86 ER 190; (1675) 3 Keb 650, 84 ER 392 (though, the exact spelling of the parties' names varies). See, for example, Baker, *An Introduction to English Legal History* (n 1) 411; SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981); Ibbetson (n 1) 501-502.

¹¹ *Mason v Keeling* (1700) 1 Ld Raym 606, 607; 91 ER 1305, 1306.

¹² Francis Buller, *An Institute of the Law Relative to Trials at Nisi Prius* (Dublin 1768).

¹³ *ibid* 35.

¹⁴ Private nuisance, for example, was confined to interference with real property.

¹⁵ Baker, *An Introduction to English Legal History* (n 1) 411-12: 'The means were now in place for the development of a distinct tort of negligence; but it did not happen suddenly. By modern standards there appears to have been remarkably little accident litigation.'

a way to limit liability for negligence, but to *expand* it, by allowing claims that would fail in contract to be converted to claims that could succeed in tort.

A. Duty Enters Relationship Negligence: From Contract to Tort and the Elevation of Duty

At around the same time that negligence was emerging as an independent wrong, so, too, were 'contract' and 'tort' emerging as distinct legal entities: the former based on obligations arising from private agreements and the latter concerning obligations arising from the law.¹⁶ Generally this distinction was unproblematic, as actions based on non-performance of an undertaking were clearly contractual, and actions based on the negligent causation of harm independent of any prior relationship were clearly tortious. But what about actions based on the negligent mis-performance of an undertaking, which were clearly ambiguous: should they be based on the breach of an implied term to perform the undertaking with care or on the negligent performance itself?¹⁷ This was particularly problematic in actions for negligence that arose from a prior relationship, including those against lawyers, surgeons, carriers, etc:¹⁸ were they based in contract or tort? It took the courts over 100 years to answer this question, and they did so in the context of the liability of the 'common carrier',¹⁹ which straddled the tort/contract divide almost perfectly.

At the start of the eighteenth-century the liability of common carriers was grounded in the so-called 'custom of the realm', the medieval action that imposed strict liability on

¹⁶ *ibid* 317-18; 401.

¹⁷ DJ Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' in E J H Schrage (ed), *Negligence The Comparative Legal History of the Law of Torts (Comparative Studies in Continental and Anglo-American Legal History; CSC 22)* (Duncker & Humblot 2001) 237. Prior to the tort-contract distinction, both the mis-performance and non-performance of an undertaking fell under the action on the case for *assumpsit* (which can be translated as 'he has undertaken'): Baker, *An Introduction to English Legal History* (n 1) 338.

¹⁸ MJ Prichard, *Scott v Shepherd (1773) and the Emergence of the Tort of Negligence* (SS 1976) 24-25. Of course, where the plaintiff had a special agreement with the defendant he would obviously sue in contract, but often this was not the case.

¹⁹ *ibid* 25.

innkeepers²⁰ and, later, carriers.²¹ Over time, however, the custom of the realm came to be seen as nothing but part of the common law and not to be specifically pleaded,²² so plaintiffs ‘dropped the statement of the custom from the declaration and confined themselves to describing the defendant as a common carrier without more.’²³ By the middle of the century, however, actions against carriers for lost goods were being classified as contractual. In *Dale v Hall*,²⁴ for example, the court held that a ‘promise to carry safely, is a promise to keep safely.’²⁵ The same conclusion was reached more explicitly in *Gibbon v Paynton*:²⁶ ‘the true principle of a carrier’s being answerable is the reward.’ By the later part of the century, however, the courts changed their minds again, and in *Forward v Pittard*²⁷ the contractual basis of the carrier’s liability was put in doubt:

It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer.²⁸

Although the courts were unable to make up their minds about the true basis of the carrier’s liability, as long as plaintiffs suffered no procedural advantage in either tort or contract, the source of liability was not of paramount importance. By the start of the nineteenth century, however, procedural differences between contract and tort were emerging. Perhaps most significantly, the rules of joinder were favourable to plaintiffs who sued in tort; in particular, whilst liability in tort was severable, and so a plaintiff could sue any of a group of defendant carriers, liability in contract was joint, meaning all parties to the simple contract of carriage had

²⁰ *Navenby v Lasseks* (1368) B&M 603 (also known as *Navenby v Lascells* (1368); see Baker, *An Introduction to English Legal History* (n 1) 408).

²¹ *Rich v Kneeland* (1613) B&M 614-15. See also, William Selwyn, *Abridgement of the Law of Nisi Prius*, vol II (4th edn, Stevens and Sons 1817) 378-80.

²² Prichard (n 18) 26.

²³ *ibid.*

²⁴ (1750) 1 Wils KB 281, 95 ER 619.

²⁵ *ibid* 282, 620 (Lee CJ). See also James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, vol II (University of North Carolina Press 1992) 1118.

²⁶ (1769) 4 Burr 2298, 2302; 98 ER 199, 201.

²⁷ (1785) 1 TR 27, 99 ER 953.

²⁸ *ibid* 33, 956.

to be discovered and listed before they could be sued,²⁹ and the acquittal of *any* of the co-defendants would be fatal to the plaintiff's claim.³⁰ Actions in tort also had a potentially longer limitation period,³¹ and were thought to entitle a plaintiff to higher damages.³² To avoid the procedural disadvantages associated with contract, plaintiffs who had suffered an injury in the course of the negligent mis-performance of a contract therefore began to formulate their declarations in tort. But how could they justify this? They could not base their claim on the older action on the case for *assumpsit*, as *assumpsit* had recently come to be identified with consideration, and so was too closely connected to the promise itself. They could also not base their claim on the custom of the realm as it was no longer being pleaded.³³ Instead, plaintiffs focussed on the source of the defendant's 'duty.' As Ibbetson explains:

The nineteenth century witnessed an increasing recognition that the main division within the law of obligations was that between contract and tort ... Given this division, some distinguishing criterion was essential, but ... none could be found within the earlier common law. Moreover, since it was well established that in a wide range of cases a tortious action could be brought for the negligent breach of a contractual duty it was no solution to say that an action was contractual whenever there was a relevant contract between the parties. The most straightforward test was to analyse both contractual and tortious obligations as arising out of breaches of duties, and say that the duty in contract arose out of the agreement of the parties while the duty in tort arose by operation of law.³⁴

Unsurprisingly, plaintiffs' attempts to use 'duty' as a tool by which they could circumvent the formalities of a claim in contract were contested by defendants. Initially, the courts sided with

²⁹ Prichard (n 18) 27; Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 171-72.

³⁰ Prichard (n 18) 27; Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 171-72.

³¹ In contractual actions the limitation period commenced at the point of the breach, whereas in tort it commenced at the time of the injury. See *Battley v Faulkner* (1820) 3 B & Ald 288, 106 ER 668; *Dyster v Battye* (1820) 3 B & Ald 448, 106 ER 727; *Fraser v Swansea Canal Navigation Co* (1834) 1 Ad & El 354, 110 ER 1241. See also Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 172.

³² Palmer (n 3) 89.

³³ According to Prichard, it was also 'too cumbersome an allegation to develop into any kind of generalised test': Prichard (n 18) 31.

³⁴ David Ibbetson, 'The Law of Business Rome': Foundations of the Anglo-American Tort of Negligence' (1999) 52 CLP 74, 88. See also Percy Winfield, 'Duty in Tortious Negligence' (1934) Colum L Rev 41, 65: 'In the first half of the nineteenth century contract and tort were slowly being disentangled, and negligence had gradually come into existence as an independent tort (in addition to retaining its old meaning of a mode in which a wrongful act might possibly be committed). In the process of separating contract from tort and in the development of the tort of negligence, a confused notion about *assumpsit* became the germ of the duty idea. It was thought that, as *assumpsit* in contract always showed an "undertaking" of liability, therefore liability in tort must show something equivalent to it, i.e., "duty" ...'

the defendants and insisted that, despite the plaintiff's allegations of a 'duty' in tort, the cause of action against a common carrier was always contractual.³⁵ Yet in *Govett v Radnidge*,³⁶ where the defendant carrier negligently staved a hogshead of treacle as they were loading it, the King's Bench held that the plaintiff was entitled to sue in tort:

What inconvenience is there in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire.³⁷

The court affirmed its position in *Ansell v Waterhouse*,³⁸ a case in which a stage-coach proprietor received the plaintiff's wife to be carried safely 'yet the defendant not regarding his duty in this behalf conducted himself so carelessly, negligently and unskilfully...' that the coach was overturned and the plaintiff's wife 'was greatly injured &c.' Despite the defendant arguing that the plaintiff was required to sue in contract, and so locate and join all 16 other proprietors of the stage coach as co-defendants, the plea was rejected and the plaintiff was permitted to proceed in tort.³⁹ In *Bretherton v Wood*⁴⁰ the Court of Exchequer Chamber affirmed that an action against a common carrier could be grounded purely in tort: 'a breach of this duty is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of contract to support it.'⁴¹

In the following years, other cases of negligence arising from a prior relationship also came to be grounded in tort.⁴² In *Boorman v Brown*,⁴³ for example, the Court of Exchequer held that a broker owed a duty to his client because 'the principle ... would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of

³⁵ Prichard (n 18) 27-28.

³⁶ (1802) 3 East, 62, 102 ER 520.

³⁷ *ibid* 70, 523 (Lord Ellenborough CJ).

³⁸ (1817) 6 M&S 385, 105 ER 1286.

³⁹ *ibid*. See also Prichard (n 18) 28.

⁴⁰ (1821) 3 Brod & Bing 54, 129 ER 1203.

⁴¹ *ibid* 62, 1206. See also Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 172.

⁴² Prichard (n 18) 28.

⁴³ (1842) 3 QB 511, 114 ER 603.

action upon a tort.⁴⁴ And so by the end of the first quarter of the nineteenth century actions for negligence against those in prior relationships were able to be based in tort and rested upon the defendant's 'duty' arising from law.

B. Duty Enters Non-Relationship Negligence

The start of the nineteenth century saw a significant increase in the number of negligence claims brought before the courts. Winfield attributes the rise to '...industrial machinery. Early railroad trains, in particular, were notable neither for speed nor safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted on the law.'⁴⁵ Whatever the cause, the increase in claims forced the courts to offer further guidance as to the proper scope and limits of negligence actions. Although negligence actions arising from prior relationships had come to rest on the idea of the negligent breach of a tortious duty, duty did not yet play an explicit role in the determination of liability for negligence in non-relationship cases. This, however, soon began to change as the language of duty eventually permeated actions for non-relationship negligence.

As had been the case with relationship negligence, initially the language of 'duty' was only used by plaintiffs. In *Daniels v Potter*,⁴⁶ for example, the plaintiff was injured when he was struck by the defendants' cellar flap as he was walking in the street. In his declaration the plaintiff alleged that:

⁴⁴ *ibid* 526, 609 (Tindall CJ). This sweeping statement, 'open to the objection that it made every breach of contract into a tort', was soon scaled down: Palmer (n 3) 91.

⁴⁵ Percy Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 LQR 184, 195. For a more detailed overview of the societal background see: WR Cornish and GdN Clark, *Law and Society in England 1750–1950* (Sweet & Maxwell 1989) 483-84: 'Transport provided the most dramatic evidence of increasing risk. The improvement of eighteenth century roads through turnpike trusts and new techniques of construction brought a growth of road traffic that constantly threatened the very advances. Yet speeds increased: 4-5 m.p.h. in mid-century to 10-14 m.p.h. by the 1830s'; D Nolan, 'The Fatal Accidents Act 1846' in TT Arvind and J Steele (ed), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2012) 135-37. See also Baker, *An Introduction to English Legal History* (n 1) 412, who notes that 'The apparent explosion in the number of negligence cases ... is in part an illusion caused by the beginning of nisi prius reporting in the 1790s. Nevertheless, there does appear to have been an increase in the number of cases.' For a detailed history of traffic liability in England and Wales, see: R Bagshaw, 'The Development of Traffic Liability in England and Wales' in Wolfgang Ernst (ed), *The Development of Traffic Liability* (Cambridge University Press 2010).

⁴⁶ (1830) 4 C&P 262, 172 ER 697.

[I]t was the duty of the defendants so to place the cellar flap as to not injure any of the king's subjects passing along the highway; and they, not regarding their duty, so negligently, carelessly, and improperly placed it, that, by reason of their negligence, it fell upon him.⁴⁷

Shortly thereafter, in *Luxford v Large*,⁴⁸ a plaintiff sued a defendant ship-owner for negligently sailing his steam ship in such a way that it created a large swell in the River Thames, which filled and sank the plaintiff's boat. Again, the plaintiff described the defendant's negligence as consisting of a breach of duty ('not regarding his duty, &c.'⁴⁹). Then, in *Drew v New River Co*,⁵⁰ the plaintiff alleged that by reason of the defendants being about to:

perform certain works respecting certain water-pipes of theirs under the pavement of a public footway ... thereupon it became *the duty of the defendants*, by their workmen and servants, to use due and proper care and precaution in performing the said work, and laying and depositing the said stones, &c., so that the King's subjects might not be injured thereby...⁵¹

The year 1837, however, marked a 'turning point',⁵² as both defendants and judges, rather than just plaintiffs, also began to adopt the language of duty, with judges even using the idea of duty to determine questions of liability. The first such case appears to be the well-known *Vaughan v Menlove*,⁵³ where the defendant's carelessly constructed hay rick had caught fire and burned down the plaintiff's nearby house. In response to the plaintiff's declaration that the defendant had not been 'regarding his duty',⁵⁴ the defendant denied liability using the same language as the plaintiff:

[T]here was no duty imposed on the Defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence: the Defendant had a right to place his stack as near to the extremity of his own land as he pleased...⁵⁵

⁴⁷ *ibid* 265, 698 (Wilde Sergt).

⁴⁸ (1833) 5 C&P 421, 172 ER 1036.

⁴⁹ *ibid* 422, 1036.

⁵⁰ (1834) 6 C&P 754, 172 ER 1449.

⁵¹ *ibid* 422, 1036 (emphasis added). See also Prichard (n 18) 42.

⁵² Winfield, 'Duty in Tortious Negligence' (n 34) 51.

⁵³ (1837) 3 Bing NC 468, 132 ER 490.

⁵⁴ *ibid* 469, 491.

⁵⁵ *ibid* 472, 492.

Vaughan J, however, rejected the defendant's submission on the basis that 'every one takes upon himself the duty of so dealing with his own property as not to injure the property of others.'⁵⁶

Later the same year was the case of *Langridge v Levy*.⁵⁷ The defendant had sold a gun to the father of the plaintiff, and falsely represented that the gun was 'good, safe and secure.'⁵⁸ However, after the father gave the gun to his son, the plaintiff discharged it and was injured when the gun 'burst and exploded' in his hands. As the plaintiff could not argue that he was a party to the contract of sale it was instead argued that liability arose by reason of a breach of the defendant's duty: 'the law imposes on all persons who deal in dangerous commodities or instruments, an obligation that they should use reasonable care...'⁵⁹ The defendant, however, disputed this: 'no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise.'⁶⁰ The court agreed with the defendant, as to uphold the widely expressed duty formulated by the plaintiff would:

lead to that indefinite extent of liability ... [and] would be an authority for any action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby.⁶¹

Notwithstanding the court's rejection of the plaintiff's submissions on duty, it nevertheless found for him on the grounds of deceit: the defendant had warranted the gun to be safe, which it was not, and this was fraudulent misrepresentation.⁶²

Duty was again the determining factor in the famous and much-discussed case of *Winterbottom v Wright*.⁶³ The Postmaster General had contracted with the defendant to provide

⁵⁶ *ibid* 477, 494.

⁵⁷ (1837) 2 M&W 519, 150 ER 863.

⁵⁸ The court held that it was, in fact, a 'bad, unsafe, ill-manufactured and dangerous gun': *ibid* 519, 863.

⁵⁹ *ibid* 525, 865.

⁶⁰ *ibid* 521, 864.

⁶¹ *ibid* 530, 868.

⁶² *ibid* 532, 868-69. See also Winfield, 'Duty in Tortious Negligence' (n 34) 53.

⁶³ (1842) 10 M&W 109, 152 ER 402.

a mail coach, and, separately, with the plaintiff's employer to horse the coach and to provide a driver. The plaintiff, who was employed to drive the coach, was injured when he was thrown from the coach after its wheel fell off, the result of the defendant failing to maintain the coach as he was required to do under his contract with the Postmaster General. As the carriage had been provided by the defendant under contract to the Postmaster General, there was no contract between the plaintiff and the defendant. The plaintiff therefore alleged that the defendant owed him a 'duty' by virtue of his contract with the Postmaster General to 'keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid.' The court, however, found that no such duty existed, as to allow the plaintiff to be owed a duty based on a contract to which he was not a party

[M]ight be the means of letting in upon us an infinity of actions ... [and] Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.⁶⁴

Although the basis for the denial of a duty has been the subject of much discussion,⁶⁵ it was nevertheless the lack of a relevant duty that determined the question of liability.

By the middle of the nineteenth century, then, the idea of duty was being used to explain liability in cases of both relationship and non-relationship negligence alike. Nevertheless, there was no sudden assertion of a duty in *every* negligence claim or any dramatic change in the style of pleadings;⁶⁶ duty was still only being used in an ad hoc manner to bolster claims, rather than because it was required. However, now that the language of duty had become commonplace, it was only 'a very short step from this to say that negligence is not actionable *unless* there is a duty to take care.'⁶⁷

⁶⁴ *ibid* 114, 405 (Lord Abinger CB).

⁶⁵ Palmer (n 3).

⁶⁶ Prichard (n 18) 33.

⁶⁷ Winfield, 'Duty in Tortious Negligence' (n 34) 54.

C. Duty as an Element of the Action for Negligence

Despite the language of duty being used in relationship negligence since the very early nineteenth century and non-relationship negligence since the 1830s, it was not until the second half of the century that judges began to insist that a duty of care was a *necessary* ingredient in cases of negligence. One of the earliest such cases appears to have been *Degg v Midland Railway Company*,⁶⁸ where Bramwell B held, ‘There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person... there can be no action except in respect of a duty infringed...’⁶⁹ The position was forcefully affirmed in 1860 by Erle CJ in *Marfell v The South Wales Railway Co*:⁷⁰

The undefined latitude of meaning in which the word “negligence” has been used, appears to me to have introduced the evil of uncertain law to a pernicious extent; and I think it essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence.⁷¹

And in 1862 Wilde B insisted in *Swan v North British Australasian Co*⁷² that, ‘The action for negligence proceeds from the idea of an obligation towards the plaintiff to use care, and a breach of that obligation to the plaintiff’s injury.’⁷³ The insistence on a duty of care was soon seen in other cases,⁷⁴ and Wilde B’s definition was incorporated into Addison’s 1864 edition of *a Treatise on the Law of Torts*.⁷⁵ What, however, was the motivation for this significant change? It seems that the elevation of the importance of duty of care in liability for negligence was the result of a number of factors.⁷⁶

⁶⁸ (1857) 1 H&N 773, 156 ER 1413.

⁶⁹ *ibid* 781-82, 1416.

⁷⁰ (1860) 8 CB NS 525, 141 ER 1271.

⁷¹ *ibid* 534, 1275.

⁷² (1862) 7 H&N 603, 158 ER 611.

⁷³ *ibid* 636, 625.

⁷⁴ See, for example, *Cox v Burbidge* (1863) 13 CB NS 431, 436; 143 ER 171, 173 (Erle CJ) (‘[there had to be] some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff’); *Grill v General Iron Screw Colliery Co* (1866) 1 CP 600 (CP), 612 (Willes J) (‘[negligence is] really the absence of such care as it was the duty of the defendant to use’). See also WR Cornish and others, *The Oxford History of the Laws of England*, vol XII: 1820-1914 Private Law (OUP 2010) 923.

⁷⁵ CG Addison, *Wrongs and their Remedies, Being a Treatise on the Law of Torts* (2nd edn, V and R Stevens, Sons and Haynes 1864) 15.

⁷⁶ Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 170-74; Ibbetson, ‘The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries’ (n 17) 235-41.

As we have already seen, the concept of duty allowed courts to distinguish between the basis of contractual and tortious obligations. As Ibbetson explains:

[T]he most straightforward test was to analyse both contractual and tortious obligations as arising out of breaches of duties, and to say that the obligation in contract arose out of the agreement of the parties while the duty in tort arose by operation of law... [and] More importantly for the present investigation, it provided a further stimulation to conceive of liability in tort in general as deriving from the breach of a legal duty, and liability in negligence in particular as deriving from the breach of a duty of care.⁷⁷

Ibbetson also points to the tendency in the nineteenth century to equate negligence with neglect, such that doing something badly (misfeasance) was seen as a different type of wrong to neglecting to do something that was required (negligence). The analysis of liability in terms of a neglect or breach of a duty, however, explained liability for acts as well as omissions:⁷⁸ negligence was the omission to do something you had a duty to do or the doing of something you had a duty not to do.

The duty/breach structure was also convenient as it not only mirrored the historic twofold structure of the action on the case, which required the plaintiff to set out the facts of their action that gave rise to the defendant's particular obligation as well as the way in which the obligation had wrongfully been breached,⁷⁹ but also provided a simple way to explain why liability attached to some types of negligent conduct but not others; in the former there was a duty to take care and in the latter there was not.⁸⁰ The shift also appears to have been influenced, albeit on a higher level of generality, by the passing of the Common Law Procedure

⁷⁷ Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' (n 17) 238.

⁷⁸ Ibbetson, 'The Law of Business Rome': Foundations of the Anglo-American Tort of Negligence' (n 34) 87-88; Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' (n 17) 236.

⁷⁹ The older writs generally adopted the syntactical structure 'whereas X, nevertheless, Y'. As Birks explains, 'The whereas clauses thus supplied the relevant background and, in particular, advanced some basis for the defendant's being under a legal duty to the plaintiff to behave differently from the dreadful way in which the 'nevertheless' sentence then reveals that he did behave': Peter Birks, 'Negligence in the Eighteenth Century Common Law' in Schrage EJM (ed), *Negligence The Comparative Legal History of the Law of Torts (Comparative Studies in Continental and Anglo-American Legal History; CSC 22)* (Duncker & Humblot 2001) 186. See also Ibbetson, 'How the Romans Did for Us: Ancient Roots of the Tort of Negligence' (n 1) 511-12.

⁸⁰ Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 171.

Act 1852, which abolished the forms of action and thereby prompted a more 'scientific treatment of principles'⁸¹ of tort law.

However, perhaps the most significant reason for the adoption of an analysis of liability based on the breach of a duty was that it allowed judges to have more control over the open-endedness of the early law of negligence. In particular, without any limitation on recoverability for carelessly caused harm, there was a considerable expansion in claims for negligence in the first half of the nineteenth century,⁸² and judges soon became concerned about the 'fact that juries were willing to give damages on the merest suggestion that the defendants – particularly railway companies – were negligent.'⁸³ In *Wilkinson v Fairrie*,⁸⁴ for example, although the defendant directed the plaintiff into an unlit passage where he fell down an open stairwell, the plaintiff's claim was abruptly rejected on the basis that 'if he could see his way, the accident was the result of his own negligence; if he could not...he ought not to have proceeded without a light.'⁸⁵ By insisting on the existence of a duty, and then formulating that duty as they saw fit, judges were able to exercise far greater control over questions of liability.⁸⁶ Indeed, the more precisely the judges formulated the duties, the more control they had, as they could remove cases from juries altogether where they believed the relevant duty did not exist. In *Collis v Selden*,⁸⁷ for example, a plaintiff was injured when a chandelier, negligently hung by the defendant, fell on him. Rather than find that a general duty existed and leave the question of fault to the jury, the judge determined the matter himself by holding that no relevant duty existed in the first place, because:

⁸¹ Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (1st edn, Stevens and Sons 1887) vii.

⁸² Cornish and others (n 74) 921-22.

⁸³ *ibid* 923.

⁸⁴ (1862) 1 H&C 633, 158 ER 1038.

⁸⁵ *ibid* 634, 1038 (Pollock CB following Bramwell B in the court below).

⁸⁶ JC Smith, 'Clarification of Duty - Remoteness Problems through a New Physiology of Negligence: Economic Loss, a Test Case' (1974) 9 UBCLawRev 213 221; Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 173.

⁸⁷ (1868) 3 CP 495.

There would be no end of actions if we were to hold that a person having once done a piece of work carelessly, should, independently of honesty of purpose, be fixed with liability in this way by reason of bad materials or insufficient fastening.⁸⁸

As a result of the courts' tendency to define duties of care in such great detail, there soon emerged a long list of specific instance duties. This is evident in Beven's *Principles of the Law of Negligence*,⁸⁹ in which he devoted 700 pages to the multitude of individual duty situations. This approach to duty later came to be known as the 'multifarious' duty approach.

Of course, it was one thing to say that a duty was necessary, but another to explain why a duty existed in one case and not another. What, then, was the test for the existence of a duty? It seems that the earliest duties were simply based on the old 'forms of action' and earlier common law:

A duty to ensure passenger safety was recognised, which was analogous to contractual duties, or to duties imposed by those exercising a 'common calling'. The duty to take care to avoid collisions was seen as analogous to the interests protected by the action of trespass. A duty not to leave a hazardous item in public places was recognised, and analogised to nuisance. A duty not to sell dangerous goods was recognised, which was a version of the duty not to deceive.⁹⁰

Indeed, in Beven's *Principles of the Law of Negligence* we find many 'duties' that are said to arise from cases that occurred sometimes hundreds of years before negligence giving rise to liability, let alone any conception of duty.⁹¹ Later duties, on the other hand, appear to have developed incrementally, 'whereby the plaintiff was expected to demonstrate the existence of a duty by showing that the case fell within an already recognised duty situation or was very closely analogous to one.'⁹² When there was no existing authority the duty was therefore unlikely to be recognised. Courts were also quick to deny the existence of a duty where they felt it would lead to a significant extension in liability. In *Morgan v The Vale of Neath Railway Co*,⁹³ for example, Pollock CB denied that a master owed a duty to a servant who had been injured by the

⁸⁸ *ibid* 497-98 (Willes J). See also Cornish and others (n 74) 944.

⁸⁹ Thomas Beven, *Principles of the Law of Negligence* (Stevens and Haynes 1889).

⁹⁰ Cornish and others (n 74) 923-24.

⁹¹ Many of which were mere jurisdictional artefacts, having evolved from the early courts' jurisdictional limits into substantive law: see, for example, Milsom (n 10) 286-87.

⁹² Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 190.

⁹³ (1865) 1 QB 149 (Ex).

negligence of another servant, because: 'It appears to me that we should be letting in a flood of litigation, were we to decide the present case in favour of the plaintiff.'⁹⁴ In some sense, then, the law of negligence was again beginning to resemble a long list of discrete torts in which negligence was an ingredient rather than a conceptually unified whole. This, however, was soon about to change.

III. Towards a General Conception

Whilst the multifarious approach to duties gave the judiciary the control they sought, at a time when academics such as Austin, Wendell Holmes and Pollock were looking for more philosophical foundations of negligence and tort law, much of which was based around the language of duty,⁹⁵ the unprincipled and 'uncultivated wilderness' of single instance duty situations of which the law consisted seemed unsatisfactory.⁹⁶ Was there a test for the existence of a duty of care that could be based on something more abstract, with the result that a more general rule could be formulated? Was there a principled explanation as to *why* a duty existed in one situation and not another of which the existing cases were just instances?

Without any theoretical framework, the existing single instance duties were far from conceptually uniform and varied in both scope (to whom it was owed) and content (what the duty entailed): some duties were owed to the world at large whilst others were only owed to a certain class of persons; some duties were a duty to take reasonable care whilst others were a duty to do a particular thing.⁹⁷

⁹⁴ *ibid* 155 (Pollock CB). See also *Stubley v The London and North Western Railway Co* (1876) 1 Ex 13 (Ex), 18 (Bramwell B): 'If such a precaution is necessary here, it must also be used elsewhere; and the argument would shew that on every road, every canal, every railway in the kingdom, means must be taken to warn people against the consequences of their own folly. It would cost too much to provide such a machinery of precaution.'

⁹⁵ Cornish and others (n 74) 890-91, 941.

⁹⁶ 'The Duty of Care Towards One's Neighbour' (1883) 18 LJ 618, 619.

⁹⁷ EK Teh, 'Reasonable Foreseeability in Negligence (1833-1882)' (1975-1977) 5 UTasLR 45, 50-62.

The tortious duty of a manufacturer to a consumer, for example, although at one time arguably not existing at all,⁹⁸ came to be owed only to those particular consumers whom the manufacturer subjectively knew had planned to use their goods.⁹⁹ The duty was first described in *George v Skivington*.¹⁰⁰ Here, a chemist compounded and then sold a bottle of hair shampoo to the plaintiff for the use of his wife. The shampoo turned out to have been negligently compounded and when used by the plaintiff's wife caused her hair to fall out. It was held that:

[W]here an article of this description is purchased by A for the use of B, and it is alleged and stated at the time of the purchase and sale, to have been so purchased, and therefore becomes *known* to the defendant, who is the seller of the article – the duty arises upon the part of the seller of the article, that it shall be reasonably fit for the purpose.¹⁰¹

The court was quick to note, however, that 'The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended.'¹⁰²

The duty of property owners, meanwhile, whilst extending to all entrants, varied in content depending on the status of the entrant.¹⁰³ The duty to an invitee, for example, was 'the exercise of reasonable care ... to prevent damage from unusual danger of which the occupier knows or ought to know';¹⁰⁴ the duty to a licensee was to refrain from laying traps and wilful

⁹⁸ *Winterbottom v Wright* (1842) 10 M&W 109, 109 ER 402.

⁹⁹ A duty would also exist if the seller fraudulently misrepresented that the product was safe (*Langridge v Levy* (1837) 2 M&W 519, 150 ER 863) or the product was dangerous *per se* (RFV Heuston, 'Donoghue v Stevenson in Retrospect' (1957) 20 MLR 1, 11).

¹⁰⁰ (1869) 5 LR Ex 1, 39 LJ Ex 8.

¹⁰¹ 39 LJ Ex 8, 9 (Kelly CB) (emphasis added).

¹⁰² 5 LR Ex 1, 4 (Pigott B). See also *Blakemore v Bristol & Exeter Railway* (1858) 8 E&B 1035, 120 ER 385; Michael L Richmond, 'The Development of Duty: *Langridge* to *Palsgraf*' (1986-1987) 31 St Louis ULJ 903, 905-10.

¹⁰³ Norman S Marsh, 'History and Comparative Law of Invitees, Licensees and Trespassers' (1953) 69 LQR 182. Up to seven categories of entrant eventually existed, before being replaced with a common duty of care in the Occupiers Liability Act 1957. See also Cornish and Clark (n 74) 505-507.

¹⁰⁴ *Indermaur v Dames* (1866) 1 CP 274 (CP), 287 (Willes J). Willes J's judgment was later affirmed in the Court of Exchequer: *Indermaur v Dames* (1866-67) 2 CP 311 (Ex).

deceit;¹⁰⁵ whilst the duty to a trespasser, if it could be described as a 'duty' at all, was merely to abstain from the intentional infliction of harm.¹⁰⁶

In traffic cases, both on roads and on the water, however, a duty was effectively owed to the whole world, and its content was simply to take reasonable care: '[the] duty which the law casts upon those in charge of a carriage on land, or a ship or a float of timber on water, [is] to take reasonable care and use reasonable skill to prevent it from doing injury.'¹⁰⁷

Duties could also be very specific, as in a duty to do or refrain from doing a particular thing, hardly going beyond the facts of the particular case. In *Farrant v Barnes*,¹⁰⁸ for example, the defendant delivered a carboy of nitric acid to the plaintiff's master. The plaintiff, not being warned that the acid was dangerous, carried the carboy on his back and was injured when it burst. On the question of duty Willes J said:

I am of the opinion that persons employing others to carry dangerous articles are bound to give reasonable notice of the character of such articles, and are liable, if they do not do so, for the probable consequences of such neglect of duty.¹⁰⁹

In *Jackson v Metropolitan Railway Co*,¹¹⁰ the duty was also formulated narrowly:

I take it to be part of the duty of a railway company which invites persons to resort to its stations and to travel by its trains (inter alia) to provide two things: first, sufficient accommodation to meet the ordinary requirements of the traffic; secondly, a sufficient staff to maintain order and prevent irregularity and confusion, and to protect passengers from annoyance, inconvenience, or injury from travellers who set not only the regulations of the company but also decency and order at defiance.¹¹¹

The existing law therefore offered little guidance in the way of a generalised duty test. Duties of different content and scope, whilst seemingly appropriate for the cases they were designed for, had little general application: a duty based on the defendant's knowledge of the identity of the

¹⁰⁵ *Gautret v Egerton* (1867) 2 CP 371, 374 (Willes J). See also *Indermaur v Dames* (1866) 1 CP 274 (CP) (Willes J).

¹⁰⁶ *Deane v Clayton* (1817) 7 Taunt 489, 521; 129 ER 196, 209 (Dallas J). The line between 'intend' to inflict and 'negligently' inflict, however, was not clear: Marsh (n 103) 188.

¹⁰⁷ *River Wear Commissioners v Adamson* (1877) 2 AC 743 (HL), 767 (Lord Blackburn).
¹⁰⁸ (1862) 31 LJCP 137.

¹⁰⁹ *ibid* 140. See also Teh (n 97) 60.

¹¹⁰ (1877) 2 CP 125.

¹¹¹ *ibid* 141 (Cockburn CJ). See also Teh (n 97) 60-61.

plaintiff, for example, would all but eliminate liability for traffic accidents,¹¹² whilst any general duty to take care, if owed to the whole world, would render the entire duty enquiry meaningless.

A. *Heaven v Pender*

Of course, it should not be surprising that the duty cases did not emerge from any *a priori* general principles, but, rather, that general principles only later emerged from the duty cases. As Buckland and McNair observed, in the formative periods, common lawyers, much like Roman lawyers, were not great theorists and simply decided cases on their facts, rather than from first principles; it was only when they looked back that general principles emerged.¹¹³

The first person to attempt to extrapolate a principle from the many duty cases was Sir William Brett, the Master of the Rolls. The central feature of Brett MR's duty formulation was the idea of 'foreseeability.' Brett MR first introduced the idea of foreseeability into the duty realm in 1870: 'I am of the opinion that no reasonable man could have foreseen [the damage] ... [therefore] It seems to me that no duty was cast upon the defendants...'¹¹⁴ In 1883 he attempted a more general formulation still, feeling that a duty *should* be owed:

[W]henver the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either to his person or property, then there is a duty shown to use reasonable care.¹¹⁵

¹¹² Another limitation of basing the duty on the defendant's knowledge of the consumer was identified in *MacPherson v Buick Motor Co* 111 NE 1050 (NY 1916). The plaintiff purchased a motor vehicle from a car dealership which, in turn, had purchased the vehicle from the defendant manufacturer. The plaintiff was later injured as he was driving the vehicle due to a defect in one of the vehicle's wheel spokes. The defendant denied the existence of a duty as they had no contract with the defendant. Yet, as Cardozo CJ pointed out, the plaintiff, as the final consumer, despite his identity not being known to the defendants, was just about the *only* person the defendant could be sure would be affected by their negligence, and the car dealership, to whom the defendants admitted a duty, were 'the one person of whom it might be said with some approach to certainty that by him the car would not be used' (at 1053).

¹¹³ WW Buckland, AD McNair and FH Lawson, *Roman Law and Common Law* (2nd edn, Cambridge University Press 1965) 11.

¹¹⁴ *Smith v London and South Western Railway Co* (1870) 5 CP 98 (CP), 103.

¹¹⁵ *Cunnington v The Great Northern Railway Co* (1883) 49 LT 392 (QB), 393.

However, Brett MR's most famous formulation came later that same year in the case of *Heaven v Pender*,¹¹⁶ where he explicitly acknowledged that he was attempting to formulate a duty formula that applied to *all* cases of negligence:

When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not...In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used ... it seems to me, that there must be some larger proposition ... The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.¹¹⁷

Brett MR's formulation was significant for two reasons. First, it described the content of the duty as simply a duty to use care, rather than a duty to do or not to do a particular thing. Second, Brett MR's test transcended the traditional categories of duty by relying on a common theme. In essence, the existence of a duty, which was a duty to take care, depended on 'foreseeability'.¹¹⁸

The other two members of the court, Lord Justices Cotton and Bowen, although also finding for the plaintiff (on the narrower ground that they were invitees¹¹⁹), were 'unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains.'¹²⁰ However, as early as 1885 Brett MR's formulation was being advocated by

¹¹⁶ (1883) 11 QB 503 (CA).

¹¹⁷ *ibid* 509.

¹¹⁸ James P Murphy, 'Evolution of the Duty of Care: Some Thoughts' (1980-1981) 30 DePaul L Rev 147, 147 ('This rationale was that duty hinges on foreseeability, nothing more and nothing less'); Teh (n 97) 67 ('What proposition did "these recognised cases suggest"? In *Heaven v Pender* the proposition was reasonable foreseeability'); Leon Green, 'The Duty Problem in Negligence Cases' (1928) 28 Colum L Rev 1014, 1029 ('Upon analysis it is clear that this formula is identical with the "foreseeability" or "anticipation of harm" formula').

¹¹⁹ Richmond (n 102) 921.

¹²⁰ *Heaven v Pender* (1883) 11 QB 503 (CA), 516 (Cotton LJ, with whom Bowen LJ concurred).

plaintiffs,¹²¹ and in 1888 Hawkins J of the Queen's Bench division said of Brett MR's formula: 'That, in my opinion, is a correct statement of the law.'¹²² Brett MR, too, continued to use his wide formulation in subsequent cases.¹²³

Other judges, however, felt that Brett MR's formulation was too wide and preferred the narrower approach of Lord Justices Cotton and Bowen. In *Caledonian Railway v Mulholland*,¹²⁴ for example, the brakes failed in the defendant's freight car and killed an employee of the purchaser of the car's load. Although it was clearly foreseeable that a negligently maintained freight car could injure its intended users (indeed, this was put forward by the respondents), Lord Herschell found that 'if we were to hold that such an obligation existed, some very strange consequences would ensue - consequences so unreasonable, it seems to me, as to shew that the duty cannot exist.'¹²⁵

Outside of the courts, academic descriptions of Brett MR's generalised formula ranged from 'the true rule'¹²⁶ to 'dangerously wide.'¹²⁷ Others dismissed his quest for a general formula entirely: 'Perhaps [lists of specific instance duties] cannot be avoided, as the world has not, in the matter of wrongs, agreed upon any wide principle such as "perform your promises," which is at the bottom of the law of contracts.'¹²⁸ And Pollock later observed that whilst *Heaven v Pender*

¹²¹ *Hurst v Taylor* (1885) 14 QB 918 (QB), 919: 'The defendants' obligation comes within the terms of the proposition enunciated by Brett, MR, in *Heaven v Pender*'.

¹²² *Thruswell v Handyside & Co* (1888) 20 QB 359 (QB), 363.

¹²³ See, for example, *Thomas v Quartermaine* (1887) 18 QB 685 (CA), 688 ('you are bound not to do anything negligently so as to hurt a person near you, and the whole duty arises from the knowledge of that proximity'); *Coventry, Sheppard & Co v The Great Eastern Railway Co* (1883) 11 QB 776 (CA), 780 ('the documents have a certain mercantile meaning attached to them and therefore the defendants owed a duty to merchants and persons likely to deal with them'); *Seton, Laing & Co v Lafone* (1887) 19 QB 68 (CA), 72 ('if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act ... there is a duty to take reasonable care that the statement shall be correct'). See also Cornish and others (n 74) 947.

¹²⁴ (1898) AC 216 (HL).

¹²⁵ *ibid* 226 (Lord Herschell).

¹²⁶ Horace Smith, *A Treatise on the Law of Negligence* (2nd edn, Philadelphia: The Blackstone Publishing Company 1884) 8.

¹²⁷ 'Duty Not to be Negligent: Towards Whom and Under what Circumstances it Arises' (1883) 27 Sol J 778, 778-79.

¹²⁸ 'The Duty of Care Towards One's Neighbour' (n 96) 619.

'may now be regarded as based on a conception sound in principle ... The precision of a neat draftsman has never been counted among [Brett MR's] accomplishments.'¹²⁹

Perhaps in response to the mixed reactions to his to his duty formulation, Brett MR, who had by that stage become Lord Esher, later stated that he 'detest[ed] the attempt to fetter the law by maxims. They are almost invariable misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'¹³⁰ Shortly thereafter, following some confusion over the extent to which his duty formula created liability for negligent misstatements,¹³¹ Lord Esher also took the opportunity to clarify, and arguably narrow, his previous formulation to make it clear that it was never intended to apply to negligent statements, but only negligent *acts*:

The case of *Heaven v Pender* ... established that, under certain circumstances, one may owe a duty to another, even if though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause personal injury to that other, or may injure his property.¹³²

The existence of a duty, then, depended on not only foreseeability but on physical 'nearness,' or proximity. By the close of the nineteenth century, however, Lord Esher appeared to have retreated from his generalised formula even further,¹³³ stating that liability in negligence is the neglect of 'some duty' and giving specific instances of such duties, thereby seemingly embracing the traditional multifarious approach:

[A] person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner or occupier; and, if by the negligent management of his house he causes injury, in either of these cases he is liable.¹³⁴

¹²⁹ Frederick Pollock, 'The Snail in the Bottle and Thereafter' (1933) 49 LQR 22, 25.

¹³⁰ *Yarmouth v France* (1887) 19 QB 647 (CA), 653

¹³¹ *Derry v Peek* (1889) 14 AC 337 (HL); cf *Cann v Wilson* (1888) 39 ChD 39.

¹³² *Le Lievre v Gould* [1893] 1 QB 491 (CA), 497. Arguably, however, this was already clear from his existing formula's limitation to 'injury to the person or property of another.'

¹³³ Cornish and others (n 74) 949.

¹³⁴ *Lane v Cox* [1897] 1 QB 415 (CA), 417.

Textbooks of the time also seem to approve of the multifarious approach to duty. In Salmond's *The Law of Torts*, for example, the existence or absence of a duty of care is said to pertain to a 'detailed exposition of the law' and not on 'general principles of liability,'¹³⁵ whilst Pollock describes the 'modern way of regarding legal duties' as not being a 'general duty not to do harm.'¹³⁶ By the end of the nineteenth century, then, after Brett MR's brief flirtation with the idea of a generalised test, the law again returned to the single instances approach to the duty of care.¹³⁷

B. The Twentieth Century and the Ever-Changing Role of Foreseeability

Following Brett MR's failure to achieve a general duty formula, the Courts of the early twentieth century were notable for their absence of any critical discussion of duty. As Richmond later observed:

The neatness and consistency which had characterised the development of the law in Great Britain seemed lost. Exceptions began to proliferate in the law, because judges could find precedent for almost any proposition by carefully writing their opinion in the proper terms.¹³⁸

As late as 1928, almost 50 years after *Heaven v Pender*, Leon Green of Yale Law School lamented the lack of any judicial guidance on the question of duty:

Where shall he find the source of duties? Do judges find them already made? Do they assume them? Do they create them, and if so, do they create them in wholesale, or must each court create a particular duty which fits the particular case then before it? So far as I have been able to discover, the common law courts have stumbled through the whole of the period of their existence without committing themselves on this enquiry. Perhaps it is a subject which is not to be talked about.¹³⁹

¹³⁵ John William Salmond, *The Law of Torts* (1907) 22 (a similar quote appears in all subsequent editions prior to 1932).

¹³⁶ Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (n 81) 22 (more or less the exact same quote is found in all 14 editions of Pollock's textbooks). See also CG Addison, *A Treatise on the Law of Torts, or, Wrongs and their Remedies* (8th edn, Stevens and Sons 1906) 13 ('The circumstances, under which such a duty may arise are so multifarious that the subject will be dealt with in detail later').

¹³⁷ Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' (n 17) 243.

¹³⁸ Richmond (n 102) 924.

¹³⁹ Green (n 118) 1024.

Green then described Brett MR's judgment of *Heaven v Pender* as 'the most impressive attempt to answer this puzzling question' of when a duty of care will 'be imposed upon affirmative conduct and to what extent.'¹⁴⁰ The position of the time was also succinctly summed up, albeit retrospectively, by Asquith LJ in *Candler v Crane, Christmas & Co*:¹⁴¹

Certain classes owed duties of care to certain other classes: road users to other road users; bailees to persons entrusting property to them; doctors and surgeons (and originally barbers) to persons entrusting their bodies to them; occupiers of premises to persons whom they invite or permit to come on the premises; and so on. These categories attracting the duty had been added to and subtracted from time to time. But no attempt had been made in the past to rationalize them; to find a common denominator between road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of care and some other classes who might be expected equally to be so bound should be exempt - no attempt, that is, save that of Lord Esher, MR (from which his colleagues dissociated themselves) in *Heaven v Pender*.

Nevertheless, although it may not have been obvious at the time, a generalised test of duty continued to develop quietly in the background, and the test centred around the idea introduced by Lord Esher: foreseeability.

Although Lord Esher was responsible for introducing foreseeability as a test for the existence of a duty, he was not the first to advocate its role in determining questions of liability. Indeed, as far back as the Romans, liability for damage to goods (under the *Lex Aquilia*) depended on some idea of foreseeability.¹⁴² Within the common law, however, foreseeability first emerged as a question of the remoteness of the damage.¹⁴³ Although such questions were traditionally the sole responsibility of the jury, by the middle of the nineteenth century judges were beginning to remove cases from juries, and make a finding of no liability, where they

¹⁴⁰ *ibid* 1028.

¹⁴¹ [1951] 2 KB 164 (CA), 188.

¹⁴² Paul, Sabinus, book 10: D.9.2.31: '*Culpam autem esse, quod cum a diligente prouideri poterit, non esset prouisum*' (there is fault when what could have been seen by a diligent man was not foreseen).

¹⁴³ At the time, 'remoteness' encompassed what we would today describe as 'factual causation' and the broad meaning of 'legal causation' (*novus actus interveniens* and remoteness / proximate cause); that is, they concerned whether the damage could be said to be attributable to the behaviour of the defendant. Factual and legal causation do not appear to have become distinct entities until around the 1960s.

believed the damage was not sufficiently 'proximate' or was too 'remote':¹⁴⁴ after all, there were cases where the breach of a conventional duty might directly cause unforeseeable damage for which the court did not believe the defendant should be held liable. Judges were therefore using remoteness - in much the same way that they were using the emerging concept of duty - as a method of limiting the liability of defendants.¹⁴⁵ Although the idea that a defendant was only responsible for the 'proximate' consequences of his conduct dated back to Francis Bacon in the sixteenth century¹⁴⁶ and, in the case of liability for negligence, to Buller's *Nisi Prius*,¹⁴⁷ it was not until 1850 that the idea was formally adopted by the courts:¹⁴⁸

I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated.¹⁴⁹

The idea was further expanded upon by Frederick Pollock in his first edition of the law of torts:

Those consequences, and those only, are deemed 'immediate', 'proximate', or, to anticipate a little, 'natural and probable', which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct.'¹⁵⁰

Soon, however, questions of foreseeability were no longer being considered as determinative of the remoteness of the damage, but of whether the act had been negligent in the first place. In

¹⁴⁴ Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' (n 17) 246.

¹⁴⁵ Cornish and others (n 74) 928. See also JG Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 Can Bar Rev 471.

¹⁴⁶ Francis Bacon, *Maxims of the Law* (London, 1598: 'Regula I: *In iure non remota causa, sed proxima spectatur*' (Rule 1: In law the proximate cause is looked to, not the remote one). See also Cornish and others (n 74) 928; Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' (n 17) 246.

¹⁴⁷ Buller (n 12) 36: 'it is proper in such cases to prove that the injury was such, as would probably follow from the act done'.

¹⁴⁸ Courts had previously refused to impose liability on the basis that the harm was not the 'natural consequence' of the defendant's act, but as Cornish notes, these tended to involve harm caused by third parties rather than harm that was unforeseeable: Cornish and others (n 74) 928-34.

¹⁴⁹ *Greenland v Chaplain* (1850) 5 Ex 243, 248; 155 ER 104, 106 (Pollock CB). Pollock CB made similar remarks in *Rigby v Hewitt* (1850) 5 Ex 240, 243; 155 ER 103, 104: 'of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result'. In both cases, Pollock CB was alone in his views, the rest of the court preferring a 'natural consequences' test.

¹⁵⁰ Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (n 81) 28.

Blyth v Birmingham Waterworks,¹⁵¹ for example, an unusually severe frost froze the defendant's fire hydrants which subsequently caused water to escape from the mains and flood the plaintiff's house. All members of the court agreed that the accident was unforeseeable, yet did not even consider the question of remoteness, instead holding that because the accident was unforeseeable there was insufficient evidence of negligence for the matter to be left to the jury.¹⁵² The same conclusion was reached more explicitly by Channel B in *Smith v London and South Western Railway Co.*¹⁵³

Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not ... but when it has been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could foresee them or not.¹⁵⁴

The implications of *Smith* were potentially very far-reaching, as once it was established that the defendant's conduct was negligent, liability ensued for *all* consequences, whether they were foreseeable or not. It is therefore not surprising that in the years that followed, Brett MR attempted, albeit unsuccessfully, to bring questions of foreseeability into the determination of duty.¹⁵⁵

Notwithstanding *Smith*, however, foreseeability was soon again being considered as a question of remoteness. In *Victorian Railways Commission v Coultas*,¹⁵⁶ a crossing guard negligently invited a woman and her husband to drive their buggy across a railway track crossing into the path of an oncoming train, thereby placing them 'in imminent peril of being killed.' Although the woman and her husband were not physically injured, the wife suffered severe

¹⁵¹ (1856) 11 Ex 781; 156 ER 1047.

¹⁵² 11 Ex 780, 785 (Bramwell B) ('it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident'); 2 Jur NS 333, 334 (Alderson B) ('The whole thing was an accident occasioned by frost, which was utterly unforeseen... That cannot be called negligence').

¹⁵³ (1870) 6 CP 14 ('*Smith*').

¹⁵⁴ *ibid* 21 (Channel B).

¹⁵⁵ Though note the comments of Beven, who suggests that foreseeability applies *only* 'in determining what is negligence [and] not in limiting the consequences flowing from it when once established': T Beven, *Negligence in Law* (Being the 2d edn, Stevens and Haynes. 1895) 105-106. Cf F Pollock, *The Law of Torts* (7th edn, Stevens and Sons 1904) 40 (fn g).

¹⁵⁶ (1888) 13 AC 222 (PC).

shock and so sued the crossing guard's employer. The Privy Council found for the defendants on the grounds that the damage suffered by the wife was 'too remote', as the plaintiff's injury could not 'be considered a consequence which, in the ordinary course of things, would flow from the negligence of the [defendant]'.¹⁵⁷

By the start of the twentieth century, however, the appropriate place for foreseeability in the negligence enquiry was *again* being questioned. In *Dulieu v White & Sons*,¹⁵⁸ the defendant lost control of a horse-drawn carriage and crashed into the public house in which the pregnant plaintiff was working. As a result of the collision the plaintiff suffered severe shock and gave birth prematurely. Kennedy J implied that matters concerning foreseeability ought to be dealt with under duty rather than remoteness. In particular, after discussing a recent unreported case that had been decided on the grounds that the harm was too remote, he stated:

I should myself, as I have already indicated, have been inclined to go a step further, and to hold upon the facts ... [that] as the defendant neither intended to affect the plaintiff nor did anything which could reasonably or naturally be expected to affect him injuriously, there was no evidence of a breach of legal duty.¹⁵⁹

Although Kennedy J's quote could be interpreted as doubting either the existence of a duty or any evidence of a breach, the fact that he had only just given a construction of the case based on duty ('as I have already indicated') suggests that the former interpretation is the correct one. What could 'reasonably or naturally be expected' (that is, what was reasonably foreseeable), was again playing a role in the determination of a duty.

There was, therefore, no consensus on the role that foreseeability was to play in the determination of liability: the authorities suggested it could be applied at the duty, breach or remoteness stages. Additionally, the vagueness of the language used in cases provided little guidance on what, exactly, it was that needed to be foreseeable; *Smith*, as we have seen, unhelpfully said that 'the question what a reasonable man might foresee is of importance' without more.

¹⁵⁷ *ibid* 225 (Couch).

¹⁵⁸ [1901] 2 KB 669 (KB).

¹⁵⁹ *ibid* 675 (Kennedy J).

The turning point appears to have come in 1921 following the case of *Re Polemis and Furness, Withy & Co Ltd*¹⁶⁰ which held that, whilst foreseeability of damage is relevant in determining whether an act is negligent, once the defendant's act is deemed to be negligent, 'the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act...'¹⁶¹ Although *Re Polemis* was silent on the issue of duty, it had nevertheless clarified and defined the role of foreseeability at the fault and remoteness stages of the negligence enquiry: at the fault stage the question was the whether *some* damage was foreseeable,¹⁶² whilst at the remoteness stage foreseeability of the *exact kind of damage actually suffered* was irrelevant.¹⁶³

With the role of foreseeability in fault and remoteness now rigidly defined, duty was the obvious vehicle for expanding or limiting liability on the basis of foreseeability: but if not foreseeability of some damage, or foreseeability of the kind of damage actually suffered, then foreseeability of what? It was not long until this question was answered. In *Hambrook v Stokes Brothers*¹⁶⁴ the defendant failed to secure their parked lorry, causing it to roll down a hill by itself. When the plaintiff's wife, who was accompanying her children to school, saw the out-of-control lorry, she became very worried for the safety of her children, who had turned the corner in front of her and so were out of her sight. Although she did not see the ensuing collision, she suffered severe anxiety and shock, which eventually led to her death, when she heard that a child answering the description of her daughter had been injured. Clearly there was no issue of fault, and *Re Polemis* ensured that the question of remoteness was not in issue; there still, however, had to be a duty in the first place, and yet *Dulieu v White & Sons* had earlier confined

¹⁶⁰ [1921] 3 KB 560 (CA) ('*Re Polemis*').

¹⁶¹ *Re Polemis*, 577 (Scrutton LJ).

¹⁶² In that a reasonable person would not engage in certain behaviour if it created a foreseeable risk of *some* harm, and the fact that that the harm that *actually* occurs is of a different kind to that foreseen does not make the unreasonable behaviour retrospectively reasonable.

¹⁶³ The wide test was subsequently subject to much criticism, but, as noted by Davies, 'A wide remoteness test [the 'directness' test] was unexceptional when duty was narrowly conceived': Martin Davies, 'The Road From Morocco: Polemis Through Donoghue to No-Fault' (1982) 45 MLR 534, 541.

¹⁶⁴ [1925] 1 KB 141 (CA).

the duty in cases of psychiatric harm to ‘shock which arises from a reasonable fear of immediate personal injury to *oneself*.¹⁶⁵ The plaintiff’s wife, however, suffered shock from a fear of immediate personal injury to her *children*. If the plaintiff were to succeed, a new duty would need to be recognised, and Bankes LJ did this on the basis that harm to the *actual plaintiff* was foreseeable. In particular, after finding that the authorities established that ‘what a man ought to have anticipated is material when considering the extent of his duty’¹⁶⁶ he employed a simple syllogism:

1. A man owes a duty where he ought to foresee that his negligence might cause mental shock to a mother occasioned by fearing for her own safety.
2. From the perspective of the defendant, there is no difference between a mother fearing for her own safety and a mother fearing for her child’s safety.
3. A man therefore owes a duty where he ought to foresee that his negligence might cause mental shock to a mother who suffers mental shock occasioned by fearing for her child’s safety.

Forty years after *Heaven v Pender*, then, duty was again coming to be based on the question of foreseeability; in particular, whether the defendant ought to have anticipated, or foreseen, harm to a person in the position of the plaintiff.¹⁶⁷

¹⁶⁵ *Dulieu v White & Sons* [1901] 2 KB 669 (CA), 675 (Kennedy J) (emphasis added).

¹⁶⁶ *Hambrook v Stokes Brothers* [1925] 1 KB 141 (CA), 151 (Bankes J). Whilst Atkin LJ acknowledged that the ‘question appears to be as to the extent of the duty, and not as to remoteness of damage’ (at 158) he was less explicit than Bankes LJ in his reasons for expanding the existing duty to include the plaintiff.

¹⁶⁷ Whilst this construction was later famously adopted by Cardozo CJ in the in the New York Appeals Court case *Palsgraf v Long Island Railway Co* (1928) (248 NY 339; 162 NE 99), and by Lord Wright in *Bourhill v Young* ([1943] AC 92 (HL)), it was not entirely new. As early as *Langridge v Levy* (1837) 2 M&W 519, 150 ER 863 the court specifically rejected the theory that ‘wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, anyone who is injured by the violation of it may have a remedy against the wrong-doer’: *Langridge v Levy* (1837) 2 M&W 519, 530; 150 ER 863, 868 (Parke B). Goodhart, on the other hand, attributes the view to Brett MR’s comments in *Smith v London and South Western Railway Co* (1870) 5 CP 98, 103: ‘Brett, J dissented on the ground that the defendant had not been negligent *in regard to this particular plaintiff*, although the act of leaving the inflammable heaps might have been negligent in relation to others’ (emphasis added) (AL Goodhart, ‘The Unforeseeable Consequences of a Negligent Act’ (1928) 39 Yale LJ 449, 453). The idea that foreseeability of harm to a person in the position of the plaintiff is distinct from the questions of remoteness and fault will be further explored in Chapter Four.

Of course, even though the role of foreseeability in the duty enquiry had now been articulated, foreseeability of harm to the particular plaintiff could not be the *only* requirement for a duty to exist; such a rule, although narrower than Brett MR's formulation, would nevertheless remain open to similar objections. Other than foreseeability of harm to the plaintiff, then, what else was required? To this question *Hambrook v Stokes Brothers* offered little guidance, yet an attempt to do exactly that was just around the corner, and it was instigated by a snail in a bottle of ginger beer.

C. *Donoghue v Stevenson*

The duty issue was addressed again in the famous Scottish case of *Donoghue v Stevenson*.¹⁶⁸ According to the pleadings, the pursuer suffered gastro-enteritis and mental depression, *inter alia*, after drinking from a bottle of 'snail-infected ginger beer' that had been purchased for her by a friend. As the ginger beer had not been purchased by the pursuer she could not sue in contract and so was forced to argue that liability arose by reason of a tortious duty of a manufacturer 'to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.'¹⁶⁹ Shortly after the pursuer's writ was lodged, the defender made an application for the writ to be struck out and, despite the application being dismissed in the Outer House of the Court of Session, it was upheld in the Inner House of the Court of Session three to one. The pursuer appealed to the House of Lords.

Lord Atkin, like Brett MR, believed in a general conception of duty, and in 1931, prior to delivering his speech in *Donoghue v Stevenson*, said in a lecture delivered at King's College London, 'I doubt whether the whole of the law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you.'¹⁷⁰ Lord Atkin

¹⁶⁸ [1932] AC 562 (HL).

¹⁶⁹ *ibid* 578-79 (Lord Atkin).

¹⁷⁰ Lord Atkin 'Law as an Educational Subject' [1932] JSPTL 27, 30. Lord Atkin, however, seems to have taken the idea from Pollock, who had said in his 1895 edition of *The Law of Torts*: "Thou shalt do no hurt to thy neighbour." Our law of torts, with all its irregularities, has for its main purpose nothing else but development of this precept' (Frederick Pollock, *The Law of Torts* (4th edn, Stevens & Sons 1895) 12). A

believed it 'remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty,¹⁷¹ but also recognised that the attempt at a general formula 'made by Brett MR in *Heaven v Pender*... [a]s framed... was demonstrably too wide.' He nevertheless acknowledged that it appeared 'if properly limited, to be capable of affording a valuable practical guide.'¹⁷² Lord Atkin's 'practical guide,' famously known as the 'neighbour dictum,' was based on foreseeability, but, as suggested by Lord Esher in *Le Lievre v Gould*, limited by the notion of 'proximity:'

[I]n English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances...The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v Pender* (1), as laid down by Lord Esher (then Brett MR) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith LJ in *Le Lievre v Gould*....¹⁷³

Lord Atkin ultimately held that the impossibility of intermediate inspection satisfied the proximity requirement and that the defender therefore owed the pursuer a duty of care. Two of the other four Law Lords also found for the pursuer, although in separate speeches, and the matter was relisted for proof. Following the defender's death from appendicitis shortly after the case was heard, the case was settled for a reported amount of £200.¹⁷⁴ There was never a

similar statement was made in Pollock's 1887 (1st) edition: 'all members of a civilized commonwealth are under a general duty towards their neighbours to do them no hurt without lawful cause or excuse' (Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (n 81) 3); though, as Hepple later noted, 'as a proposition of law this was certainly wrong in 1887' (B Hepple, 'Negligence: The Search for Coherence' (1997) 50 CLP 69, 76).

¹⁷¹ *Donoghue v Stevenson* [1932] AC 562 (HL), 589.

¹⁷² *ibid* 580.

¹⁷³ *ibid* 580-81. Whether Lord Atkin's conception of proximity *actually* imposed any additional limitations on the foreseeability-based test is discussed further in Chapter Three.

¹⁷⁴ Martin R Taylor, 'Mrs Donoghue's Journey' in Burns (ed), *Donoghue v Stevenson and the Modern Law of Negligence: the Paisley Papers: the Proceedings of the Paisley Conference on the Law of Negligence* (1991) 33.

hearing of evidence, and Mrs Donoghue never proved that there was really a snail in the ginger beer.¹⁷⁵

In light of the five individual speeches, identifying a clear ratio decidendi from *Donoghue v Stevenson* was no simple task and there has been much discussion as to what, exactly, it was.¹⁷⁶ At its narrowest, it had overruled *Winterbottom v Wright* and stood for nothing more than that a manufacturer now owed a duty to consumers. Indeed, this was the interpretation favoured by most commentators,¹⁷⁷ including the reporter who authored the ‘somewhat conservatively worded headnote.’¹⁷⁸ Then there was the view that it had simply approved the multifarious approach to duties, which could be extended only by close analogy to existing duties. This appeared to be the view of Lord Macmillan, who based his finding for the pursuer on the fact that ‘the *categories* of negligence are never closed.’¹⁷⁹ The wider view, however, was a rejection of the multifarious approach to duties of care and the adoption of a test whereby duties of care were now owed to anyone who had suffered an injury to their ‘life or property’¹⁸⁰ and could be considered one’s ‘neighbour,’ as per Lord Atkin’s formula. This is undeniably the popular view of the case.

Whatever the true ratio of the case, it could no longer be said that duties of care were ‘a subject which is not to be talked about.’¹⁸¹ On the contrary, ‘The factors underlying the decision to recognise a new duty of care [were] now the subject of open analysis and discussion.’¹⁸²

¹⁷⁵ William W McBryde, ‘*Donoghue v Stevenson*: The Story of the “Snail in the Bottle” Case’ in AJ Gamble (ed), *Obligations in Context: Essays in Honour of Professor DM Walker* (W Green 1990) 26.

¹⁷⁶ See, for example, Heuston (n 99) 5-10; Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 190-91.

¹⁷⁷ See, for example, the case notes in (1932) Sol J 387; [1933] CLJ 116; (1932) 173 LT 411; (1932) 174 LT 399; (1932) 74 LJ 75; (1932) 10 Can Bar Rev 478. See also, Ibbetson, *A Historical Introduction to the Law of Obligations* (n 9) 190.

¹⁷⁸ *Candler v Crane, Christmas & Co* [1951] 2 KB 164 (CA), 189 (Asquith LJ).

¹⁷⁹ *Donoghue v Stevenson* [1932] AC 562 (HL), 619 (emphasis added).

¹⁸⁰ *ibid* 599 (Lord Atkin).

¹⁸¹ Green (n 118) 1024.

¹⁸² Heuston (n 99) 24.

IV. Conclusion

Prior to the emergence of negligence as an independent wrong, there was little need for a duty of care; the discrete nature of the wrongs in which negligence was required performed essentially the same function, limiting liability for negligence to a set of defined situations. As negligence developed into a wrong in its own right, however, its potential reach was practically limitless, yet few chose to make use of the emerging action, and so there was no immediate need to impose restrictions on its scope. On the contrary, duty was first employed as a way of *expanding* the scope of negligence, by reformulating breaches of contractual duties, which arose by reason of agreement, as breaches of tortious duties, which arose by reason of law. Over time, this terminology spread from relationship negligence to non-relationship negligence, and, eventually, negligence was no longer actionable without a duty. As the action for negligence expanded, however, the focus of duty changed from inclusionary to exclusionary. Yet this was not because duty was the *only* way to limit liability for negligence, but, as a result of the division of functions between judge and jury, because it was the most convenient.

By the last quarter of the nineteenth century, although duty was firmly established into the analysis of liability for negligence, the courts were yet to offer an adequate explanation for why a duty existed in one situation but not another. Brett MR was the first to make such an attempt and his explanation was that duties were of uniform content (duty to take care), and that their scope depended on the idea of foreseeability. Although Brett MR's explanation was eventually rejected, the idea that duty depended on some notion of foreseeability was not easily forgotten. The climax of this development was in 1932, when Lord Atkin pronounced his neighbour dictum: the duty, as Brett MR had suggested, was a duty to take care, and its existence depended on a modified version of Brett MR's foreseeability formula. Although judicial development of the duty test has continued over the last 80 years, the general position remains relatively unchanged: the question of when damage caused by another's careless conduct becomes actionable is determined by reference to the duty of care.

Lord Atkin's neighbour principle is, however, only the beginning of the story, and so, in Chapter Three, we will explore the various other methods that have been used to determine the existence of a duty of care, both by past and modern courts.

3. The Methods for Determining the Existence of a Duty of Care

*The development of the tort of negligence since the seminal case of *Donoghue v Stevenson* has not been one of steady advance along a broad front. It has been a much more confused series of engagements with salients and beachheads, and retreats as well as advances. It has sometimes been only long after the event that it has been possible to assess the true significance of some clash of arms.*

- Lord Walker in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, 209.

I. Introduction

The question ‘Who, then, in law, is my neighbour?’¹ has caused courts, lawyers, and academics alike considerable consternation since it was first posed by Lord Atkin over 80 years ago. Despite the various attempts to answer it, usually in the form of general duty ‘tests,’ no simple method for determining the existence of a duty of care has emerged. In Chapter Three, we will trace the development of these various methods, as well as examining why they have generally been of limited success. In particular, we will see how Lord Atkin’s neighbour dictum soon proved to be inadequate as a general duty criterion, leading, initially, to an apparent return to the multifarious approach, and, later, to a number of further attempts at ostensibly all-encompassing generalised tests. The common theme throughout is the difficulty the courts have faced in articulating a test that struck the right balance; a test that was broad enough to explain the existing duty situations, but not so broad as to permit recovery in a raft of hitherto unrecognised duty situations. We will also see how some methods reject the use of general tests altogether, preferring to instead determine the existence of a duty via narrower and more fact-specific principles.

¹ *Donoghue v Stevenson* [1932] AC 562 (HL) (*‘Donoghue v Stevenson’*).

II. The aftermath of *Donoghue v Stevenson*

As we saw in Chapter Two, prior to *Donoghue v Stevenson* duties of care were imposed somewhat arbitrarily, rather than in accordance with any sort of general conception. Lord Atkin's neighbour dictum, however, was an attempt at such a general conception; one that encapsulated the entirety of the wide range of discrete duty situations. To some extent, his attempt initially proved quite successful, with a number of courts seizing upon his generalisation to justify the imposition of a duty of care in hitherto unrecognised situations. For example, the neighbour test was relied on to impose a duty of care on the manufacturers of woollen-underpants,² independent lift contractors,³ car-dealers,⁴ and even tombstone makers.⁵ Perhaps most significantly, however, in *Stennett v Hancock*,⁶ the neighbour principle was relied on to justify the imposition of a duty of care on a repairer towards not only his client, but towards *any person* foreseeably physically injured as a result of their negligent repairs. Of course, as the neighbour dictum was a 'general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances,'⁷ it could be used to explain not only where a duty *did* exist but also where a duty did *not* exist. And so, in *Bourhill v Young*,⁸ the neighbour dictum was relied on to deny that any duty was owed to a plaintiff who had suffered serious shock, leading to a miscarriage, as a result of hearing, but not seeing, a motorcycle accident involving a stranger.⁹

Nevertheless, whilst some judges were happy to adopt the neighbour dictum as a general principle of duty, others were not. In particular, aside from doubts about whether the

² *Grant v Australian Knitting Mills Ltd* [1936] AC 562 (PC).

³ *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343 (CA).

⁴ *Herschtal v Stewart & Ardern Ltd* [1940] 1 KB 155 (KB); *Andrews v Hopkinson* [1957] 1 QB 229 (QB).

⁵ *Brown v Cotterill* (1934) 51 TLR 21 (KB).

⁶ [1939] 2 All ER 578 (KB).

⁷ *Donoghue v Stevenson* 580.

⁸ [1943] AC 92 (HL) ('*Bourhill*').

⁹ *ibid* 102.

neighbour dictum formed part of the ratio of the case,¹⁰ it was widely believed that the dictum required little more than foreseeability of harm to be satisfied and so, much like Brett MR's earlier attempt at a duty formula in *Heaven v Pender*,¹¹ too widely drawn to serve as a useful statement as to when one party owes another a duty of care.¹² There was, of course, the fact that Lord Atkin had explicitly stated that a duty test based on foreseeability alone (i.e. Brett MR's formulation in *Heaven v Pender*¹³) was 'demonstrably too wide,'¹⁴ and that his 'neighbour dictum,' whilst based primarily on reasonable foreseeability of harm, was '*limited by the notion of proximity*';¹⁵ however, Lord Atkin's definition of 'proximity'¹⁶ was generally seen to be synonymous with his neighbour dictum itself, such that 'neighbourhood,' 'proximity' and 'reasonable foreseeability,' were merely different ways of saying the same thing.¹⁷ Based on this

¹⁰ Stone, for example, suggested that the decision could logically be confined to Scots widows caused by the presence of dead snails in opaque bottles: J Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control; a Study in Jurisprudence* (Stevens 1947) 187-88. See also: GJB Hughes, *Jurisprudence* (Butterworth & Co 1955) 232-34; RWM Dias, 'The Breach Problem and the Duty of Care' (1956) 30 TulLRev 377, 402 (fn 89); RFV Heuston, 'Donoghue v Stevenson in Retrospect' (1957) 20 MLR 1, 5-6. For more modern commentary, see DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 190-91; Keith Stanton, 'The Neighbour Principle in the 21st Century: Yesterday's Revolution' (2012) 20 Tort L Rev 61, 62; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2012) 109-110.

¹¹ (1883) 11 QB 503 (CA) ('*Heaven v Pender*').

¹² See, for example, Scrutton LJ in *Farr v Butters Bros* [1932] KB 606 (CA), 614: 'It is quite clear that the statement ... [of] Lord Atkin, needs qualification ... [T]he general proposition stated by Lord Atkin ... is wider than is necessary...'

¹³ *Heaven v Pender* 509.

¹⁴ *Donoghue v Stevenson* 580.

¹⁵ *ibid* 581 (emphasis added).

¹⁶ 580-81 (footnotes omitted): 'This [the neighbour dictum] appears to me to be the doctrine of *Heaven v. Pender* as laid down by Lord Esher (then Brett MR) when it is limited by the notion of proximity ... if proximity be not confined to mere physical proximity, but be used ... to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.'

¹⁷ See, for example: WL Morison, 'A Re-Examination of the Duty of Care' (1948) 11 MLR 9, 24; JG Fleming and WL Morison, 'Duty of Care and Standard of Care' (1953) 1 SydLR 69, 71; MA Millner, *Negligence in Modern Law* (Butterworths 1967) 13; Julius Stone, *Precedent and Law* (Butterworths 1985) 265; JA Smillie, 'The Foundation of the Duty of Care in Negligence' (1989) 15 MonLR 302, 310, 314; AJE Jaffey, *The Duty of Care* (Dartmouth 1992) 6, 11; JG Fleming, *The Law of Torts* (9th edn, Law Book Co 1998) 151; A Beever, *Rediscovering the Law of Negligence* (Hart 2007) 184; McHugh J in *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317, 356; Lord Oliver in *Murphy v Brentwood DC* [1991] 1 AC 398 (HL), 486; Iacobucci, J in *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193 [47]. Compare the views of Katter, who argues that Lord Atkin's notions of proximity and reasonable foreseeability were distinct: Norman Katter, 'Who Then in Law is My Neighbour?' (2004) 12 Tort L Rev 85, 90.

understanding, the existence of a duty of care continued to be denied in many circumstances that clearly satisfied Lord Atkin's test.

It was clearly foreseeable, for example, that making a negligent misstatement could cause a pecuniary loss to anyone who relied on that misstatement. Yet, in *Candler v Crane Christmas & Co*,¹⁸ despite acknowledging that the circumstances of the case satisfied the neighbourhood principle,¹⁹ the court denied that a duty could exist in the absence of fiduciary relationship, a contract, or fraud.²⁰ Similarly, Lord Atkin's statement, 'You must take reasonable care to avoid acts *or omissions* which you can reasonably foresee would be likely to injure your neighbour,'²¹ appeared to obviate the 'vital'²² and 'fundamental'²³ distinction between acts and omissions. Yet, in *East Suffolk Rivers Catchment Board v Kent*,²⁴ it was confirmed that the neighbour dictum was not to be taken literally in such cases. The existing duty owed to trespassers, which conferred immunity on occupiers for all but the deliberate infliction of harm,²⁵ also ought to have been affected by Lord Atkin's test; clearly it was foreseeable that failing to take care of your property could injure those who will foreseeably come on to it, whether as visitors or trespassers. Yet, in *Edwards v Railway Executive*,²⁶ the House of Lords held that the old law continued to apply.²⁷ Similarly, the rule that lessors of defective premises owed

¹⁸ [1951] 2 KB 164 (CA). Though note the dissent of Denning LJ.

¹⁹ *ibid* 195 (Asquith LJ); 200 (Cohen LJ).

²⁰ *ibid*, following *Derry v Peek* (1889) 14 AC 337 (HL). See the judgements of Asquith and Cohen LJ generally. Note also *Le Lievre v Gould* [1893] 1 QB 491 (CA), 502, where Bowen LJ said 'the law of England ... does not consider that what a man writes on paper is like a gun or other dangerous instrument...'

²¹ *Donoghue v Stevenson* 580 (emphasis added).

²² *Dias* (n 10) 402 (fn 89).

²³ JC Smith and Peter Burns, 'Donoghue v Stevenson - The Not So Golden Anniversary' (1983) 46 MLR 147, 154.

²⁴ [1941] AC 74 (HL).

²⁵ This had been most recently affirmed in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 (HL), 371 (Viscount Dunedin), affirming Hamilton LJ in *Latham v Johnson* [1913] 1 KB 398 (CA), 410, who had defined the duty of an occupier as nothing more than 'not to injure the trespasser wilfully ... otherwise a man trespasses at his own risk.'

²⁶ [1952] AC 737 (HL).

²⁷ See also *Cairns v St Marylebone BC* (1954) *The Times*, 8 December 1954 (QB), where, to counsel's suggestion that the neighbour dictum justified extending an occupier's duty of care to trespassers, Glyn-Jones J respond with an astonished 'My God!', and ultimately found the defendants 'clearly not liable': *ibid* 11.

no duty, outside of contract, to their lessees, or their lessees' lawful guests, who were foreseeably injured as a result of those defective premises,²⁸ also ought to have been wiped out by the neighbour dictum, yet was upheld in both *Otto v Bolton*²⁹ and *Travers v Gloucester Corporation*.³⁰ Even in cases of defective products causing foreseeable injury to consumers the neighbour dictum did not apply unconditionally, and a duty of a care was often denied where the defect could have been discovered by intermediate examination prior to the injury.³¹

Despite, then, the potentially wide reaching effects of Lord Atkin's test, it did *not* provide a 'general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.' Indeed, as noted by Wrottesley J in 1939, outside of cases involving 'negligence which results in danger to life, danger to limb, or danger to health,'³² the neighbour dictum had little application; and even within such cases its application was not universal, given that injuries to 'life, limb, or health' caused by goods with reasonably discoverable defects, injuries to trespassers, or injuries that arise as a result of defective premises, gave rise to no duty. As late as 1957, 25 years after *Donoghue v Stevenson* had been decided, Heuston therefore felt able to say:

²⁸ *Cavalier v Pope* [1906] AC 428 (HL). This was the rule Lord Buckmaster had in mind when he said, at *Donoghue v Stevenson* 577: 'If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon.'

²⁹ [1936] 2 KB 46 (KB).

³⁰ [1947] 1 KB 71 (KB).

³¹ *Denny v Supplies & Transport Co* [1950] 2 KB 374 (CA); *Buckner v Ashby & Horner Ltd* [1941] 1 KB 321 (CA); *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343 (CA); *Dransfield v British Insulated Cables Ltd* [1937] 4 All ER 382 (KB); *London Graving Dock Co v Horton* [1951] AC 737 (HL). See also Heuston (n 10) 13-14, D Nolan, 'Product Liability' in K Oliphant (ed), *Common Law Series: The Law of Tort* (3rd edn, LexisNexis 2015) 19.32. The 'intermediate examination' exception was based on Lord Atkin's comments in *Donoghue v Stevenson* at pp582-83: '[A] proximate relationship ... may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed.' For criticism of Lord Atkin for equating proximity in defective goods cases with the lack of an opportunity of intermediate examination/inspection, see, for example, G Williams, 'Negligent Contractors and Third Parties' (1942) 42 LJ 115, 124, FC Underhay, 'Manufacturers' Liability: Recent Developments Since *Donoghue v Stevenson*' (1936) 16 Can Bar Rev 283, 286.

³² *Old Gate Estates Ltd v Toplis & Harding & Russell* [1939] 3 All ER 209 (KB), 217.

[The neighbour principle] cannot properly be treated as being, a general formula which will explain all conceivable cases of negligence. Even at a fairly high level of abstraction it needs considerable qualifications and reservations before it can be accepted.³³

The limited effects of the neighbour principle, and the court's continued reliance on pre-*Donoghue v Stevenson* 'exceptions' to the neighbour principle meant that, in practice, a duty of care was only recognised where it fell into one of the discrete categories recognised by the law, and so it was the multifarious approach to duty, that had been favoured by Lord Macmillan, that continued to dominate.³⁴

III. The staggering march of negligence³⁵

Much of the reluctance of the courts to depart from the multifarious approach to duty can be put down to the doctrine of precedent. Both trial judges and the Court of Appeal were bound by the existing authorities, whilst the House of Lords was, at the time, subject to the doctrine of self-binding precedent.³⁶ There was certainly also much sympathy for the view that 'the duty to be careful only exists where the wisdom of our ancestors has decreed that it should exist.'³⁷ Not everyone, however, was prepared to allow legal history to dictate the progression of the common law, and by the middle of the twentieth-century, more progressive views were beginning to emerge. As early as 1943, Lord Wright wrote that '[T]he instinct of inertia is as potent in judges as in other people ... Precedents would still be precedents, though not coercive

³³ Heuston (n 10) 23.

³⁴ See, generally, *ibid*; Ibbetson (n 10) 191. See also Nicholas J McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) 106: 'Lord Atkin's "neighbour principle" had very little impact in terms of being used by the courts after *Donoghue v Stevenson* to determine whether or not a defendant owed a claimant a duty of care.'

³⁵ For the 'Staggering March of Negligence' outside of the duty context, see: Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1999).

³⁶ This is usually attributed to Lord Halsbury's decision in *London Street Tramways Co Ltd v London CC* [1898] AC 375 (HL), but can in fact be traced back to Lord Campbell in *Beamish v Beamish* (1861) 9 HL Cas 274, 338-9; 11 ER 735, 761. See also Louis Jacques Blom-Cooper, '1966 and All That: The Story of the Practice Statement' in Louis Blom-Cooper, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords: 1876-2009* (OUP 2009) 129.

³⁷ PA Landon, 'Notes' (1941) 57 LQR 179, 183. See also Heuston (n 10) 4.

but merely persuasive,³⁸ and similar calls for change continued in the 1950s, many of which came from Lord Denning. In 1959, for example, Lord Denning wrote:

It seems to me that when a particular precedent - even of your Lordships' House - comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedent at the expense of fundamental principle.³⁹

However, it was not until the 1960s that, at least in relation to the duty of care, these views began to be realised. As Mitchell explains:

In 1963 the House of Lords as a judicial body was in transition. Throughout the 1950s, under the leadership of Viscount Simonds, the House had taken a very limited view of its role in developing the Common Law. Certainty and precedent were the dominant themes. By the 1960s, however, a more nuanced approach was beginning to appear. Bold creativity of the kind practiced by Lord Denning was still untypical, but there was an emerging sense that certain legal areas, at least, were suitable for judicial development.⁴⁰

In particular, the courts were becoming more assertive and daring in their treatment of precedent,⁴¹ and the constraints of legal history were loosening their grip. The long list of exceptions to *Donoghue v Stevenson* soon began to be eroded.⁴²

One of the earliest changes came in the area of pure economic loss, in what was the most significant duty case since *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.⁴³ The plaintiff was a firm of advertising agents who had purchased forward television and print advertisements on behalf of their clients. As was the practice of the time, the plaintiff became personally liable for the cost of the ads they purchased. After becoming

³⁸ Blom-Cooper (n 36) 130.

³⁹ *London Transport Executive v Betts* [1959] AC 213 (HL), 247. See also Denning LJ in *Candler v Crane, Christmas & Co* [1951] 2 KB 164 (CA), 178; and Blom-Cooper (n 36) 130.

⁴⁰ Paul Mitchell, '*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Torts* (Hart 2010) 181.

⁴¹ *ibid.*

⁴² JC Smith, 'Clarification of Duty - Remoteness Problems through a New Physiology of Negligence: Economic Loss, a Test Case' (1974) 9 *UBCLawRev* 213, 217.

⁴³ [1964] AC 465 (HL) ('*Hedley Byrne*').

concerned about a client's creditworthiness, the plaintiff asked their bankers to make appropriate enquiries about the client's financial position. The plaintiff's bankers, in turn, asked the defendant, being the client's bankers, to provide a credit reference. The credit reference, despite being marked 'without responsibility on the part of the [defendant],' came back favourable, and so the plaintiff purchased the advertising space on behalf of their client. Shortly thereafter, however, the client went into liquidation and the plaintiff lost £17,000. The plaintiffs sued the defendants on the basis that they would not have purchased the advertisements if they had known the client's true financial position. Despite the common law's longstanding reluctance to impose a duty in relation to pure economic loss caused by negligent misstatements,⁴⁴ the House of Lords held that, in certain circumstances at least, a duty of care *could* exist.⁴⁵ Although the decision did not depend on Lord Atkin's neighbour principle,⁴⁶ it nevertheless demonstrated that the law relating to duty was evolving. As to why a duty could exist, whilst a variety of reasons were proposed, the majority appear to have required that the defendant 'assumed responsibility' for the quality of their statement for the benefit of the plaintiff, and that the defendant knew or should have known that the plaintiff would rely on that statement.⁴⁷ Despite the Court's lengthy analysis of the law, considering that the statement had been made 'without responsibility,' no duty was held to arise on the facts.⁴⁸ *Hedley Byrne* nevertheless represented a significant development in the way the courts approached the duty

⁴⁴ *Cattle v Stockton Waterworks* (1875) 10 QB 453 (QB); *Simpson v Thompson* (1877) 3 AC 279 (HL); *Derry v Peek* (1889) 14 AC 337 (HL); *Le Lievre v Gould* [1893] 1 QB 491 (CA); *Old Gate Estates Ltd v Toplis & Harding & Russell* [1939] 3 All ER 209 (KB); *Candler v Crane Christmas & Co* [1951] 2 KB 164 (CA).

⁴⁵ Technically, the House of Lords did not overrule the still binding *Derry v Peek* (1889) 14 AC 337 (HL), as they continued to be bound by their prior decisions until 1966 (see the *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234; [1966] 3 All ER 77). As Mitchell says, the better view is that they circumvented the still-binding authorities not by overruling them, but by 'reinterpreting' and 'distinguishing' them: Mitchell (n 40) 178.

⁴⁶ This was made explicitly clear by Lord Reid (482), Lord Devlin (516, 525) and Lord Pearce (536). For further discussion, see McBride and Bagshaw (n 34) 106 (fn 19.)

⁴⁷ Lord Reid (486-87), Lord Morris (494, 503), Lord Hodson (514), and Lord Pearce (538).

⁴⁸ To which Honore commented that the court had gone 'to the village via the moon': A Honore, 'Hedley Byrne & Co Ltd v Heller & Partners Ltd' (1964-1965) 8 JSPTL 284, 291. Though even if the disclaimer had *not* been given, it seems that the court would have decided the same way: Mitchell (n 40) 177.

issue. In particular, it appeared to create a new test for the existence of a duty of care, and in doing so expanded the law of negligence into the realm of pure economic loss.

The reach of the duty of care was expanded elsewhere too. The minimal duty to trespassers, for example, had by the 1950s come to be seen as particularly harsh, especially as it applied to children.⁴⁹ The law's initial response was to find implied licences, so that trespassing children were transformed into lawful visitors.⁵⁰ Of course, this solution, which depended on a fiction, was clearly unsatisfactory, and so in *Videan v British Transport Commission*⁵¹ the Court of Appeal relied on Lord Atkin's neighbour dictum to extend an occupier's duty to trespassers whose presence was foreseeable,⁵² and also found that the content of the duty was one of 'common humanity.'⁵³ This approach was later approved by the House of Lords in *British Railways Board v Herrington*.⁵⁴

Liability for omissions was also considerably expanded. In *Dutton v Bognor Regis Urban DC*,⁵⁵ for example, the defendant council, in the course of a building inspection, failed to notice that a property's foundations did not comply with the relevant byelaws. Although the council had a statutory power to perform the inspection, they were under no public obligation to do so. A subsequent purchaser sued the council for negligence when subsidence occurred. The majority of the Court of Appeal found that the defendant owed a duty to the plaintiff on the

⁴⁹ See, for example, *Pearson v Lambeth LBC* [1950] 2 KB 353 (CA); *Williams v Cardiff Corp* [1950] 1 KB 514 (CA). See also Denning LJ's comments in *Videan v British Transport Commission* [1963] 2 QB 650 (CA), 663: 'This rule seems fair enough if you put all trespassers in the same bag as burglars or poachers and treat them all alike.'

⁵⁰ See *Cooke v Midland Great Western Railway of Ireland* [1909] AC 229 (HL) and *Lowery v Walker* [1911] AC 10 (HL). See also the discussion of Denning LJ in *Videan v British Transport Commission* [1963] 2 QB 650 (CA), 663-64.

⁵¹ [1963] 2 QB 650 (CA).

⁵² *ibid* 672-3 (Harman LJ); 665 (Denning LJ) ('at least in the case of activities taking place, opposed to doing nothing, in which case his liability is that of an occupier:' at 667); 679-80 (Pearson LJ). A similar decision had been handed down by the High Court of Australia several years prior: *Thompson v Bankstown Municipal Council* (1953) 87 CLR 619.

⁵³ *ibid* 680-81 (Pearson LJ).

⁵⁴ [1972] AC 877 (HL).

⁵⁵ [1972] 1 QB 373 (CA).

basis that she was someone closely and directly affected by the inspector's negligence, and so fell within Lord Atkin's neighbour principle.⁵⁶

Even the rule that manufacturers owed no duty to those injured by their defective products where there had been a reasonable opportunity of intermediate examination, at that point the primary obstacle to the neighbour principle providing a general rule for when a duty would be held to exist in relation to physical injuries,⁵⁷ was effectively abolished in *Griffiths v Arch Engineering Co Ltd*.⁵⁸

[T]he importance laid on the possibility—that is, the probability—of intermediate examination is merely one facet of the wider principle as it has now been formulated, namely, was there a reasonably foreseeable risk that the plaintiff in fact injured would sustain injury if no precautions were taken to guard against the risk.⁵⁹

From then on, the possibility of intermediate examination was dealt with elsewhere in the negligence enquiry⁶⁰ (except insofar as the possibility of intermediate examination made it unforeseeable that the plaintiff would suffer any harm), and so, save for a *very* small number of exceptions,⁶¹ conduct that created a foreseeable risk of *physical* harm to the plaintiff always attracted a duty of care.

Arguably, however, the most profound development in the test for the existence of a duty of care came in 1970. In *Home Office v Dorset Yacht Co Ltd*,⁶² the Home Office was sued for

⁵⁶ *ibid* 400, 410-11. Technically, the Court of Appeal did not overrule *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL), a decision of the House of Lords, but distinguished it on the somewhat questionable grounds that failing to repair a dam wall within a reasonable time, as had been the case in *East Suffolk Rivers Catchment Board v Kent*, amounted to nonfeasance, whilst failing to detect a breach of the byelaws, as had been the case here, was misfeasance.

⁵⁷ The other obstacle, being the rule that lessors of defective premises owed no duty to take care of their lessees and their guests, discussed at (n 28), had earlier been abrogated by s4 of the Occupiers' Liability Act 1957 (later replaced by s4 of the Defective Premises Act 1972).

⁵⁸ [1968] 3 All ER 217 (Newport Assizes). For an overview of the rule's decline in the preceding years, see Heuston (n 10) 13-14.

⁵⁹ [1968] 3 All ER 217 (Newport Assizes), 222 (Chapman J).

⁶⁰ M Lunney and K Oliphant, *Tort Law: Text and Materials* (5th edn, OUP 2013) 117; Nolan (n 31) 19.32. Though note Lord Keith in *Murphy v Brentwood DC* [1991] 1 AC 398 (HL), 464, who commented that 'there may [nevertheless] be room for disputation.'

⁶¹ See, for example, *Shaw Savill & Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, concerning the so-called 'combat immunity.'

⁶² [1970] AC 1004 (HL).

failing to prevent seven inmates from escaping from a Borstal institution and damaging the plaintiffs' nearby yacht. As there was little authority on point, save for a County Court case that based the existence of a duty on foreseeability alone,⁶³ the House of Lords took the opportunity to clarify the law relating to the existence of a duty of care. Most significant was the judgment of Lord Reid:

About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence, each with its own rules, and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the courts had from time to time recognised new duties and new grounds of action. But the heroic age was over; it was time to cultivate certainty and security in the law; the categories of negligence were virtually closed. The Attorney-General invited us to return to those halcyon days, but, attractive though it may be, I cannot accede to his invitation.

In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue v. Stevenson* may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.⁶⁴

Lord Reid recognised that Atkin's neighbour dictum, whilst useful as a starting point, was too wide to explain *all* of the duty cases. Much like Lord Atkin had qualified Brett MR's test with his notion of proximity, Lord Reid qualified Lord Atkin's test with the proviso that it only applied where there was not some 'justification or valid explanation' why it ought not. This represented the first attempt at a general duty formulation since *Donoghue v Stevenson*.

However, whilst Lord Reid's approach certainly appeared to explain the approach taken in the existing duty cases, his speech had nevertheless been given alone. It was to be another eight years before the House of Lords confirmed that Lord Reid's approach was, indeed, the correct one.

⁶³ *Greenwell v Prison Commissioners* (1951) 101 LJ 486 (CC).

⁶⁴ [1970] AC 1004 (HL), 1026-1027.

IV. The 'rise and fall' of *Anns v Merton*

In *Anns v Merton LBC*⁶⁵ the defendant local authority approved building plans for a block of flats which required the foundations to be three feet or deeper. The building contractors nevertheless only dug the foundations to a depth of two feet and six inches. Eight years later structural defects began to occur in the building, allegedly as a result of the shallow foundations. The plaintiffs, who at that point were lessees of the building, sued the defendant for their alleged negligence in failing to ensure that the builders complied with the approved plans. On the question of duty, Lord Wilberforce, with whom the rest of the House of Lords concurred, said:

Through the trilogy of cases in this House, *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and *Home Office v Dorset Yacht Co Ltd*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.⁶⁶

This approach to duty, which became known as the 'two-stage' test, was effectively a restatement of the test proposed by Lord Reid in *Home Office v Dorset Yacht Co Ltd*; only now, it had the full support of the House of Lords. Significantly, just as Lord Atkin appeared to have done in *Donoghue v Stevenson*,⁶⁷ Lord Wilberforce, too, appeared to have used the term 'proximity' as a mere synonym for foreseeability.⁶⁸

⁶⁵ [1978] AC 728 (HL).

⁶⁶ *Anns v Merton LBC* [1978] AC 728 (HL), 751-52 ('*Anns*').

⁶⁷ See discussion at (n 17).

⁶⁸ Richard Kidner, 'Resiling From the *Anns* Principle: The Variable Nature of Proximity in Negligence' (1987) 7 LS 319, 322, 327-28; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 477-78 (Brennan J), 506 (Deane J); *Murphy v Brentwood DC* [1991] 1 AC 398 (HL), 487 (Lord Oliver). See also the comments of Lord

The two-stage test represented a significant change of focus. Whereas in the past the onus was on the *plaintiff* to establish why a duty ought to exist, now, provided that some foreseeable damage had been suffered by the plaintiff, the onus was on the *defendant* to provide some explanation why a duty ought to not exist and why some exception ought to apply.⁶⁹ All foreseeable losses were now subject to a prima facie duty of care and the multifarious approach to duty was well and truly a thing of the past. As Ibbetson explains, *Anns* confirmed that:

[T]he law of negligence was beginning to be conceptualized in terms of an ocean of liability for carelessly causing foreseeable harm, dotted with islands of non-liability, rather than as a crowded archipelago of individual duty situations.⁷⁰

The two-stage test was subsequently interpreted by some courts as an invitation to reconsider existing authority and overturn long-established areas of non-liability.⁷¹ In *The Irene's Success*,⁷² for example, Lloyd J held that cases involving pure economic loss had to be reconsidered in light of *Anns*, whilst in *Ross v Caunters*,⁷³ another case of pure economic loss, Megarry VC relied on the *Anns* test to circumvent the *Hedley Byrne* reliance requirement. However, the so called 'high-watermark' of the *Anns* approach occurred in *Junior Books Ltd v Veitchi Co Ltd*.⁷⁴ The defenders were engaged as sub-contractors to lay a floor in the pursuer's factory, but the defenders did a poor job and the floor soon began to crack. For reasons that are not clear, the pursuers sued the defenders, rather than the primary contractors, for the cost of replacing the defective floor: a purely economic loss. Whilst the existence of a duty of care could have

Oliver in *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL), 645-47, and the detailed discussion of the first stage of *Anns* in JA Smillie, 'Principle, Policy and Negligence' (1984) 11 NZULR 111, 132, 136.

⁶⁹ See also: Smith and Burns (n 23) 150; JC Smith, 'The Mystery of Duty' in L Klar (ed), *Studies in Canadian Tort Law* (Butterworths 1977) 6; Lord Goff in *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL), 280.

⁷⁰ Ibbetson (n 10) 192-93.

⁷¹ Lunney and Oliphant (n 60) 137; EW Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) 5-017; Smillie, 'The Foundation of the Duty of Care in Negligence' (n 17) 306.

⁷² *Schiffahrt & Kohlen GMBH v Chelsea Maritime Ltd (The Irene's Success)* [1982] QB 481 (QB), 484 (Lloyd J). This was subsequently overruled by *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL).

⁷³ [1980] Ch 297 (Ch), 310-11, 313-14.

⁷⁴ [1982] 1 AC 520 (HL).

conceivably been justified under the principle in *Hedley Byrne*,⁷⁵ the majority of the House of Lords instead relied on the two-stage *Anns* test, effectively denying any distinction between physical damage and pure economic loss. As Smith and Burns later commented, after *Junior Books*, 'The sorts of situations in which pure economic loss is now recoverable are so numerous that it would be difficult to state an exclusionary rule clearly.'⁷⁶

The *Anns*-based expansion of the law of negligence, however, particularly in the area of pure economic loss, soon came to be seen as regrettable. *Anns* was simply too easy to satisfy, and 'the pendulum [had] now swung from over-particularisation to the other extreme of over generalisation...';⁷⁷ as a result, any control the House of Lords had once had over setting the boundaries of the law of negligence was practically gone. The earliest sign of the retreat from *Anns* occurred in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson*,⁷⁸ where Lord Keith, the most vocal critic of *Anns*, said of the test:

There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. ... in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it *should* be so.⁷⁹

Later cases confirmed the retreat,⁸⁰ and it soon became clear that *Anns* was not a license to reconsider existing authority and only applied to novel cases,⁸¹ and that foreseeability of harm alone was not enough to justify the imposition of a duty of care:

⁷⁵ Indeed, this is generally how the case is rationalised today: *D&F Estates v Church Commissioners* [1989] 1 AC 177 (HL), 215 (Lord Oliver); *Murphy v Brentwood DC* [1991] 1 AC 398 (HL), 466 (Lord Keith), 481 (Lord Bridge). See also McBride and Bagshaw (n 34) 183, Lunney and Oliphant (n 60) 429-30.

⁷⁶ Smith and Burns (n 23) 152.

⁷⁷ *ibid* 162. Note that some attribute this shift to a Conservative government and change of Lordships. See, for example, David Howarth, 'Negligence After Murphy: Time to Re-Think' (1991) 50 CLJ 58, 59; Weir (n 35) 137 (fn 214). Compare John G Fleming, 'Requiem for Anns' (1990) 106 LQR 525 (who blames the 'ill-conceived decision in *Junior Books Ltd v Veitchi Co Ltd*'); and Robert Stevens, 'Torts' in Louis Blom-Cooper, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords: 1876-2009* (OUP 2009) 636 (who blames the conflation of *injuria* with *damnum*).

⁷⁸ [1985] AC 210 (HL).

⁷⁹ *ibid* 240-41 (emphasis added).

⁸⁰ *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC) 190-4 (Lord Keith); *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC) 501 (Lord Keith). See also the comments of Lord Oliver in *Caparo*

It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present. The nature of the ingredient will be found to vary in a number of different categories of decided cases.⁸²

At least insofar as it applied to the liability of local authorities for purely economic loss, *Anns* was eventually overruled in *Murphy v Brentwood DC*,⁸³ where the House of Lords unanimously declared that it had been wrongly decided. Of the decision, Howarth said: '[W]hen the Law Lords, by 7-0, declare unsound a case that has been cited in 189 English cases in only 13 years (and until recently mostly with approval) we know something extraordinary has happened.'⁸⁴ Of course, given that *Anns* had been so completely emasculated in the preceding years, its ultimate end, as general approach to duty questions, had occurred many years prior, and so, in that sense, *Murphy v Brentwood DC* was of little consequence; besides, the House of Lords had revisited the general duty issue in the landmark decision of *Caparo Industries plc v Dickman*,⁸⁵ less than six months earlier.

V. *Caparo*

In *Caparo*, the plaintiff company made a successful takeover bid for another company, Fidelity, in reliance on an audit report that had been prepared by the defendants. Although the audit report showed that Fidelity had made a pre-tax profit of £1.2m, they had in fact made a loss of £400,000. The plaintiff sued the defendants for the loss they had suffered by overpaying for the shares as a result of the audit report. After the claim was struck out by the trial judge, a decision that was later reversed by the Court of Appeal, the House of Lords were, yet again, faced with the task of providing guidance as to when a duty of care does or does not exist. Lord Bridge, in

Industries plc v Dickman [1990] 2 AC 605 (HL), 647 (*Anns* was 'severely qualified by subsequent decisions'); and Lord Keith in *Murphy v Brentwood DC* [1991] 1 AC 398 (HL), 461.

⁸¹ *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL), 815 (Lord Brandon, with whom the rest of the court agreed).

⁸² *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL), 60 (Lord Keith).

⁸³ [1991] 1 AC 398 (HL) ('*Murphy v Brentwood DC*').

⁸⁴ Howarth (n 77) 58.

⁸⁵ [1990] 2 AC 605 ('*Caparo*').

his leading judgment, was reluctant to attempt any complete duty formulation, noting Lord Atkin's earlier warning that 'To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.'⁸⁶ Lord Bridge also highlighted the 'inability of any single general principle to provide a practical test which can be applied in every situation to determine whether a duty of care is owed...'⁸⁷ Notwithstanding these warnings, Lord Bridge then noted that, what emerges from the cases is that:

[I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.⁸⁸

Lord Bridge's dictum, which was almost a verbatim restatement of Bingham LJ's judgment in the Court of Appeal,⁸⁹ came to be known as the 'three-stage' test for the existence of a duty of care, as it required: (1) foreseeability; (2) proximity; and (3) that the imposition of a duty would be fair, just, and reasonable. Notwithstanding Lord Bridge's denial that any simple duty formula could possibly exist, the three-stage test has come to be regarded as the 'classic exposition of the modern approach to establishing a duty of care,'⁹⁰ and continues to represent the UK's approach to duty questions today.⁹¹

⁸⁶ *ibid* 616, citing *Donoghue v Stevenson* 580.

⁸⁷ *Caparo* 617. See also Lord Oliver (at p633): 'I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp.'

⁸⁸ *ibid* 617-18.

⁸⁹ *Caparo Industries plc v Dickman* [1989] QB 653 (CA) 678-79: 'The first is foreseeability ... The second is ... usually described as proximity ... The third requirement to be met before a duty of care will be held to be owed by A to B is that the court should find it just and reasonable to impose such a duty.'

⁹⁰ *Lunney and Oliphant* (n 60) 137.

⁹¹ *Customs and Excise Commissioners v Barclays Bank* [2007] AC 181 (HL) ('*Customs and Excise Commissioners v Barclays Bank*').

A. Foreseeability

As we have already seen, since *Donoghue v Stevenson*, foreseeability of harm to the plaintiff has always been a necessary, but not sufficient, requirement for a duty of care to exist.⁹² The rationale behind the requirement is that, in the eyes of the law, a defendant cannot be expected to exercise reasonable care towards the world at large, but only to those he can reasonably foresee could be affected by his actions; if the defendant cannot foresee that his actions will harm the claimant, then he cannot have a legal duty to take care to avoid harming them.⁹³ This is not to say, however, that harm to the *actual and specific* claimant must be foreseeable in order for a duty to be owed. Mr Stevenson, for example, could not deny the existence of a duty to Mrs Donoghue because he could not foresee that *Mrs Donoghue in particular*, a person whom he had never met, would consume his product. Rather, the foreseeability requirement merely requires that the defendant's conduct might foreseeably affect a person in her position, *or a class of persons to which she belonged*.⁹⁴ The nature, and necessity, of the foreseeability requirement will be further explored in Chapter Four.

B. Proximity

'Proximity' has been used as a determinant of a duty of care since at least the late nineteenth century,⁹⁵ and, as we saw, was central to the idea of a general duty principle in both *Donoghue v Stevenson* and *Anns*. Yet, as we also saw, in both cases, 'proximity' appeared to be being used as

⁹² Cf Beever (n 17) 120, who argues that foreseeability alone *is* sufficient.

⁹³ See, for example, A Robertson, 'Justice, Community Welfare and the Duty of Care' (2011) 127 LQR 370, 373; Christian Witting, 'The Three Stage Test Abandoned in Australia - Or Not?' (2002) 118 LQR 214, 218; J Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998) 61; JG Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 Can Bar Rev 471, 486; NJ McBride and R Bagshaw, *Tort Law* (3rd edn, Pearson Longman 2008) 59.

⁹⁴ *Farrugia v Great Western Railway* [1947] 2 All ER 565 (CA).

⁹⁵ *Le Lievre v Gould* [1893] 1 QB 491, 504 (CA) (Smith LJ): 'The decision of *Heaven v Pender* was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such *proximity* to the person or property of another that, if due care was not taken, damage might be done by the one to the other.'

little more than a synonym for foreseeability.⁹⁶ By the 1980s, however, the foreseeability-based understanding of proximity was being challenged, and proximity was developing into an important legal concept in its own right. In *McLoughlin v O'Brien*,⁹⁷ for example, Lord Wilberforce retreated from the foreseeability-based understanding of proximity, indicating that, at least in secondary psychiatric injury cases, proximity required closeness in 'time and space.'⁹⁸ Similarly, in *Yuen Kun-Yeu v A-G of Hong Kong*,⁹⁹ Lord Keith held that proximity referred to the 'the whole concept of necessary relationship between plaintiff and defendant,'¹⁰⁰ as 'Lord Atkin clearly had in contemplation that all the circumstances of the case, not only the foreseeability of harm, were appropriate to be taken into account in determining whether a duty of care arose.'¹⁰¹ This was elaborated upon even further by Bingham LJ in the Court of Appeal's decision in *Caparo*:

The approach will vary according to the particular facts of the case, as is reflected in the varied language used. But the focus of the inquiry is on the closeness and directness of the relationship between the parties. In determining this, foreseeability must, I think, play an important part: the more obvious it is that A's act or omission will cause harm to B, the less likely a court will be to hold that the relationship of A and B is insufficiently proximate to give rise to a duty of care.¹⁰²

This new understanding of proximity clearly involved considerations beyond reasonable foreseeability, and, soon after *Caparo*, came to be relied on to justify the determination of duty questions in a number of cases. In cases of negligent misstatements causing pure economic loss, for example, a *Hedley Byrne* type assumption of responsibility was typically understood as evidence of the requisite degree of proximity,¹⁰³ whilst in cases involving liability for the criminal

⁹⁶ See (n 17) and (n 68).

⁹⁷ [1983] 1 AC 410 (HL).

⁹⁸ *ibid* 422.

⁹⁹ [1988] AC 175 (PC).

¹⁰⁰ *ibid* 191

¹⁰¹ *ibid* 192. See also Lord Keith's comments in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson* [1985] AC 210, 240 (HL).

¹⁰² *Caparo Industries plc v Dickman* [1989] QB 653 (CA), 679. See also Deane J's comments in *Jaensch v Coffey* (1984) 155 CLR 549, 580.

¹⁰³ *Caparo Industries plc v Dickman* [1989] QB 653 (CA), 679 (Bingham LJ); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 498 (Deane J); *Murphy v Brentwood DC* 486 (Lord Oliver). More recently, this appears to have been the view of Lords Hoffmann and Walker in *Customs and Excise Commissioners v*

conduct of third parties, proximity would only exist where the claimant was at a 'special distinctive risk'.¹⁰⁴

Of course, an assumption of responsibility or that the claimant be at a 'special distinctive risk' could not always be required in order to establish proximity, such as in cases involving directly caused physical injury, where the parties are typically complete strangers. In such cases, reasonable foreseeability alone was thought to be enough, as explained in *Canadian National Railway Co v Norsk Pacific Steamship*:¹⁰⁵ '[W]here there is physical injury or damage one posits proximity on the ground that if one is close enough to someone or something to do physical damage to it one is close enough to be held legally responsible for the consequences.'¹⁰⁶ The degree of proximity required between the parties, then, depended on the facts of the case. The obvious difficulty with this understanding of proximity is that it is not clear why an assumption of responsibility (or that the claimant be at some 'special distinctive risk,' etc) is required in some cases, whilst foreseeability of injury alone is enough in others. According to the courts, however, the requisite degree of proximity required in a particular case depends on whatever the court deems to be fair, just and reasonable in the circumstances. As Lord Nicholls explained in *Stovin v Wise*:¹⁰⁷

The *Caparo* tripartite test elevates proximity to the dignity of a separate heading. This formulation tends to suggest that proximity is a separate ingredient, distinct from fairness and reasonableness, and capable of being identified by some other criteria. This is not so. Proximity is a slippery word. Proximity is not legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care. This is only another way of saying that when assessing the

Barclays Bank (at 199 and 210 respectively), and Lord Kerr in *Michael v Chief Constable of South Wales Police* [2015] 2 WLR 343 (HL), 382. See also: Smillie, 'The Foundation of the Duty of Care in Negligence' (n 17) 314; Jaffey (n 17) 12; and Andrew Robertson, 'On the Function of the Law of Negligence' (2012) 33 OJLS 31, 33 (fn5).

¹⁰⁴ *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL), 62 (Lord Keith).

¹⁰⁵ (1992) 91 DLR (4th) 289.

¹⁰⁶ *ibid* 1153 (McLachlin J). See also Norman A Katter, *Duty of Care in Australia* (LBC Information Services 1999) 21-22; H Luntz and others, *Torts: Cases and Commentary* (7th edn, Lexis Nexis 2013) 113.

¹⁰⁷ [1996] AC 923 (HL).

requirements of fairness and reasonableness regard must be had to the relationship of the parties.¹⁰⁸

Of course, if the existence of a duty of care depends on what is fair, just, and reasonable, and the requisite degree of proximity, too, depends on what is fair, just, and reasonable, then the proximity 'stage' would appear to be superfluous. Indeed, as McBride and Bagshaw state, it is 'hard to imagine' a court denying that there was a relationship of proximity if harm to the plaintiff was reasonably foreseeable and, in the opinion of the court, it was fair, just, and reasonable to impose a duty.¹⁰⁹ Proximity is therefore often criticised as being devoid of any content, and little more than a label to attach to the conclusion that a duty of care exists. Dawson J, for example, wrote in *Hill v Van Erp*¹¹⁰ that proximity was 'the result of a process of reasoning rather than the process itself,' whilst McHugh J, writing extra-judicially, has said 'The difficulty with proximity ... is that it is a legal rule without specific content and merely records the result of a finding reached on other grounds.'¹¹¹ More recently, Rogers has expressed the view that 'there is a tenable view that [proximity] is really no more than a statement of the conclusion that there is or is not a duty.'¹¹²

Despite these criticisms, the concept of proximity continues to have its advocates.¹¹³

Witting, for example, argues that much of the criticism of proximity is 'misguided,'¹¹⁴ as

¹⁰⁸ *ibid* 932. See also: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL), 411 (Lord Oliver); and *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] AC 211 (HL), 235 (Lord Steyn). For academic commentary to this effect, see: WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) 179; Tom Hickman, 'Negligence and Article 6: The Great Escape?' (2002) 61 CLJ 13, 14; and Kidner (n 68) 328.

¹⁰⁹ McBride and Bagshaw (n 93) 58. See also Jaffey (n 17) 18.

¹¹⁰ (1997) 188 CLR 159, 178. See also Brennan J in *Hawkins v Clayton* (1988) 164 CLR 539, 555-56.

¹¹¹ MH McHugh, 'Neighbourhood, Proximity and Reliance' in PD Finn (ed), *Essays on Torts* (Law Book Co Ltd 1989) 36.

¹¹² Rogers (n 108) 169. For further criticism of proximity, see: Stone (n 17) 264-68; K Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461, 461; Howarth (n 77) 60; Smillie, 'The Foundation of the Duty of Care in Negligence' (n 17) 312, 316; D Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, 583-84, and *Canadian National Railway Co v Norsk Pacific Steamship* (1992) 91 DLR (4th) 289 [112] (Stevenson J).

¹¹³ Christian Witting, 'Negligent Inspectors and Flying Machines' (2000) 59 CLJ 544; Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33; Witting, 'The Three Stage Test Abandoned in Australia - Or Not?' (n 93); Adam Kramer, 'Proximity as Principles: Directness, Community Norms and the Tort of

proximity was never intended to be a 'test.'¹¹⁵ Similarly, Kramer believes that 'The critics of proximity who worry that proximity is not a simple formula are attacking a straw man. Proximity is a label for the enquiry ... not a rule or formula that encapsulates or replaces that enquiry.'¹¹⁶ Indeed, even Lord Bridge conceded in *Caparo* that proximity was 'not susceptible of any such precise definition' and so amounted to little more than a 'convenient label' to attach to the features of a situation that gave rise to a duty of care.¹¹⁷

Proximity's defenders also reject the idea that proximity is synonymous with considerations of what is fair, just, and reasonable, and argue that it, instead, performs a 'distinct analytical function.'¹¹⁸ In particular, proximity concerns the 'directness' between the act of the defendant and the plaintiff's loss,¹¹⁹ which, as Witting explains, 'helps to establish the fact that the loss really is the product of the defendant's conduct and that it should be identified with him rather than with someone else.'¹²⁰ Proximity, in other words, is focussed exclusively on the facts of the case, whilst what is fair, just, and reasonable is focussed on external 'policy' factors.¹²¹ In cases of negligent misstatement causing pure economic loss, for example, proximity might be evidenced by explicit knowledge that the claimant was intending to rely on the statement and would likely suffer loss as a result, and an absence of external influences in the intervening period.¹²² In manufacturers' liability cases, on the other hand, proximity can be

Negligence' (2003) 11 Tort L Rev 70; Robertson (n 93); A Robertson, 'Policy-Based Reasoning in Duty of Care Cases' (2012) 33 LS 119.

¹¹⁴ Witting, 'Negligent Inspectors and Flying Machines' (n 113) 216.

¹¹⁵ *ibid* 216.

¹¹⁶ Kramer (n 113) 75.

¹¹⁷ *Caparo* 618. See also: Lord Oliver at 633 and 651 and Lord Roskill at 628; Bingham LJ in the Court of Appeal, at [1989] QB 653, 679; and Deane J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497.

¹¹⁸ Witting, 'Duty of Care: An Analytical Approach' (n 113) 34. See also Kramer (n 113) 72 (proximity is a 'meaningful definitional element') and Robertson, 'Justice, Community Welfare and the Duty of Care' (n 93) 374 (proximity is 'a workable criterion').

¹¹⁹ Robertson, 'Justice, Community Welfare and the Duty of Care' (n 93) 374; Witting, 'Negligent Inspectors and Flying Machines' (n 113) 560; Witting, 'The Three Stage Test Abandoned in Australia - Or Not?' (n 93) 218-19; Witting, 'Duty of Care: An Analytical Approach' (n 113) 38; Kramer (n 113) 77.

¹²⁰ Witting, 'Negligent Inspectors and Flying Machines' (n 113) 560.

¹²¹ Witting, 'Duty of Care: An Analytical Approach' (n 113) 36-37. The meaning of 'policy' is discussed in further detail below in Section V.C.

¹²² Witting, 'Negligent Inspectors and Flying Machines' (n 113) 559.

evidenced simply from the fact that conduct of the defendant might create a risk to consumers.¹²³ So whilst proximity can be said to depend on what is fair, just, and reasonable in a broad sense, according to its defenders it nevertheless performs a separate function to the third stage of the *Caparo* test.

C. Policy considerations and what is fair, just and reasonable

Prima facie, the third stage of the *Caparo* test, whether it is fair, just, and reasonable to impose a duty, admits a potentially limitless range of considerations. Lord Nicholls, for example has called the third stage ‘vague’ and ‘uncomfortably loose’,¹²⁴ whilst Lunney and Oliphant have written that ‘the third stage of the *Caparo* approach can be regarded as the general repository for a miscellaneous set of ... arguments, undefined in nature and unlimited in number, which are invoked haphazardly and in an ad hoc fashion...’¹²⁵ Of course, if the third stage were truly unlimited, it would all but render the first two stages of the *Caparo* test redundant, as it could easily be argued that it is not fair, just, and reasonable to impose a duty where the parties are not in a relationship of ‘proximity’,¹²⁶ or where harm to the claimant is not foreseeable. Accordingly, the third stage is usually understood in a narrower sense; in particular, as referring to considerations of ‘policy.’¹²⁷

¹²³ *ibid* 558. Witting is referring specifically to the facts of *Donoghue v Stevenson*.

¹²⁴ *Stovin v Wise* [1996] AC 923 (HL), 933 (Lord Nicholls).

¹²⁵ Lunney and Oliphant (n 60) 140. See also Nolan, who calls it a ‘blatant tautology.’ Nolan, ‘Deconstructing the Duty of Care’ (n 112) 582.

¹²⁶ See, for example, McBride and Bagshaw (n 93) 58.

¹²⁷ *Michael v Chief Constable of South Wales Police* [2015] 2 WLR 343 (HL), 381 (Lord Kerr); *Customs and Excise Commissioners v Barclays Bank* 190 (Lord Bingham); *Perre v Apand Pty Ltd* (1999) 198 CLR 180 [259] (Kirby J); *Pyrenees Shire Council v Day* (1998) 192 CLR 330 [249] (Kirby J); Prue Vines, Peter Hanford and Carol Harlow, ‘Duty of Care’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (10th edn, Thomson Reuters (Professional) Australia Limited 2011) 155; J Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable’ (2003) 24 Aust Bar Rev 135, 137; J Murphy and C Witting, *Street on Torts* (13th edn, OUP 2012) 46; H Luntz, ‘The Use of Policy in Negligence Cases in the High Court of Australia’ in M Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish 2007) 77. See also Deane J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 [5], who, albeit prior to *Caparo*, equates ‘notions of what is “fair and reasonable”’ with ‘considerations of public policy.’

The use of policy considerations to resolve private law disputes can be dated to at least 1414,¹²⁸ and to determine duty problems since 1842.¹²⁹ However, the idea of policy as an aspect of a *general* duty formulation, whilst being suggested by academics as early as the 1940s and 1950s,¹³⁰ did not gain traction in the courts until the 1960s. The earliest statement to this effect appears to be that of Lord Pearce, who stated in *Hedley Byrne* that the size of the 'sphere of the duty of care in negligence ... depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others.'¹³¹ This statement was later relied upon by Lord Denning in *Dorset Yacht Co Ltd v Home Office*,¹³² who was far more explicit, commenting that the determination of a duty of care was 'at bottom a matter of public policy which we, as judges, must resolve,'¹³³ a comment that was later approved by Lord Diplock in the House of Lords.¹³⁴ It was not until *Anns*, however, that, under the second stage of the test,¹³⁵ policy considerations were officially declared to be central to any general duty formula.

There is, however, considerable uncertainty as to the proper scope and content of the term 'policy,'¹³⁶ which has led MacCormick, for example, to conclude that the term is 'hideously

¹²⁸ *Dyer's Case* (1414) YB Pas 2 Hen V, fo 5, pl 26. See also WSM Knight, 'Public Policy in English Law' (1922) 38 LQR 207, 207.

¹²⁹ *Winterbottom v Wright* (1842) 10 M&W 109, 152 ER 402. For why this decision was based on 'policy,' see Vines, Hanford and Harlow (n 127) 156. Cf Beever (n 17) 11.

¹³⁰ See, for example: FH Lawson, 'The Duty of Care in Negligence: A Comparative Study' (1947) 22 TulLRev 111, 113; RG McKerron, 'The Duty of Care in South African Law' (1952) 69 SALJ 189, 196; JG Fleming, 'The Action Per Quod Servitum Amisit' (1952) 26 ALJ 122, 127; F James, 'Scope of Duty in Negligence Cases' (1952) 47 NwULRev 778, 808; Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (n 93) 485.

¹³¹ *Hedley Byrne* (Lord Pearce) 536. Though, as Mitchell notes, this was 'very much the exception': Mitchell (n 40) 181-82.

¹³² [1969] 2 QB 412.

¹³³ *ibid* 426. See also Lord Denning MR's comments in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA), 37.

¹³⁴ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL), 1058 (Lord Diplock).

¹³⁵ Although Lord Wilberforce did not use the term 'policy,' his dictum is widely considered to incorporate considerations of what we would today label as policy: *Yuen Kun-Yeu v A-G of Hong Kong* [1988] AC 175 (PC), 193 (Lord Keth); Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (n 127) 137; Vines, Hanford and Harlow (n 127) 155.

¹³⁶ Robertson, 'Justice, Community Welfare and the Duty of Care' (n 93) 371. See, for example, the definition given by Bell, who defines policy in a way that would also render the first two stages of the *Caparo* test redundant: J Bell, *Policy Arguments in Judicial Decisions* (Clarendon Press 1983) 23.

inexact.¹³⁷ In the duty context, however, it is generally understood that arguments based on policy tend to focus on whether, *taking into account the consequences that the imposition of a duty would have on the community*, it would be fair, just, and reasonable to impose a duty.¹³⁸ An argument that it would be unfair to impose a duty on a police officer because it may lead to ‘detrimentally defensive’ policing is an example of a policy-based argument.¹³⁹ Considerations of policy are typically contrasted with considerations of ‘principle,’¹⁴⁰ which focus on whether, *as between the parties before the court*, it is fair, just, and reasonable, to impose a duty.¹⁴¹ An argument that a police officer owes a duty to those they are investigating because of the close connection between the parties and the high probability that a carelessly conducted investigation will cause damage to the suspect, is an example of a principle-based argument (which, under the *Caparo* formulation, would be discussed at the proximity and foreseeability stages). Arguments based on policy, then, focus on considerations of *public* policy or community welfare, whilst arguments based on principle focus on considerations of interpersonal justice.

Policy considerations are often thought to play an important part in determining the outcome of modern duty questions, particularly at the ultimate appellate level.¹⁴² The permissibility of policy-based arguments in determining duty issues is, however, controversial. Why this is so will be explored in Chapter Five.

¹³⁷ N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 263

¹³⁸ Robertson, ‘Justice, Community Welfare and the Duty of Care’ (n 93) 371; R Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 22, 82; R Stevens, *Torts and Rights* (OUP 2007) 308;

¹³⁹ *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL), 63 (Lord Keith).

¹⁴⁰ According to Stevens, the distinction can be traced back to *Egerton v Brownlow* (1853) 4 HL Cas 1, 123; 10 ER 359, 408-409, where Parke B distinguished between ‘public policy’ and ‘the policy of the law’: Stevens (n 138) 308.

¹⁴¹ EJ Weinrib, ‘The Disintegration of Duty’ in M Stuart Madden (ed), *Exploring Tort Law* (Cambridge University Press 2005) 157; Robertson, ‘Justice, Community Welfare and the Duty of Care’ (n 93) 371; Dworkin (n 138) 22, 82.

¹⁴² Robertson, ‘Policy-Based Reasoning in Duty of Care Cases’ (n 113) 121, 128, 137. See also Jonathan Morgan, ‘Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics’ (2009) 125 LQR 215, 215. The extent to which this is the case is explored in Chapter Six, Section III.E.

VI. Canada and the ‘two stage’ test

Despite *Anns* falling out of favour in the UK, and having only a limited effect in Australia,¹⁴³ it proved to be very influential in Canada. After initially being adopted by the Supreme Court in *City of Kamloops v Nielsen*,¹⁴⁴ the two-stage test was met with much enthusiasm, and was repeatedly affirmed by the Supreme Court for almost two decades.¹⁴⁵ Over the course of time, however, as had been the case in the UK, the two-stage test eventually led to a considerable expansion in liability for negligence, occasionally well beyond what would have been allowed in the UK or Australia.¹⁴⁶ Indeed, upon reflection, Neyers described the two-stage test as giving rise to an ‘untrammelled expansion of negligence liability in the Canadian context.’¹⁴⁷

The Supreme Court took the opportunity to revisit the duty question in the 2001 case, *Cooper v Hobart*.¹⁴⁸ After explaining that *Anns* continued to provide a ‘useful framework in which to approach the question of whether a duty of care should be imposed in a new situation,’¹⁴⁹ the court proceeded to set out a reformulated version of the two-stage test:

In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we

¹⁴³ This was evident as early as *Seale v Perry* [1982] VR 193, and later made clear by the High Court in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481 (Brennan J), and 503-505, 507 (Deane J).

¹⁴⁴ (1984) 10 DLR (4th) 641.

¹⁴⁵ See, for example: *BDC Ltd v Hofstrand Farms Ltd* (1986) 26 DLR (4th) 1 (Estey J); *Rothfield v Manolakos* (1989) 63 DLR (4th) 449 (Cory J); *Canadian National Railway Co v Norsk Pacific Steamship* (1992) 91 DLR (4th) 289; *Dobson (Litigation Guardian of) v Dobson* (1999) 174 DLR (4th) 1.

¹⁴⁶ See, for example, *Canadian National Railway Co v Norsk Pacific Steamship* (1992) 91 DLR (4th) 289. cf *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA).

¹⁴⁷ JW Neyers, ‘Distilling Duty: the Supreme Court of Canada Amends *Anns*’ (2002) 118 LQR 221, 224.

¹⁴⁸ (2001) 206 DLR (4th) 193 (*‘Cooper’*).

¹⁴⁹ *ibid* 202 [28] (McLachlin CJC and Major J).

think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.¹⁵⁰

Despite the Court paying lip-service to *Anns*, and insisting that they were merely ‘highlighting’ and ‘honing’ the existing law,¹⁵¹ *Cooper* nevertheless represented a substantial reformulation of the two-stage test,¹⁵² a reformulation that ultimately led to an end of the expansion of the law of negligence in Canada that had occurred under the pre-*Cooper* two-stage test.¹⁵³

On one view, *Cooper* had done little more than create a three-stage test, identical in substance, if not name, to the three-stage *Caparo* test. Indeed, this appeared to be the understanding of Iacobucci J, who, in *Odhavji Estate v Woodhouse*,¹⁵⁴ described the reformulated *Anns* test as consisting of three independent stages: foreseeability of harm, sufficient proximity between the parties, and an absence of policy reasons to negative a duty.¹⁵⁵ It was soon made clear by McLachlin CJ, however, that this was not the correct understanding of *Cooper*, and that the two-stage test was to be understood as follows:

[A]t stage one, foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a *prima facie* duty of care arises. At stage two, the issue is whether this duty is negated by other, broader policy considerations.¹⁵⁶

¹⁵⁰ *ibid* 202-203 [29] (McLachlin CJC and Major J). The reference to ‘policy’ as part of the first stage is, admittedly, bizarre, as it is not clear what, if any, difference there is between ‘policy’ considerations that are relevant to the first stage and ‘policy’ considerations that are relevant to the second stage. Indeed, as Klar notes, the meaning of the term is ‘not altogether clear’: Lewis Klar, *Tort Law* (5th edn, Carswell 2012) (n 155) 187. See also, Robertson (n 103) 37. For examples of the Court using ‘policy’ considerations as part of the proximity enquiry, see: *D(B) v Children's Aid Society* (2007) 284 DLR (4th) 682; *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620.

¹⁵¹ *ibid* 196 [1] (McLachlin CJC and Major J).

¹⁵² Neyers (n 147) 222; Stephen GA Pitel, ‘Negligence: Canada Remakes the *Anns* Test’ (2002) 61 CLJ 252, 253.

¹⁵³ Allen M Linden and Bruce Feldthusen, *Canadian Tort Law* (9th edn, LexisNexis 2011) 300.

¹⁵⁴ 233 DLR (4th) 193

¹⁵⁵ 218 [52]. Klar and Pitel also seem to endorse this view: Klar (n 150) 178-79; Pitel (n 152) 254.

¹⁵⁶ *Childs v Desormeaux* (2006) 266 DLR (4th) 257, 263 [12]. Unsurprisingly, this largely echoes McLachlin CJ and Major J’s comments on the first (*Cooper* 204 [34]) and second (*Cooper* 206 [37]) stages of the two-stage test in *Cooper*.

In other words, the test did not consist of three independent stages, as is the case under *Caparo*, but two independent stages, one of which consisted of two related ‘questions.’¹⁵⁷ It will be noticed that the first stage largely corresponds to what we have seen is described as considerations of ‘principle,’ and the second of which corresponds to what we have seen is described as considerations of ‘community welfare.’¹⁵⁸ Notwithstanding, however, McLachlin CJ’s insistence that the UK’s three-stage approach and Canada’s two-stage approach are distinct, there is no doubt that the competing tests for the existence of a duty of care are ‘remarkably similar.’¹⁵⁹

VII. Assumption of responsibility and the ‘extended’ *Hedley Byrne* principle

We saw above that *Hedley Byrne* determined that a duty of care will be owed whenever a defendant assumes responsibility towards the claimant for the quality of their conduct. This was particularly significant in cases involving purely economic loss where, despite the developments elsewhere, *Hedley Byrne* remained the preferred test for establishing the existence of a duty of care.¹⁶⁰ The result was that *two* apparently independent duty tests existed simultaneously: one for purely economic loss, and one for everything else.¹⁶¹ At least as initially understood, the assumption of responsibility test was applied quite strictly, so that only *explicit* assumptions of

¹⁵⁷ It is also arguable that Canada’s *Anns* test is different to *Caparo* on the basis that the second stage of *Anns* looks for reasons why a duty should *not* be imposed, whilst the equivalent (i.e. third) stage of *Caparo* looks for reasons why a duty *should* be imposed. However, as Robertson notes, this distinction is not reflected by what occurs in practice, as the majority of applications of *Caparo* focus exclusively on reasons why a duty should *not* be imposed in any event: Robertson, ‘Policy-Based Reasoning in Duty of Care Cases’ (n 113) 131. See also the comments to this effect in Chapter Six, Section III.E.iii.

¹⁵⁸ See Section V.C above. See also Robertson, ‘Justice, Community Welfare and the Duty of Care’ (n 93), who proposes a two-stage duty test largely along these lines.

¹⁵⁹ Linden and Feldthusen (n 153) 299.

¹⁶⁰ *Mutual Life & Citizens Assurance Co Ltd v Evatt* [1971] AC 793 (HL); *Smith v Eric S Bush* [1990] 1 AC 831 (HL); *Caparo*.

¹⁶¹ Whilst *Hedley Byrne* tended to be confined to cases involving purely economic loss *in practice*, there is no indication in the speeches of the law lords that *Hedley Byrne* was intended to be understood in this way. Indeed, McBride and Bagshaw label the idea that the assumption of responsibility test was to be confined to cases involving purely economic loss as a ‘common misconception’: see McBride and Bagshaw (n 34) 187.

responsibility, and only those in relation to statements,¹⁶² could satisfy the test. Indeed, according to Lord Devlin in *Hedley Byrne*, there could only be an assumption of responsibility where the relationship between the parties was 'equivalent to contract,' meaning, 'in circumstances in which, but for the absence of consideration, there would be a contract.'¹⁶³ Given the narrow understanding of what it meant to 'assume a responsibility,' the assumption of responsibility test was only capable of explaining the existence of a duty in a very limited set of circumstances, and so in no sense did it provide the basis for a duty test of *general* application. By the 1990s, however, what it meant to 'assume a responsibility' came to be understood in a much wider sense than 'equivalent to contract,' leading to what became known as the 'extended' *Hedley Byrne* test, and considerable confusion surrounding the extent to which the assumption of responsibility test could be used as a duty determinant.

The extension of *Hedley Byre* first became evident in *Smith v Eric S Bush*.¹⁶⁴ The defendant had provided a negligently prepared valuation of a property to the plaintiff's bank. The valuation was provided to and for the bank, and at no point did the defendant communicate directly with the plaintiff. The defendant also included a disclaimer of liability on the valuation stating that the valuation was supplied without any warranty as to its accuracy. The plaintiff subsequently purchased the property in reliance on the valuation, which had been provided to her by the bank, and suffered economic loss as a result. Notwithstanding that the defendant had not made any *actual* representation to the plaintiff, and had explicitly disclaimed any responsibility for the accuracy of the report, Lord Templeman nevertheless relied on *Hedley Byrne* to justify the imposition of a duty of care on the basis that, as the defendant knew or ought to have known that the plaintiff would rely on the report when deciding whether or not

¹⁶² That *Hedley Byrne* was not confined to statements was not *explicitly* recognised until *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

¹⁶³ *Hedley Byrne* 529.

¹⁶⁴ [1990] 1 AC 831 (HL) (*'Smith v Eric S Bush'*).

the buy the house, an assumption of responsibility could be inferred.¹⁶⁵ As for the disclaimer, it was held to be of no effect by virtue of section 2(2) of the Unfair Contract Terms Act (1977).

A further expansion of the assumption of responsibility concept occurred in a trio of cases in 1995, led by the efforts of Lord Goff. The first of these cases was *Spring v Guardian Assurance plc*,¹⁶⁶ where the plaintiff was suing his former employer for the negligent preparation of an employment reference. The reference was so unfavourable that the plaintiff was unable to gain further employment in the industry. As the reference had been requested by the potential employer, and not the plaintiff, the defendant had not actually made any representation to the plaintiff at all. Lord Goff,¹⁶⁷ with whom Lord Lowry agreed,¹⁶⁸ nevertheless imposed a duty on the basis that an assumption of responsibility could be inferred. Lords Slynn and Woolf, despite also imposing a duty, did so by relying on the tripartite test. Lord Keith dissented.

Later that same month, in *Henderson v Merrett Syndicates Ltd*,¹⁶⁹ members of an unprofitable investment syndicate (the 'Names') sued those responsible for management of the syndicate. Due to the structure of the syndicate, many of the Names had had no direct contact with the defendants. As far as Lord Goff was concerned, however, the fact that the parties had never communicated with each other was no reason to prevent the existence of a duty being based on an assumption of responsibility:

[T]here is in my opinion plainly an assumption of responsibility in the relevant sense by the managing agents towards the Names in their syndicates. The managing agents have accepted the Names as members of a syndicate under their management. They obviously hold themselves out as possessing a special expertise to advise the Names on the suitability of risks to be underwritten; and on the circumstances in which, and the extent to which, reinsurance should be taken out and claims should be settled. The Names, as the managing agents well knew, placed implicit reliance on that expertise, in that they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to the settlement of claims. I can see no escape from the

¹⁶⁵ *ibid* 844.

¹⁶⁶ [1995] 2 AC 296 (HL) ('*Spring*').

¹⁶⁷ *ibid* 316-19.

¹⁶⁸ *ibid* 325.

¹⁶⁹ [1995] 2 AC 145 (HL) ('*Henderson v Merrett Syndicates Ltd*').

conclusion that, in these circumstances, prima facie a duty of care is owed in tort by the managing agents to such Names.¹⁷⁰

This time, the rest of the court agreed with Lord Goff's analysis. *Henderson v Merrett Syndicates Ltd* was especially significant because it clarified that *Hedley Byrne* applied not only in relation to statements, but also to the provision of services.¹⁷¹

Lastly, in *White v Jones*,¹⁷² two intended beneficiaries under a will sued the testator's solicitor for negligently failing to include them in the will prior to the testator's death. Again, there had not been any representation whatsoever to the plaintiff, nor could it be said that there had been any reliance by the plaintiffs. Indeed, Lord Goff even acknowledged that 'the *Hedley Byrne* principle cannot, in the absence of special circumstances, give rise on ordinary principles to an assumption of responsibility by the testator's solicitor towards an intended beneficiary,¹⁷³ but nevertheless felt that, due to the 'impulse to do practical justice,'¹⁷⁴ he was justified in *deeming* that there had been such an assumption:

[Y]our Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.¹⁷⁵

Lord Browne-Wilkinson, agreeing with Lord Goff, also held that 'the defendant solicitors were under a duty of care to the plaintiffs arising from an extension of the principle of assumption of responsibility explored in *Hedley Byrne*.'¹⁷⁶

What it meant to 'assume responsibility' therefore meant something well beyond *explicit* undertakings as to the quality of a statement; in particular, it had come to include

¹⁷⁰ *ibid* 182.

¹⁷¹ Though as McBride and Bagshaw note, certain dicta in *Hedley Byrne* suggests that this had always been the case: McBride and Bagshaw (n 34) 180.

¹⁷² [1995] 2 AC 207 (HL) ('*White v Jones*'). Compare *Hill v Van Erp* (1997) 188 CLR 159.

¹⁷³ *White v Jones* 262.

¹⁷⁴ *ibid* 259.

¹⁷⁵ *ibid* 268

¹⁷⁶ *ibid* 270. Compare the powerful dissenting speech of Lord Mustill.

implied undertakings, and extended to not only statements, but the provision of services also. That the undertaking no longer had to be *explicit* was not, of course, objectionable *per se*; an offeree can consent to a contract by their conduct, without the need to explicitly state ‘I accept the terms of the contract,’ and so there seems no good reason why one cannot also assume a responsibility in tort on the basis of their conduct alone, absent an explicit undertaking that one will take care with respect to the making of a statement or performance of an activity. But it is equally clear that the utility of the explanation as a duty determinant has limits. Nevertheless, following Lord Goff’s lead, the more liberal understanding of assumption of responsibility was soon being used to describe the existence of a duty in a raft of situations that did not lend themselves to an analysis in terms of an assumption of responsibility at all. In *White v Jones*, for example, Lord Nolan suggested that the duty owed by the driver of a motor vehicle to other road users (not to directly cause them physical injury) was based on the assumption of responsibility test,¹⁷⁷ whilst in *Customs and Excise Commissioners v Barclays Bank plc*, Lord Hoffmann suggested that:

[T]he arguments in *Henderson’s* case were a rerun of *Donoghue v Stevenson* in a claim for economic loss ... To say that the managing agents assumed a responsibility to the Names to take care not to accept unreasonable risks is little different from saying that a manufacturer of ginger beer assumes a responsibility to consumers to take care to keep snails out of his bottles.¹⁷⁸

Such comments essentially endorsed an understanding of assumption of responsibility that could explain *all* duty cases, and, contrary to the initial understanding, implied that the assumption of responsibility test could be used as a duty test of general application. Of course, extending the meaning of ‘assumption of responsibility’ so widely was not unproblematic. First, it meant that the phrase ‘assumption of responsibility’ had tended to become, like ‘proximity,’ meaningless, merely expressing a conclusion rather than providing a useful test. After all, in what sense can a driver assume a responsibility to another road user (indeed, *all* road users)

¹⁷⁷ *White v Jones* 293-94.

¹⁷⁸ *Customs and Excise Commissioners* [37].

whom he has never met or communicated with, directly or indirectly. It would arguably be no more artificial to justify the liability of a driver to a road user on the basis of an implied contract. According to Lord Slynn in *Phelps v Hillingdon London BC*,¹⁷⁹ the phrase ‘assumption of responsibility’ had become ‘misleading ... [and] means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by law.’¹⁸⁰ Similarly, in *Customs and Excise Commissioners*, Lord Rodger commented that there were a number of cases that:

[D]o not readily yield to an analysis in terms of voluntary assumption of responsibility, but where liability has none the less been held to exist ... [but doing so produces a rule which] inevitably lead[s] to the concept of voluntary assumption of responsibility being stretched beyond its natural limits – which would in the long run undermine the very real value of the concept as a criterion of liability in the many cases where it is an appropriate guide.¹⁸¹

McBride and Bagshaw, too, argue that it is ‘not possible’ to explain many of the cases, including *Smith v Eric S Bush*, *Spring* and *White v Jones*, on the basis that the defendant assumed a responsibility towards the claimant,¹⁸² whilst Lunney and Oliphant state that ‘the concept – arguably – has been stretched to breaking point.’¹⁸³

A second difficulty with the extended assumption of responsibility test was that, by effectively equating ‘assumption of responsibility’ with ‘circumstances in which a defendant *should* have assumed a responsibility to the claimant,’ it was no longer clear how the assumption of responsibility test differed from other general tests, such as *Caparo*. As Lord Bingham stated in *Customs and Excise Commissioners v Barclays Bank plc*:

¹⁷⁹ [2001] 2 AC 619 (HL).

¹⁸⁰ *ibid* 654. See also: McBride and Bagshaw (n 34) 174-75 (regarding whether or not the concept is ‘empty’); Barker (n 112) 462 (who argues, *inter alia*, that neither assumption of responsibility nor reliance ‘has a useful role to play in the duty enquiry’); and Steve Hedley, ‘Negligence—Pure Economic Loss—Goodbye Privity, Hello Contorts’ (1995) 54 CLJ 27, 29 (‘[assumption of responsibility is] a vague principle, and not a very useful one unless it can be sensibly applied by judges of far less eminence [than those in the House of Lords]’).

¹⁸¹ *ibid* 204.

¹⁸² McBride and Bagshaw (n 34) 188-91.

¹⁸³ Lunney and Oliphant (n 60) 446.

The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test.¹⁸⁴

A related complication was that, despite the assumption of responsibility test historically being the *only* method for establishing the existence of a duty in purely economic loss cases,¹⁸⁵ *Caparo* had come to be seen as an acceptable alternative, as many judges felt that, whilst the law needed to be extended, it was not appropriate to do so via fictional assumptions of responsibility.¹⁸⁶ In the face of two apparently independent tests, some judges tried to reconcile the competing approaches by explaining away assumptions of responsibility as nothing more than evidence of proximity.¹⁸⁷ Others, however, rejected this explanation, as not only did it further complicate the already problematic concept of proximity, but it was difficult to see how, where the defendant had explicitly assumed a responsibility towards the claimant, it could not be fair, just, and reasonable for a duty to be imposed. As Lord Steyn put it in *Williams v Natural Life Health Foods Ltd.*¹⁸⁸

[O]nce a case is identified as falling within the extended *Hedley Byrne* principle, there is no need to embark upon any further enquiry whether it is “fair, just and reasonable” to impose liability ...¹⁸⁹

Of course, if *Caparo* and the assumption of responsibility test were independent, then it raised the question of which test should prevail in the event they produced inconsistent outcomes.

¹⁸⁴ *Customs and Excise Commissioners* 191.

¹⁸⁵ That *Hedley Byrne* actually ever stood for such a proposition has been labelled ‘nonsense:’ McBride and Bagshaw (n 34) 188.

¹⁸⁶ See, for example, Lord Griffiths in *Smith v Eric S Bush*, who preferred a pre-*Caparo* version of the three-stage test as ‘the phrase “assumption of responsibility” can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the device.’ (ibid 862. Lord Jauncey took a similar view: ibid 871). See also, Lords Slynn and Woolf in *Spring*, who also relied on *Caparo* rather than the assumption of responsibility test.

¹⁸⁷ In *Caparo*, for example, Lord Bridge suggested that, far from a test in itself, an assumption of responsibility was simply an ‘essential ingredient’ in demonstrating proximity between the plaintiff and defendant: ibid 620-21. See also Lord Bridge’s comments at 623: ‘I do not think that in the context of the present appeal anything turns upon the difference between these two approaches.’

¹⁸⁸ [1998] 1 WLR 830 (HL).

¹⁸⁹ ibid 834 (Lord Steyn, with whom the rest of the Lords agreed). These comments mimicked those of Lord Goff in *Henderson v Merrett Syndicates Ltd*, at 181.

Lower courts circumvented this problem by insisting that both approaches should always lead to the same outcome.¹⁹⁰ Though, as Mitchell and Mitchell note, this was an ‘utterly unconvincing basis for imposing liability’ as the only way of ensuring that both approaches would lead to the same outcome was by ‘manipulating the questions, so that each is effectively the same.’¹⁹¹

The role of assumption of responsibility in duty analyses was eventually considered by the House of Lords in *Customs and Excise Commissioners*. The House of Lords was clear that *Caparo* remained the primary test for the existence of a duty of care, but that the assumption of responsibility test also had a useful role to play.¹⁹² Stanton summarises the decision as follows:

[T]he consensus is that [assumption of responsibility] is a test which is useful when a person has *expressly* indicated a willingness to undertake responsibility for the interests of another but that it fails to provide any useful assistance in the more common case where there is no such express undertaking. An implied assumption of responsibility merely begs the question as to what circumstances justify the implication being made. It is simpler to ask what circumstances justify the recognition of a duty of care than to ask what circumstances justify the implication of an assumption of responsibility which gives rise to a duty of care.¹⁹³

Accordingly, it is now clear that the assumption of responsibility test does *not* provide the basis for duty test of general application; it does, however, continue to provide an independent method for establishing the existence of a duty of care,¹⁹⁴ at least where the assumption of responsibility is sufficiently clear. Where there has not been an assumption of responsibility, it appears that the claimant may still try their luck under *Caparo*, as the claimant did in *Customs and Excise Commissioners*, though ultimately failing under both tests.

¹⁹⁰ See, for example, *Merrett v Babb* [2001] QB 1174 (CA). See also Lunney and Oliphant (n 60) 440.

¹⁹¹ Paul Mitchell and Charles Mitchell, ‘Negligence Liability for Pure Economic Loss’ (2005) 121 LQR 194, 199.

¹⁹² See, for example, *Customs and Excise Commissioners v Barclays Bank* 190 (Lord Bingham), 199 (Lord Hoffmann).

¹⁹³ Stanton (n 10) 66. (emphasis added).

¹⁹⁴ *ibid* 190 (Lord Bingham), 204 (Lord Roger), 216 (Lord Mance). Compare Lords Hoffmann and Walker (at 199 and 210 respectively), who appear to suggest that an assumption of responsibility *is* merely evidence of proximity.

Despite the confusion surrounding the concept, assumptions of responsibility *do* play an important role in any understanding of the duty of care, and so are discussed in further detail in Chapter Five.

VIII. Australia and the ‘salient features’ test

For the first three-quarters of the twentieth century, Australian courts, much like Canadian courts, made only a very limited contribution to the development of duty jurisprudence, typically deferring to the UK courts entirely. However, following 1975 legislation abolishing appeals to the Privy Council,¹⁹⁵ the High Court of Australia was able to move away from the legalism that had characterised earlier courts, towards the a more progressive court that was no longer reluctant to disagree with the Law Lords of the UK.¹⁹⁶ Although *Anns* was nevertheless followed initially,¹⁹⁷ its influence was short lived,¹⁹⁸ and it was soon replaced by the first uniquely Australian approach to duty: Deane J’s proximity test.¹⁹⁹ Beginning in *Jaensch v Coffey*,²⁰⁰ Deane J argued that proximity was a ‘unifying concept,’ or ‘touchstone,’ for determining the existence of a duty of care:

[O]ne finds, in cases in the comparatively uncharted areas of the law of negligence, repeated reference to proximity as a touchstone for determining the existence and content of any common law duty of care to avoid reasonably foreseeable injury of the type sustained ... The requirement of a relationship of “proximity” in that broad sense

¹⁹⁵ Privy Council (Appeals from the High Court) Act 1975 (Cth). Appeals on federal and Constitutional law matters had been abolished eight years previously under the Privy Council (Limitation of Appeals) Act 1968 (Cth). Appeals from State Supreme Courts were later abolished in the Australia Acts of 1986. Theoretically, appeals to the Privy Council are still possible, if the High Court grants a certificate under the still operational section 74 of the Constitution, but it is extremely unlikely this will ever occur. See Tony Blackshield, ‘Australia Acts 1986’ in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (OUP 2001); Michael Coper, Tony Blackshield and George Williams, ‘Privy Council, Judicial Committee of the’ in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (OUP 2001).

¹⁹⁶ This was particularly evident under the leadership of Mason CJ. See Michelle Dillon and John Doyle, ‘Mason Court’ in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (OUP 2001).

¹⁹⁷ *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 44 (Mason J); *Jaensch v Coffey* (1984) 155 CLR 549, 553 (Gibbs CJ).

¹⁹⁸ See (n 143).

¹⁹⁹ See, generally, Peter Handford, ‘The Snail’s Antipodean Adventures’ in Joe Thomson (ed), *The Juridical Review: Donoghue v Stevenson the Paisley Papers* (W Green 2013) 321-26.

²⁰⁰ (1984) 155 CLR 549.

should, in my view, be accepted as a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care.²⁰¹

Deane J's proximity test proved to be very influential amongst the other judges of the High Court, and dominated the Australian approach to duty for much of the following decade.²⁰² It even seemed to exact some influence in the House of Lords, where a number of cases determined during Deane J's time on the High Court relied on *some* general concept of proximity to determine the existence of a duty.²⁰³ Proximity was generally understood quite widely, concerning both notions of 'the relationship between the parties ... [and] the notion of nearness of closeness ... [in] space and time...',²⁰⁴ and considerations of public policy. In *Jaensch v Coffey*,²⁰⁵ for example, Deane J accepted that proximity should not be 'either ostensibly or actually divorced from considerations of public policy which underlie and enlighten it,'²⁰⁶ whilst in *Gala v Preston*,²⁰⁷ Brennan J held that 'proximity in its extended sense may also comprehend policy considerations.'²⁰⁸ Similar statements were later made by the majority of the court (Mason CJ, Dean and Gaudron JJ) in *Bryan v Maloney*,²⁰⁹ and by Dawson J in *Hill v Van Erp*.²¹⁰ Of course, as we saw above, proximity is not an unproblematic concept, particularly when it begins to subsume concepts like public policy; indeed, as Handford comments, the increasing reliance on public policy within proximity 'was probably the beginning of the end. Perhaps, like Aesop's

²⁰¹ *ibid* 583-84.

²⁰² See, for example, *San Sebastian v Minister* (1986) 162 CLR 340, *Cook v Cook* (1986) 162 CLR 376, *Gala v Preston* (1991) 172 CLR 243, *Burnie Port Authority v General Jones* (1994) 179 CLR 520, and *Bryan v Maloney* (1995) 182 CLR 609. See also P Cane, 'Proximity' in Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (OUP 2001).

²⁰³ See, for example: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 396 (Lord Keith), 402 (Lord Ackner), 406 (Lord Oliver) and 420 (Lord Jauncey); *Smith v Eric S Bush* 856, 871-72 (Lord Jauncey); and *Caparo passim* (Lords Jauncey and Oliver).

²⁰⁴ *Jaensch v Coffey* (1984) 155 CLR 549, 584-85 (Deane J). Deane J made similar comments in *Hackshaw v Shaw* (1984) 155 CLR 614, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

²⁰⁵ (1984) 155 CLR 549.

²⁰⁶ *ibid* 585.

²⁰⁷ (1991) 172 CLR 243.

²⁰⁸ *ibid* 260.

²⁰⁹ (1995) 182 CLR 609, 618: '[Policy considerations can be] legitimately taken into account in determining whether sufficient proximity exists in a novel category.'

²¹⁰ (1997) 188 CLR 159, 176: '[T]he identification of the requirements of proximity in developing areas of the law is not divorced from the considerations of public policy which underlie and enlighten the concept.' See also the discussion in Katter (n 106) 17-18.

frog, it blew itself bigger and bigger until it burst.²¹¹ And so after Deane J left the High Court in November 1995, proximity soon fell out of favour. In *Hill v Van Erp*,²¹² for example, the first duty case since the departure of Deane J, a number of judges expressed doubt about the utility of proximity as a duty determinant,²¹³ whilst by 1998, Kirby J felt able to state that 'it is tolerably clear that proximity's reign in this Court, at least as a universal identifier of the existence of a duty of care at common law, has come to an end.'²¹⁴ The 'demise of proximity as a unifying theme'²¹⁵ was echoed shortly thereafter in *Perre v Apand Pty Ltd*,²¹⁶ where McHugh J explained that 'this Court no longer sees proximity as the unifying criterion of duties of care.'²¹⁷

Despite the High Court's unequivocal rejection of proximity, it nevertheless failed to make clear what the failed test was to be replaced with. Whilst Kirby J argued for the adoption of the *Caparo* three stage-test,²¹⁸ the rest of the court were reluctant to commit to any kind of general formula.²¹⁹ The lack of clear guidance from the High Court on how duty questions were to be determined was described by one lower court judge as 'disgraceful,'²²⁰ whilst Witting has said it 'culminated in nothing less than doctrinal chaos.'²²¹ This confusion appeared to reach its climax in *Perre v Apand Pty Ltd*,²²² where, despite every member of the High Court concluding that a duty existed, they all did so for different reasons.

²¹¹ Handford (n 199) 325, citing Aesop, *Aesop's Fables* ('The Frog and the Ox'). See also the comments of Dawson J in *Hill v Van Erp* (1997) 188 CLR 159, 177.

²¹² (1997) 188 CLR 159.

²¹³ 176-178 (Dawson J); 188-90 (Toohey J); 210-11 (McHugh J); and 237-239 (Gummow J). Though, Deane J was not blind to the limits of proximity as a general determinant, as evidenced by his comments in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497, that: 'There is an incontestable element of truth in that statement in that the notion of proximity is obviously inadequate to provide an automatic or rigid formula for determining liability.'

²¹⁴ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 414.

²¹⁵ *Perre v Apand Pty Ltd* (1999) 198 CLR 180 [70].

²¹⁶ (1999) 198 CLR 180.

²¹⁷ *ibid* [74]. See also the comments of Gaudron J at [27]

²¹⁸ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 419-20; *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 275.

²¹⁹ Handford (n 199) 325-26.

²²⁰ *Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd* (1999) 9 NTLR 82 (FC) (Bailey J) [24]. See also the discussion in Luntz (n 127) 76.

²²¹ Witting, 'The Three Stage Test Abandoned in Australia - Or Not?' (n 93) 214.

²²² (1999) 198 CLR 180.

The High Court eventually clarified their position in *Sullivan v Moody*,²²³ a case where the court had to determine whether a duty of care was owed by child protection authorities towards those being investigated for sexual abuse. In a rare joint judgment, the High Court clarified that the ‘three stage approach ... does not represent the law in Australia.’²²⁴ In particular, the High Court believed that, in light of the difficulties with proximity and the potential for the third stage to be ‘misunderstood as an invitation to formulate policy rather than to search for principle,’²²⁵ the three stage approach had too much scope for duty determinations to be ‘reduced to a discretionary judgement based upon a sense of what is fair, just and reasonable as an outcome in a particular case.’²²⁶ Instead, the Court preferred an approach based on an ‘evaluation of the factors which tend for and against a conclusion’ that a duty does or does not exist.²²⁷ ‘Factors’ of particular importance to the Court in *Sullivan* were that any recognised duty be coherent with other laws,²²⁸ that it not be incompatible with other established duties,²²⁹ and that the proposed duty would not give rise to indeterminate liability.²³⁰

This approach has subsequently come to be known as the ‘salient features’ test, based on the comments of Gummow J in *Perre v Apand*,²³¹ but has also been called the ‘salient factors’ test and ‘multi-factoral’ approach. Within the High Court, Kirby J took the clear lead in developing and explaining the test, despite his personal preference for the three stage test.²³² Surprisingly, however, with the exception of Kirby J, who retired from the Court in February

²²³ (2001) 207 CLR 562 (*Sullivan*).

²²⁴ *ibid* [49]

²²⁵ *ibid*

²²⁶ *ibid*

²²⁷ *ibid* [50].

²²⁸ *ibid* 580-581 [53]-[54].

²²⁹ *ibid* 581-582 [55]-[60].

²³⁰ *ibid* 582-583 [61]-[63].

²³¹ (1999) 198 CLR 180 [198], [201]-[203]. Though Gummow J attributes the language to Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* (1976) 136 CLR 529, 576-577.

²³² See, for example, his comments in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 [222], [236]-[243]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 [123], [158], [169]; and *Harriton v Stephens* (2006) 226 CLR 52 [64]-[65].

2009, the High Court has offered almost no guidance on the salient features test whatsoever. Instead, the most authoritative statement on the salient features test has come from Allsop J in the New South Wales Court of Appeal decision of *Caltex Refineries (Qld) Pty Ltd v Stavar*,²³³ who said that the salient features include:

- (a) the foreseeability of harm;
- (b) the nature of the harm alleged;
- (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the degree of reliance by the plaintiff upon the defendant;
- (f) any assumption of responsibility by the defendant;
- (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) the nature of the activity undertaken by the defendant;
- (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
- (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) any potential indeterminacy of liability;
- (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
- (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
- (o) the existence of conflicting duties arising from other principles of law or statute;
- (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.²³⁴

Allsop J added that the test 'should not...be treated as a shopping list, all the items of which must have application in a particular case. Rather, it provides a list of considerations which should be considered, as potentially relevant, depending on the kind of case before the Court'.²³⁵

²³³ (2009) 75 NSWLR 649.

²³⁴ *ibid* [103]

²³⁵ *ibid* [172].

Like other duty tests, the salient features test is not without its problems. As noted by McHugh, for example:

Left unchecked, this approach becomes nothing more than the exercise of a discretion - like the process of sentencing, where the final result is determined by the individual "judge's instinctive synthesis of all the various aspects". Different judges will apply different factors with different weightings. There will be no predictability or certainty in decision-making because each novel case will be decided by a selection of factors particular to itself. Because each factor is only one among many, few will be subject to rigorous scrutiny to determine whether they are in truth relevant or applicable.²³⁶

Arguably, then, the salient features 'test' is not a 'test' at all, so much as a formalised label for the unrestricted consideration of any arguments that appeal to the court; indeed, Gummow J first discussed the idea of salient features as a duty determinant under the heading 'No general formula,'²³⁷ just as Lord Bridge's three-stage test followed his comments regarding the 'inability of any single general principle to provide a practical test which can be applied in every situation to determine whether a duty of care is owed...'²³⁸

Despite the High Court's ostensible preference for principle over policy,²³⁹ the salient features test, ironically, bears a striking resemblance to Stapleton's multi-factoral approach to duty of care problems,²⁴⁰ an approach that is widely acknowledged as an almost perfect embodiment of a policy-based approach to the duty of care. Indeed, in *Sullivan* itself, the High Court referred to the potential for the recognition of a duty to lead to defensive policing as a factor to be considered when determining the existence of a duty of care;²⁴¹ yet such a consideration is clearly a *policy*-based consideration. Despite, then, paying lip service to the

²³⁶ *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 [77] (footnotes omitted). For further criticism, see *ibid* [71]-[78] generally, and Katter (n 17) 88.

²³⁷ *Perre v Apand* (1999) 198 CLR 180, 242.

²³⁸ *Caparo* 617. See also the judgment of Lord Oliver (at 633): 'I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp.'

²³⁹ (n 225)

²⁴⁰ Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus' (n 93).

²⁴¹ *Sullivan* [57]. The High Court was referring specifically to the comments of Lord Keith in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL), 63.

priority of principle over policy, one must wonder what, exactly, the High Court thought ‘policy’ actually meant.²⁴²

IX. Pockets

The focus of this chapter so far has been predominantly on *general* duty tests,²⁴³ each of which we have seen, has been the subject of considerable criticism. There is, however, another method for determining the existence of a duty of care, one which allays some of the criticisms directed at general tests: the so-called ‘pockets’ approach. Under the pockets approach, cases are not decided by recourse to the broad general tests or principles that are said to underlie *all* duty cases, but by recourse to the particular reasons or logic that are deemed to underlie the outcome of groups, or ‘pockets,’ of cases involving similar fact scenarios. On this understanding, pockets are not merely examples of the application of general tests and principles, but indicators of duty in their own right.²⁴⁴ Different principles therefore govern different types of cases. So, for example, there are independent sets of rules that govern the liability of police officers for failing to apprehend a suspect,²⁴⁵ the liability of public authorities for omissions,²⁴⁶ the liability for defective buildings causing purely economic loss,²⁴⁷ and liability for secondary victims of psychiatric injury.²⁴⁸

There is considerable authority for the pockets approach. In *Caparo*, for example, immediately before detailing the three-stage test, Lord Bridge was explicit that:

Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and

²⁴² Allsop J addresses this at [172]-[174]. Though see Luntz’s comments on the High Court’s understanding of the meaning of ‘policy’ in *Cattanach v Melchior* (2003) 215 CLR 1: Luntz (n 127) 80-82.

²⁴³ The principal exception to this being the assumption of responsibility test, which, as we have seen, only justifies the existence of a duty in *some* cases.

²⁴⁴ Smillie, ‘Principle, Policy and Negligence’ (n 68) 120.

²⁴⁵ *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL).

²⁴⁶ *Gorringe v Calderdale MBC* [2004] 1 WLR 1057 (HL).

²⁴⁷ *D&F Estates v Church Commissioners* [1989] 1 AC 177 (HL).

²⁴⁸ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL).

recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.²⁴⁹

Similarly, Lord Roskill said:

If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge of Harwich, suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty.²⁵⁰

According to the headnote writer at least, this, and not the three-stage test, was *the* basis of the case.²⁵¹ Both the High Court of Australia and Supreme Court of Canada have also made it clear that the first step in any duty analysis is to look to the existing cases for guidance.²⁵²

The principal benefit of the pockets approach is the predictability it offers when compared to general tests. Indeed, it is undeniable that more reliable guidance is offered by reference to specific and identifiable arguments, as they apply to the particular fact scenario, than by reference to concepts of more general application, such as whether the parties are in a relationship of ‘proximity’ or whether the imposition of a duty would be ‘fair, just, and reasonable.’ It also prevents a fresh duty analysis needing to be undertaken in every case involving slightly different fact scenarios to those that have come before the courts already; in particular, similar cases are determined on the basis of a relatively restricted set of arguments, rather than every slightly different fact scenario requiring a reconsideration of every plausible argument afresh.

In the majority of cases, the facts will fit comfortably into an existing pocket and the pockets approach will essentially resemble an orthodox application of the principle of *stare*

²⁴⁹ *Caparo* 618.

²⁵⁰ *ibid* 628.

²⁵¹ *ibid* 606-607.

²⁵² See, for example, *Perre v Apand* (1999) 198 CLR 180, 217 (McHugh J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 [61] (McHugh J); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 88 ALJR 911 [169] (Gageler J); *Cooper* [41] (McLachlin J); *Childs v Desormeaux* (2006) 266 DLR (4th) 257 [15] (McLachlin CJ).

decisis, whereby *any* question of law is determined by reference to principles drawn from similar cases. As much was observed by McLachlin CJ in *Childs v Desormeaux*:²⁵³

The reference to categories simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that ... a duty of care will arise.²⁵⁴

Despite its benefits, and ostensibly orthodox nature, the pockets approach has nevertheless been subjected to criticism. According to Witting, for example, without any underlying rationalisation for the discrete pockets, there can become ‘a degree of arbitrariness in the way that cases are categorised and issues determined.’²⁵⁵ The reason why a duty exists in one pocket, may therefore be entirely different to, and even contradict, the reason why a duty exists in another pocket. Whilst this may not be especially problematic in day-to-day cases, where the facts of the case fit neatly into a single pocket, it *can* be problematic where the facts of the case fall into multiple pockets. In particular, the selection of the relevant pocket will determine, at the outset, the types of reasons that can be relied upon in determining the outcome of the duty enquiry, and so potentially preclude consideration of otherwise relevant factors, a process which, according to Stapleton, can be ‘akin to the tail wagging the dog.’²⁵⁶ Stapleton cites *Smith v Eric S Bush* as an example of such a case, which, as we saw above, involved a defendant’s negligent misstatement leading to the plaintiff purchasing a defective property and suffering purely economic loss as a result. The case was ultimately classified into the pocket of negligent misstatement cases, where a duty could be, and was, held to exist on the basis of the reasons given in *Hedley Byrne*. According to Stapleton, however, if the case had been classified into the pocket of defective building cases, the logic would have pointed towards a duty being denied.²⁵⁷

²⁵³ (2004) 239 DLR (4th) 61.

²⁵⁴ *ibid* [15]. The same observation is made in Prue Vines, ‘The Needle in the Haystack: Principle in the Duty of Care in Negligence’ (2000) 23 UNSWLJ 35, 35.

²⁵⁵ Witting, ‘Negligent Inspectors and Flying Machines’ (n 113) 552. See also, Stanton (n 10) 71.

²⁵⁶ Jane Stapleton, ‘Duty of Care and Economic Loss: A Wider Agenda’ (1991) 107 LQR 249, 284-85.

²⁵⁷ *ibid* 277-83. The basis for the denial of a duty in such a pocket being *D&F Estates v Church Commissioners* [1989] 1 AC 177 (HL)). This conclusion is, however questionable, as, given the finding that there had been an assumption of responsibility, it is doubtful that the logic of *D&F Estates v Church Commissioners* would have applied.

Stapleton therefore argues that the pockets approach should be abandoned, and that courts should instead focus on ‘convincing’ and ‘unconvincing’ factors that point for and against the existence of a duty. In this way ‘pockets would be the natural end product of the analysis, not its dictator.’²⁵⁸ This criticism of the pockets approach could, however, be mitigated to a large extent, or possibly even overcome entirely, with more careful classification of the pockets, and the reasons they rely upon, so as to avoid overlap and contradictory logic; and even if it could not be, it is nevertheless arguable that such a limitation is outweighed by the benefits of the pockets approach, namely, the added certainty in predicting outcomes due to the restricted number of reasons in play and limiting the number of occasions on which the courts need to undergo fresh duty analyses.

A more fundamental limitation of the pockets approach concerns how it applies to novel cases. In particular, a strict application of the pockets approach would require that novel cases *never* give rise to a duty of care, as, by definition, novel cases do not fall into an existing pocket of case law upon which a duty could be based. Whilst such an approach has the benefit of avoiding the need for reliance on vague general duty principles or tests, and preserves the predictability of the law,²⁵⁹ it would also keep the law static and unable to evolve, a situation that few would agree should be the case. To remedy this deficiency, some jurisdictions have therefore reserved the pockets approach for cases that already fall into existing pockets, whilst dealing with novel cases via general principles; this appears to be the position in Canada, for example.²⁶⁰ Of course, whilst such an approach is able to deal with novel cases in a manner that allows the law to evolve, it only does so by reintroducing the problems the pockets approach is trying to overcome, being the problems associated with determining the existence of a duty by reference to vague general principles.

²⁵⁸ Stapleton (n 256) 285. See also Jane Stapleton, ‘In Restraint of Tort’ in Peter Birks (ed), *Frontiers of Liability*, vol 2 (OUP 1994), and Stapleton, ‘Duty of Care Factors: a Selection from the Judicial Menus’ (n 93).

²⁵⁹ Assuming the problem of overlapping pockets could be dealt with via better classification.

²⁶⁰ *Cooper* [42] (McLachlin J); *Childs v Desormeaux* (2006) 266 DLR (4th) 257 [15] (McLachlin CJ).

As a compromise, a related method has developed, whereby the pockets approach determines the majority of cases, but novel cases are dealt with, not via general tests, but by incremental extensions of existing pockets. In this way, the vagaries of general tests are avoided, but the law is still able to develop over time and deal with novel cases without forcing them into the strict confines of the existing pockets or simply denying a duty altogether. This approach is known as ‘incrementalism.’

X. Incrementalism

Incrementalism, which is closely related to the pockets approach, is usually associated with the following passage of Brennan J’s judgment in *Sutherland Shire Council v Heyman*:²⁶¹

It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.’²⁶²

Incrementalism, then, working from the basis of existing pockets, determines the existence of a duty on the grounds that, either, it fits in an existing pocket, or into a new pocket that is an incremental extension of an existing pocket. Accordingly, like the pockets approach, incrementalism ‘rejects’²⁶³ any reliance on general duty formulations or principles, but, unlike the pockets approach, entails a more flexible approach to resolving the existence of a duty in circumstances that do not fit neatly into existing pockets.

Although the incremental approach never managed to achieve much popularity in Brennan J’s native Australia, it was enthusiastically embraced by the Supreme Court of Canada in

²⁶¹ (1985) 157 CLR 424.

²⁶² *ibid* 481. Brennan J’s dicta appears to be based on his earlier comments in *Jaensch v Coffey* (1984) 155 CLR 459, 575. For a later statement of Brennan J’s understanding of incrementalism, see *Bryan v Maloney* (1995) 182 CLR 609, 652-55.

²⁶³ Keith Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty First Century’ (2006) 22 PN 134, 141; Keith Stanton, ‘Incremental Approaches to the Duty of Care’ in Nicholas J Mullany (ed), *Torts in the Nineties* (LBC Information Services 1997) 38. See also the comments of McHugh J in *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 [73]: ‘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.’

*Canadian National Railway Co v Norsk Pacific Steamship Co*²⁶⁴ (at least in relation to claims for purely economic loss), and by the House of Lords in *Caparo*, where Lord Bridge famously said:

Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman*...²⁶⁵

The ‘wisdom’ of Brennan J’s words was approved by Lord Keith in *Murphy v Brentwood DC*²⁶⁶ shortly thereafter, and so soon went from ‘relative obscurity, to a position of prominence ... central to the methodology’ used to determine duty cases.²⁶⁷ In *White v Jones*, for example, Lord Browne-Wilkinson clearly adopted an incremental approach in determining the existence of a duty of care, stating that ‘although the present case is not directly covered by the decided cases, it is legitimate to extend the law to the limited extent proposed using the incremental approach by way of analogy...’²⁶⁸ He then proceeded to extend the principle in *Hedley Byrne* to cover the facts of the case, explaining that ‘this is a case where such development should take place since there is a close analogy with existing categories of special relationship giving rise to a duty of care to prevent economic loss.’²⁶⁹ The incremental approach was also relied on in *Gorham v British Telecommunications plc*,²⁷⁰ *Punjab National Bank v de Boinville*,²⁷¹ and *Goodwill v British Pregnancy Advisory Service*.²⁷²

The increasing reliance on incrementalism (and the pockets approach) is typically seen as a response to the massive expansion in the reach of the law of negligence that had occurred

²⁶⁴ (1992) 91 DLR (4th) 289 (McLachlin CJ). See especially [40]-[41].

²⁶⁵ *Caparo* 618. See also Lord Roskill at 628.

²⁶⁶ *Murphy v Brentwood DC* 461.

²⁶⁷ Stanton, ‘Incremental Approaches to the Duty of Care’ (n 263) 38.

²⁶⁸ *White v Jones* 270.

²⁶⁹ *ibid* 275.

²⁷⁰ [2000] 1 WLR 2129 (CA), 2144 (Schiemann LJ), and 2141 (Pill LJ).

²⁷¹ [1992] 1 WLR 1138 (CA).

²⁷² [1996] 1 WLR 1397 (CA) (Gibson LJ).

under the general duty principle outlined in *Anns*.²⁷³ Incrementalism, it was thought, would give the appellate courts far greater control over the future development and expansion of the law of negligence than general tests, thereby forestalling any potential for massive expansions in the future. As Stapleton explains:

[C]oncerning the retreat to incrementalism ... it is fairly clear that it was motivated principally by concern that recovery in negligence for economic loss was threatening to get out of hand ... The complaint seemed to be that if the analysis of duty was generalised ... into some sort of principle or 'test' it was doomed to generate far too much liability in the hands of lower courts who needed more restraining guidelines. Better to eschew this 'modern' approach and return to the incremental approach.²⁷⁴

Despite its express approval by the House of Lords and Supreme Court of Canada, incrementalism has nevertheless been subjected to considerable criticism. Perhaps the principal criticism is directed at the vagueness of the term 'incremental.' In particular, it is objected that it is not clear at which point the facts of a case are sufficiently analogous to established categories to allow incremental extensions; are the facts required to be almost identical, or is it sufficient that they are broadly similar?²⁷⁵ According to Toohy J in *Bryan v Maloney*,²⁷⁶ for example, 'the very term "incremental" invites enquiry because what is incremental is in the eyes of the beholder.' In other words, what one judge considers analogous, another might consider wildly dissimilar; what one judge considers a small step, another might consider a giant leap.²⁷⁷ Of course, whilst the precise meaning of incrementalism is undeniably vague, this is not a problem unique to incrementalism; indeed, as we have seen, the terms foreseeability, proximity, and fair, just and reasonable, are subject to exactly the same criticism. Further, as Nolan points out, "incrementalism" is nothing more than the analogical reasoning employed in a common law

²⁷³ Stanton, 'Professional Negligence: Duty of Care Methodology in the Twenty First Century' (n 263) 141.

²⁷⁴ Stapleton, 'In Restraint of Tort' (n 258) 85.

²⁷⁵ See, for example, McBride and Bagshaw (n 93) 69.

²⁷⁶ (1995) 182 CLR 609, 661.

²⁷⁷ See, for example, Rogers (n 108) 162: '[The incremental approach] gives no indication of where the increments should stop – one might simply reach a radically different in three steps rather than one leap.' See also Stanton, 'Incremental Approaches to the Duty of Care' (n 263) 46.

system to decide *any* novel question of law.²⁷⁸ McLachlin J, too, has made a similar observation, noting that incrementalism is ‘consistent with the incremental character of the common law.’²⁷⁹ Any criticism on this basis would therefore appear to be misguided.

A more fundamental criticism of incrementalism relates to its rejection of general duty principles. In particular, in the absence of any underlying principles, the existence of a duty of care has been said to rest on illusory foundations. According to Howarth, for example:

It should be noted what an extraordinarily weak argument the argument from authority is in this context. If the only justification for saying that a situation was a duty-situation is that it had been declared to be such on a previous occasion, the question arises as to what justified the decision to treat the situation as a duty-situation the first time that it arose. By definition, the first time that it arose, there was no specific authority for the decision “on those precise facts”, and if such authority is the only justification for a decision that a duty exists, the first case must therefore have been wrongly decided.²⁸⁰

Incrementalism has also been said to be unable to handle ‘truly novel’ cases, being those that do not fit into existing pockets or incremental extensions of existing pockets, other than with the ‘unhelpful response’ that the claimant must lose.²⁸¹ Such criticisms are not, however, likely to be of great concern to advocates of incrementalism, given that the rejection of any reliance on underlying theories, and the inability of ‘truly novel’ cases to attract a duty and thereby give rise to massive extensions in the law, are viewed as incrementalism’s primary benefits.

In any event, modern courts do not seem to be prepared to abandon the idea that *some* general principle underlies all duty cases, and so incrementalism is seen to be ‘of little value as a

²⁷⁸ Nolan, ‘Deconstructing the Duty of Care’ (n 112) 583.

²⁷⁹ *Canadian National Railway Co v Norsk Pacific Steamship* (1992) 91 DLR (4th) 289 [41] (McLachlin J).

²⁸⁰ Howarth (n 77) 70-71. See also: Gummow J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253-54 (‘[T]he making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental development, with an analogy to an established category. Such a proposition, in terms used by McCarthy J in the Irish Supreme Court, “suffers from a temporal defect – that rights should be determined by the accident of birth”, quoting *Ward v McMaster* [1988] IR 337, 347); and Hayne J in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 631 (‘recovery becomes an accident of history dependent upon when, in the development of the common law, the claim falls for consideration’).

²⁸¹ Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty First Century’ (n 263) 145. Though note McBride and Bagshaw, who argue that it is difficult to conceive of a situation about which the decided cases have nothing to say: McBride and Bagshaw (n 93) 56.

test in itself.²⁸² Incrementalism is, however, thought to play a valuable secondary or ‘complementary’²⁸³ role when determining the existence of a duty in novel cases. In particular, whilst general duty tests continue to act as the ultimate determinant of duty questions, incrementalism acts as *limit* on their *application*, so as to prevent those general principles being used to justify the massive expansion that occurred under *Anns*. Given, however, that incrementalism is built on a rejection of the validity of general tests, whether or not assigning it a secondary role undermines its primary benefit is open to debate.²⁸⁴

XI. Conclusion

Since *Donoghue v Stevenson* was handed down in 1932, the courts have endured a continual struggle in their attempts to articulate a precise formula that can be used to determine when a duty of care does or does not exist; in particular, a formula that is wide enough to capture the existing duties, without being so wide as to permit recovery in a raft of previously unrecognised situations. Modern courts appear to believe the best way to achieve this balance is by taking refuge in increasingly vague terms, such as ‘proximity’ and ‘fairness,’ or by requiring the presence of unspecified number of ‘salient features’ from an indeterminately long list. As Kirby J has noted, ‘we seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so.’²⁸⁵ Whilst this certainly gives the courts the flexibility required to explain the existing law, and develop it as they see fit, it hardly gives

²⁸² *Customs and Excise Commissioners v Barclays Bank* 192 (Lord Bingham).

²⁸³ Stanton, ‘Incremental Approaches to the Duty of Care’ (n 263) 50. See also Lord Mance, at *ibid* 213, who appeared to agree: ‘[C]autious and analogical reasoning are generally valuable accompaniments to judicial activity, and this is particularly true in the present area.’ This largely accords with the views of Mitchell and Mitchell (n 191) 199: ‘Factual analogies and distinctions are not helpful in themselves; they are only helpful when used in combination with a test or principle which identifies the legally significant features of the situation.’) Ironically, this is not considerably dissimilar to the role originally assigned to the incremental approach by Lord Bridge in *Caparo*.

²⁸⁴ For further discussion on this point, see Stanton, ‘Incremental Approaches to the Duty of Care’ (n 263) 46.

²⁸⁵ *Graham Barclay Oysters Pty Ltd v Ryan* 211 CLR 540, para 244.

lower courts and practitioners the certainty and predictability required of the law in practice.²⁸⁶ Indeed, the courts' present general duty formulations are so vague and abstract that they are, arguably, not 'tests' in any meaningful sense at all. As much is explicitly conceded by the courts,²⁸⁷ leading to the paradoxical position whereby the courts have 'declared (whether boldly or despairingly) that the elements of the [duty] test ... have no content, yet at the same time, they continue to be talked about and apparently applied.'²⁸⁸ Stapleton even goes so far as to say that given the diverse range of 'complex concerns' that judges face in duty analyses, there *is* no duty test, nor *can* there be a duty test,²⁸⁹ whilst Nolan, too, argues that the search for a general duty test merely 'obscures and confuses.'²⁹⁰

It is therefore perhaps unsurprising that, whilst the courts continue to pay lip service to these generalised tests, in the majority of day-to-day cases the tests are largely ignored in favour of a 'pockets' approach, whereby a range of different principles apply to a range of different factual situations. The pockets approach provides specific guidance for specific types of problems, and is therefore of considerably more use for low-level courts and practitioners. Whilst a strict application of the pockets approach has trouble dealing with novel cases, when used in conjunction with incrementalism it manages to overcome those problems as well as many of the criticisms directed at the vagaries of general tests, which are thought to only give the *illusion* of providing any workable underlying theory. Ironically, however, its independence of any all-encompassing general formula is the source of its main criticism; not being reducible to any general principle.

²⁸⁶ McHugh J, for example, believes that a duty test should provide 'a conceptual framework that will promote predictability and continuity and at the same time facilitate change when it is needed': *Perre v Apand Pty Ltd* (1999) 8 CLR 180 [93].

²⁸⁷ See, for example, *Caparo* 618 (Lord Bridge): 'the concepts of proximity and fairness ... are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.' See also *Caparo* 633 (Lord Oliver) 628 (Lord Roskill), *Customs and Excise Commissioners v Barclays Bank*, 189-92 (Lord Bingham); Jaffey (n 17) 18-19.

²⁸⁸ Jenny Steele, 'Scepticism and the Law of Negligence' (1993) 52 CLJ 437, 445.

²⁸⁹ Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus' (n 93) 60.

²⁹⁰ Nolan, 'Deconstructing the Duty of Care' (n 112) 581-82.

The courts therefore seem to be seeking an all-encompassing formula; one that is general enough to explain *all* duty cases, yet particular enough to offer useful guidance in fact-specific situations. Yet generality and particularity pull in opposite directions, and *no* formula can possibly accommodate such opposing tensions. It should therefore come as no surprise when Ibbetson says: ‘That the tort of negligence is in a mess goes almost without saying’,²⁹¹ and, as was suggested in Chapter One, the courts’ approach to the duty enquiry seems to be a principal reason for this. Of course, whilst the courts may have made a mess of duty, it does not follow that the concept itself is inherently problematic. In the next two chapters we will therefore examine the function and anatomy of the duty enquiry in further detail, as, only when we understand what, exactly, it does and does not do, and how it does it, can we have any hope of articulating a reliable method for determining when a duty does or does not exist.

²⁹¹ David Ibbetson, ‘How the Romans Did for Us: Ancient Roots of the Tort of Negligence’ (2003) 26 UNSWLJ 475, 475.

4. Factual Duty

Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question

- Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580.

I. Introduction

As we have just seen in Chapter Three, an ever increasing number of discrete issues are being dealt with under the duty rubric, with the result that explanations as to why a duty does or does not exist in a particular case are becoming more and more vague. In the next two chapters, we therefore try to isolate and better articulate some of these discrete issues in the hope of both simplifying the enquiry, at least to some degree, and providing guidance for future decisions. In particular, in the first part of this chapter we will see that the duty enquiry, in fact, involves both factual *and* notional elements. In the second part of this chapter we will explore the factual element in further detail and see that its presence in the negligence enquiry is unnecessary. The notional element of the duty enquiry will be explored in Chapter Five.

II. The Dual Function of Duty

A. The attack on duty

Lord Atkin's neighbour dictum provided that a duty was owed to all persons 'so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'¹ As we saw in Chapter Three, this was widely seen to provide a test for the existence of a duty based on foreseeability alone.² Whilst many objected that such a duty test, based on foreseeability

¹ *Donoghue v Stevenson* [1932] AC 562 (HL) 580 ('*Donoghue v Stevenson*').

² See the discussion in Section II of Chapter Three.

alone, cast the duty net too wide, others had a more fundamental objection; that such an understanding of duty rendered the enquiry completely unnecessary. According to Winfield, for example, the duty concept, on this understanding, was ‘superfluous’,³ ‘unnecessary’,⁴ and ‘in theory ... might well be eliminated from the tort of negligence.’⁵ Similarly, Buckland famously described the duty of care as ‘an unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice.’⁶ The basis of these criticisms was, essentially, that the function of the duty of care, which the critics saw as being to prevent liability in negligence extending to those who were not foreseeably affected by the defendant’s conduct, was able to be satisfactorily performed at other stages of the negligence enquiry. As Stone explained:

A duty towards the plaintiff then means that the defendant ought reasonably to have him in contemplation as likely to be affected by the conduct in question; in short, the defendant ought reasonably have anticipated injury to him. But is not that in any case one essential element of what is meant by the requirement of “negligence” itself?⁷

The duty requirement was said to therefore be ‘tautologous,’ or ‘circuitous,’ with the ‘negligence’ (i.e. ‘fault,’ ‘breach,’ or ‘standard of care’⁸) requirement.⁹ Similarly, if the focus were shifted from the foreseeability of some harm, a question of fault, to the foreseeability of the actual harm that materialised,¹⁰ then, at least according to Buckland¹¹ and Price,¹² it became a question of remoteness, which already provided rules relating to a defendant’s liability where

³ Percy Winfield, ‘Duty in Tortious Negligence’ (1934) *Colum L Rev* 41, 43, 66.

⁴ *ibid* 59.

⁵ *ibid* 66.

⁶ WW Buckland, ‘The Duty to Take Care’ (1935) 51 *LQR* 637, 639.

⁷ Stone, quite generously, attributes the idea to Holmes: J Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control; a Study in Jurisprudence* (Stevens 1947) 182, citing OW Holmes, ‘The Path of the Law’ (1897) 10 *Harv L Rev* 457, 472. Green had previously made exactly the same criticism in relation to Brett MR’s duty formula: (Leon Green, ‘The Duty Problem in Negligence Cases’ (1928) 28 *Colum L Rev* 1014, 1029.) See also HT Terry, ‘Negligence’ (1915) 29 *Harv L Rev* 40; Winfield (n 3) 61-64.

⁸ For reasons explained below, the ‘fault’ terminology is to be preferred to ‘breach’ and ‘standard’ terminology, and so is used throughout this thesis.

⁹ Stone (n 7) 182, 181. See also WL Morison, ‘A Re-Examination of the Duty of Care’ (1948) 11 *MLR* 9, 14, 15(22); and TW Price, ‘The Conception of the ‘Duty of Care’ in the *Actio Legis Aquiliae*’ (1949) 66 *SALJ* 171, 180.

¹⁰ See, for example, *Smith v London and South Western Railway Co* (1870) 5 *CP* 98 (CP), 103; *Palsgraf v Long Island Railway Co* (1928) 248 *NY* 339; 162 *NE* 99; *Chester v Waverly Corp* (1939) 62 *CLR* 1; and *Bourhill v Young* [1943] *AC* 92 (HL).

¹¹ Buckland (n 6) 644.

¹² Price (n 9) 185-86, 288. Price even goes so far as to claim that despite what was said by the court, *Bourhill v Young* [1943] *AC* 92 (HL), was, in fact, a case of remoteness.

‘the exact kind of damage’ suffered by the claimant was unforeseeable.¹³ According to the critics, then, every case decided on the grounds of duty could just as easily be decided on some other ground not depending on duty at all,¹⁴ and so had little role to play, performing no function not already performed elsewhere in the negligence enquiry.

Many also pointed to the fact that there was no equivalent of a duty of care outside of the common law, and so argued if other legal systems of law could operate without a duty of care, surely the common law could live without it too. Winfield, for example, described the duty requirement as ‘wholly alien to Roman Law and of which there is no trace in the modern Continental systems.’¹⁵ Similarly, Stallybrass, the normally ‘conservative’¹⁶ editor of *Salmond’s Law of Torts*, argued that the Roman method ‘provided a simpler and better solution of the problems involved than English law with its reliance upon a duty to take care.’¹⁷ Buckland, too, pointed to the fact that there was no mention of ‘duty’ in the definition of negligence provided in §165 of the draft US *Restatement of Torts*,¹⁸ whilst Price, who described the duty enquiry as ‘manifestly undesirable,’¹⁹ a ‘fetish,’²⁰ ‘totally unnecessary,’ and ²¹ a ‘will-o-the wisp,’²² maintained that it was yet to make its way into the Roman-Dutch law of South Africa.²³

¹³ *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560 (CA).

¹⁴ Winfield (n 3) 64. It could, of course, be objected that *Re Polemis* did not, in fact, permit the materialisation of unforeseeable risks to be deemed too remote, but this is more of an objection to the law of remoteness than to the materialisation of unforeseeable risks being an issue of remoteness, and therefore *able to be* dealt with on grounds not depending on duty. This is discussed in further detail in Section IV below.

¹⁵ *ibid* 58.

¹⁶ RG McKerron, ‘The Duty of Care in South African Law’ (1952) 69 SALJ 189, 189-90.

¹⁷ JW Salmond and WTS Stallybrass, *Salmond’s Law of Torts* (10th edn, Sweet & Maxwell 1945) 431.

¹⁸ Buckland (n 6) 644-45. The definition of negligence was eventually moved to §281 of the *Restatement of Torts* (1934).

¹⁹ Price (n 9) 274

²⁰ *ibid* 270.

²¹ *ibid* 271

²² *ibid*. This characterisation of duty, or at least the search for a general duty formula, was later famously used by Lord Oliver in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL), 633 (‘*Caparo*’).

²³ *ibid* 275. Cf McKerron (n 16) 189: ‘It is clear, however, that the [duty] doctrine is just as firmly established in South African law as it is in English law.’ Despite the subsequent commentary suggesting that factual duty *was* necessary, detailed below, Price’s views remained unchanged 10 years later: TW Price, ‘Aquilian Liability and the ‘Duty of Care’: A Return to the Charge’ [1959] *Acta Juridica* 120.

A number of commentators therefore believed that the duty concept performed *no* valuable function at all, and that this was why no equivalent concept had developed outside the common law. Its only saving grace, according to Winfield, was that, despite having no 'practical value ... it is now too deeply embedded in English law to remove it. It has been recognised by the House of Lords, and nothing but legislation can eradicate it.'²⁴ Of course, it is hard to believe that this could have been the only reason. Could the duty of care really have lasted so long if it were entirely superfluous, particularly at a time when the jury trial had effectively been abolished in civil trials²⁵ and so the duty of care was no longer needed to distinguish between the respective roles of judges and juries?²⁶ Much of the criticism of 'duty' was also, in fact, attacking a straw man in the form of Lord Atkin's foreseeability-based neighbour dictum, which, as we saw in Chapter Three, was not an entirely accurate representation of the law; indeed, there were many cases that satisfied the neighbour dictum but did not give rise to a duty of care.²⁷ How did the critics explain these cases? By the late 1940s, it was therefore being objected that the foregoing critiques were fundamentally flawed. In particular, it was being argued that the duty enquiry, in fact, performed *two* functions, and that the critics of the duty concept focussed only on the first of these functions, and either overlooked or simply ignored the second function entirely.²⁸

B. Factual and notional duty

The first person to explicitly suggest that the duty enquiry had a dual function appears to have been Lawson.²⁹ According to Lawson, the duty enquiry served two 'entirely separate purposes':³⁰

²⁴ Winfield (n 3) 58. For a criticism of this rationale see: R Dale Gibson, 'A New Alphabet of Negligence' in Allen M Linden (ed), *Studies in Canadian Tort Law* (Butterworths 1968) 215.

²⁵ DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 188-89.

²⁶ Green (n 7) 1029, Price, 'The Conception of the 'Duty of Care' in the *Actio Legis Aquiliae*' (n 9) 183.

²⁷ For example, there was no liability for negligently causing injury to trespassers, for pure economic loss resulting from negligent misstatements, etc. See Section II of Chapter Three for further detail.

²⁸ FH Lawson, 'The Duty of Care in Negligence: A Comparative Study' (1947) 22 TulLRev 111; McKerron (n 16) 193; RWM Dias, 'The Breach Problem and the Duty of Care' (1956) 30 TulLRev 377, 404.

²⁹ Lawson (n 28).

³⁰ FH Lawson, *Negligence in the Civil Law* (Clarendon Press 1950) 34.

[First,] to decide whether the plaintiff was or was not too remote from the reasonable contemplation of the defendant for damage done to the former to be imputable to the latter, and, secondly, to mark off from each other the situations where a person is required to advert to the possibility of damage to other persons from those where he may act without any regard for others, except, perhaps, that he must not deliberately do them harm.³¹

In other words, the function of the duty of care was to determine whether harm to the plaintiff was a reasonably foreseeable consequence of the defendant's conduct, *and* whether the broad circumstances in which the plaintiff suffered the injury *ought* to be subject to the laws of negligence. Around the same time, Stone, too, made the comment that by reason of the apparent tautology between negligence and duty, 'it must be obvious again that there is some determinant of the actual decision other than can be drawn by deductive logic from the category ostensibly used,'³² which he later explained to be a reference to the existence of a second aspect of the duty enquiry not expressed in Lord Atkin's (foreseeability based) test.³³ McKerron³⁴ and Morison³⁵ made similar observations shortly thereafter. Dias later explained the distinction on the basis that the duty of care involved both a 'factual' question, since whether or not something is foreseeable will depend on the actual facts of the case,³⁶ and a question of law, or a 'notional' question, because whether or not the situation is one that falls within the law of negligence will depend on what has been decided in previous cases,³⁷ thereby coining the terminology of 'factual' and 'notional' duty.

The criticisms of duty, then, focussed exclusively on the factual aspect, and ignored the notional aspect altogether. Indeed, the criticisms did not apply to the notional aspect at all: the

³¹ *ibid.* This, in fact, was Lawson's later description of the dual role. In his original description of the separate purposes, the second function was confined to 'determining the *kinds* of injury which can be brought within the action of negligence...', rather than the broad '*situations*' that come within the action for negligence: Lawson, 'The Duty of Care in Negligence: A Comparative Study' (n 28) 112. Lawson's later, and broader, description, however, is much more in line with the modern understanding of the second function of duty ('notional duty'), which is discussed in greater detail in Chapter Five, Section II.

³² Stone (n 7) 182.

³³ Morison (n 9) 13 (fn 11), where Morison cites a personal note written to him by Stone.

³⁴ McKerron (n 16) 190.

³⁵ Morison (n 9) 24.

³⁶ RWM Dias, 'The Duty Problem in Negligence' [1955] CLJ 198, 204.

³⁷ *ibid.* 204. He later refers to the second question as one of 'notional duty': *ibid.* 205.

notional aspect was in no way ‘tautologous’ with the fault or remoteness elements; nor was it ‘wholly alien’ to other systems of law, as the restriction of liability for negligence to a particular set of prescribed situations was present in both Roman law and other modern civil law systems.³⁸ Notional duty even explained the cases that satisfied Lord Atkin’s neighbour dictum, but did not give rise to a duty of care; in particular, pecuniary loss caused by negligent misstatements, injuries suffered by trespassers, damage caused by omissions, etc, were irrecoverable not because the harm was not foreseeable, but because the law was not prepared to extend the law of negligence to permit recovery in those types of situations. In other words, there was a factual duty but no notional duty. Whilst, then, factual duty continued to be subject to the foregoing criticisms, and so widely believed to be a ‘fifth wheel on the coach,’ notional duty soon came to be seen as obviously ‘necessary,’³⁹ ‘indispensable,’⁴⁰ and performing the ‘primary function of the duty of care.’⁴¹

Despite the widespread criticism of factual duty, it nevertheless today remains an orthodox part of the negligence enquiry,⁴² and, although the ‘factual’/‘notional’ terminology is

³⁸ For a detailed comparison see Lawson, who argues that that ‘a comparison with Roman law and a number of systems largely derived from or strongly influenced by Roman law proves that such a duty of care, or some other requirement substantially identical with it, is hardly to be avoided...’: Lawson, ‘The Duty of Care in Negligence: A Comparative Study’ (n 28) 113. See also WW Buckland, AD McNair and FH Lawson, *Roman Law and Common Law* (2nd edn, Cambridge University Press 1965) 367-70. A similar conclusion can be seen in Winfield’s analysis of liability for carelessness in the medieval law of trespass: ‘The question was not “Is there a duty?” but, “Was the defendant in fact a bailee, common carrier, or the like and, if so, what excuse has he to offer for the harm that has occurred’ (Winfield (n 3) 49). A more detailed comparison with other legal systems is contained in Section V.C of Chapter Five.

³⁹ Lawson, ‘The Duty of Care in Negligence: A Comparative Study’ (n 28) 112.

⁴⁰ Dias, ‘The Duty Problem in Negligence’ (n 36) 204.

⁴¹ Lawson, *Negligence in the Civil Law* (n 30) 35. See also the discussion in MA Millner, *Negligence in Modern Law* (Butterworths 1967) 230.

⁴² See, for example: Prue Vines, Peter Hanford and Carol Harlow, ‘Duty of Care’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (10th edn, Thomson Reuters (Professional) Australia Limited 2011) 160; H Luntz and others, *Torts: Cases and Commentary* (7th edn, Lexis Nexis 2013) 120; M Lunney and K Oliphant, *Tort Law: Text and Materials* (5th edn, OUP 2013) 126; EW Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) 5-010; AM Dugdale and MA Jones, *Clerk & Lindsell on Torts* (20th edn, Sweet & Maxwell 2010) 8-07; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin’s Tort Law* (7th edn, OUP 2012) 104-105; D Nolan and J Davies, ‘Torts and Equitable Wrongs’ in AS Burrows (ed), *English Private Law* (3rd edn, OUP 2013) 17.35-17.38; Lewis Klar, *Tort Law* (5th edn, Carswell 2012) 179; David Howarth, ‘Duty of Care’ in Ken Oliphant (ed), *The Law of Tort* (2nd edn, LexisNexis Butterworths 2007) 12.12-12.14; and D Nolan, ‘Deconstructing the Duty of Care’ (2013) 129 LQR 559.

no longer popular,⁴³ the distinction continues to be widely recognised.⁴⁴ Nolan and Davies, for example, recently explained the distinction as follows:

First, it answers the general question whether there can in principle be a right not to be subjected to damage by carelessness in the kind of situation to which the particular facts belong. Secondly, it addresses the question whether on the particular facts the defendant did indeed owe a duty to the claimant.⁴⁵

Given the underlying importance of the factual / notional distinction to the structure of the duty enquiry, both factual and notional duty will be examined in further detail. Although there is a strong argument that the notional aspect of the duty enquiry is ‘logically prior’ to the factual aspect, as ‘We must first ask whether the defendant could possibly owe a duty to anyone, and only if we answer this question in the affirmative can we ask the further question whether he owed a duty of care to this particular plaintiff,’⁴⁶ it is nevertheless convenient to examine the factual aspect first. We will therefore examine the factual aspect for the remainder of Chapter Four, and the notional aspect in Chapter Five.

III. Factual duty, fault, and remoteness

As we have seen, whether the defendant owed the claimant a factual duty, or a duty ‘on the particular facts’ of the case, is determined by asking whether harm to the claimant was a reasonably foreseeable consequence of the defendant’s conduct. Lord Atkin’s neighbour dictum, with its focus on foreseeability, is the classic formulation of the factual duty enquiry. As we have also seen, early commentators were highly critical of the factual aspect of the duty enquiry (even if they thought it was the *only* aspect of the duty enquiry), believing it to be superfluous, on the basis that its function was already performed elsewhere in the negligence enquiry.

⁴³ See, for example, WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) 5-5 (fn 40).

⁴⁴ Peel and Goudkamp (n 42) 5-010; Lunney and Oliphant (n 42) 134-35 (though notional duty is termed ‘the legal aspect of the duty of care’); Deakin, Johnston and Markesinis (n 42) 104-105; Dugdale and Jones (n 42) 8-06, 8-07; Klar (n 42) 169; Nolan and Davies (n 42) 17.26.

⁴⁵ Nolan and Davies (n 42) 17.26. See also Peel and Goudkamp (n 42) 5-010.

⁴⁶ Lawson, *Negligence in the Civil Law* (n 30) 34.

Notwithstanding this, however, factual duty continues to remain an orthodox part of the duty enquiry.⁴⁷ Indeed, Dorfman recently wrote of the ‘impossibility of a duty purged of any requirement of foreseeability,’⁴⁸ whilst Robertson has noted that, based on a survey of 92 recent duty cases:

[A]pproximately 10 percent of the decisions in which duties were denied were based on a lack of foreseeability. A lack of foreseeability operated as a basis for denying duties of care in a wide range of case cases including, for example, cases involving psychiatric injury to an employee, physical injury caused indirectly or by the criminal act of a third party, property damage caused indirectly, and pure economic loss caused by a third party.⁴⁹

If the early critics were right, and factual duty *is* superfluous, then this would be very curious. Accordingly, in this section we will examine this criticism of factual duty in further detail; in particular, whether the fault and remoteness stages *really* perform the same function as the factual duty enquiry. In the next section we will examine whether, even if they do perform the same function, there is nevertheless some other justification for retaining it.

A. Factual duty and fault

The fault stage of the negligence enquiry requires that the defendant’s conduct unreasonably created a risk of harm to another. In determining what was ‘reasonable,’ the court will rely on the ‘reasonable person’ test; that is, if the defendant did something the reasonable person would not have done, or did not do something the reasonable person would have done, they are deemed to have behaved unreasonably.⁵⁰ Like the factual duty enquiry, the fault enquiry therefore involves an element of foreseeability, as the reasonable person’s behaviour will depend on what he or she can foresee. Where, then, the defendant’s conduct does not create a foreseeable risk of harm to anyone (i.e. *no* harm is a foreseeable consequence of the defendant’s behaviour), not only will there be no factual duty, as a defendant does not owe a

⁴⁷ See (n 42).

⁴⁸ Avihay Dorfman, ‘Foreseeability as Re-Cognition’ (2014) 59 Am J Juris 163, 167.

⁴⁹ A Robertson, ‘Policy-Based Reasoning in Duty of Care Cases’ (2012) 33 LS 119, 133-34 (footnotes omitted). For details of the study, see *ibid* 129-30.

⁵⁰ *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784; 156 ER 1047, 1049 (Alderson B).

duty to those he cannot foresee will be affected by his actions, there will also be no fault, as the reasonable person will take no precautions against the materialisation of risks he or she cannot foresee. As Howarth puts it 'If there was no foreseeable risk at the time the defendant acted, it is impossible for the defendant to have been at fault and therefore impossible for the defendant to be liable.'⁵¹ The question of liability is therefore determined at the fault stage, and the factual duty enquiry adds nothing.⁵² Where, on the other hand, the defendant's behaviour does create a foreseeable risk of harm to the claimant, *and that risk materialises*, whilst there will clearly be a factual duty, as the defendant owes a duty to those he can foresee will be affected by his conduct, this is of little consequence, as liability will ultimately depend on whether the defendant's failure to take further steps to prevent the risk from materialising amounted to carelessness.⁵³ Where, then, the defendant's conduct creates no foreseeable risk of injury to anyone, or does create a foreseeable risk of harm to the claimant and that risk materialises, the ultimate question of liability is determined at the fault stage, and the factual duty enquiry is superfluous.

More problematic, however, is conduct that creates foreseeable risk A, but unforeseeable risk B materialises, such as in the case of the 'unforeseeable plaintiff;' that is, where the defendant's conduct does *not* create a foreseeable risk of harm to the plaintiff, but *does* create a foreseeable risk of harm to someone else, yet it is the risk of harm to the *plaintiff* that materialises. Clearly, in such a situation, there will be no factual duty owed to the plaintiff, as harm to the plaintiff was not a foreseeable consequence of the defendant's conduct. Equally clearly, the defendant has been at fault, as the reasonable person does not engage in behaviour

⁵¹ David Howarth, 'Many Duties of Care - Or A Duty of Care? Notes from the Underground' (2006) 26 OJLS 449, 458.

⁵² A similar conclusion is reached in JC Smith, 'Clarification of Duty - Remoteness Problems through a New Physiology of Negligence: Economic Loss, a Test Case' (1974) 9 UBCLawRev 213, 218, 222; Jonathan Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 PN 206, 209-10; Howarth, 'Many Duties of Care - Or A Duty of Care? Notes from the Underground' (n 51) 458; W Jonathan Cardi, 'Purging Foreseeability' (2005) 58 VandLR 739, 744-47; and Howarth, 'Duty of Care' (n 42) 12.12-12.14.

⁵³ See, for example, *Bolton v Stone* [1951] AC 850 (HL); *Paris v Stepney BC* [1951] AC 367 (HL); *Latimer v AEC Ltd* [1953] AC 643 (HL); *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA); *Tomlinson v Congleton BC* [2004] 1 AC 46 (HL).

that unreasonably creates a foreseeable risk of *any* harm; whether or not it is that harm or some other harm that materialises is irrelevant.⁵⁴ Of course, if there can be a situation in which the fault element is satisfied, and the factual duty enquiry is not, then it is wrong to say that factual duty is ‘tautologous’ with the fault enquiry.⁵⁵ However, before concluding that factual duty is therefore necessary, we must first examine the remoteness enquiry, which, like the factual duty enquiry, considers the extent to which a defendant will be held liable for the unforeseeable consequences of their otherwise careless behaviour.

B. Factual duty and remoteness

The present law of remoteness was outlined in the landmark 1961 Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd*,⁵⁶ better known as ‘*The Wagon Mound (No 1)*.’ The defendant ship owners had allowed oil to be discharged from their ship, the Wagon Mound, which was moored in Sydney harbour. The oil then drifted along the water towards the plaintiff’s wharf, some 600 feet away. The plaintiffs were carrying on welding work at the time, which they determined to continue, after being advised that the oil could not reach flash point (170°F) and ignite whilst on the water from errant sparks alone. It seems, however, that one of the sparks nevertheless managed to ignite a rag or some cotton waste beneath the surface oil which acted as a wick, thereby allowing the oil to ignite and start a fire that eventually burned down the plaintiff’s wharf. It was accepted in court that the defendant could have foreseen the risk of damage to the wharf by fouling, and that the discharge of oil was careless in relation to that risk, but that they could not have foreseen the risk of damage to the wharf by fire. As the defendant was careless in relation to *a* risk, even if not the risk that materialised, the fault element of the negligence enquiry was therefore satisfied. On the question of remoteness, however, the court held:

⁵⁴ To put it another way, if it is unreasonable to engage in certain behaviour on the basis that it creates foreseeable risk of harm A to person P, such behaviour will not retrospectively become reasonable on the basis that it actually (and unforeseeably) causes harm B to person Q.

⁵⁵ See (n 9).

⁵⁶ [1961] AC 388 (PC) (*‘The Wagon Mound (No 1)’*).

[I]t does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial ... the actor should be liable for all consequences however unforeseeable and however grave ...⁵⁷

[I]f it would be wrong that a man should be held liable for damage unpredictable by a reasonable man ... equally it would be wrong that he should escape liability ... if he foresaw or could reasonably foresee the intervening events which led to its being done ... Thus foreseeability becomes the effective test.⁵⁸

As the consequences were unforeseeable, the defendant therefore escaped liability.

Lord Hoffmann has described this enquiry as 'limit[ing] liability to those consequences which are attributable to that which made the act wrongful.'⁵⁹ Similarly, Clark and Nolan argue:

[W]hat makes the defendant's act wrongful is the fact that it creates unreasonable risks, and it follows that in general negligence liability is imposed only where the consequence in question was the materialization of one of the risks which made the defendant's conduct negligent in the first place.⁶⁰

Accordingly, if the risk that materialised was unforeseeable, being the risk that the particular plaintiff would suffer the particular kind of harm they in fact suffered, then the damage is too remote.⁶¹

The remoteness enquiry therefore encompasses the factual duty enquiry entirely, as the suffering of harm by an unforeseeable plaintiff is simply the materialisation of an unforeseeable risk. Where, then, there is no factual duty, the harm suffered will necessarily be too remote.⁶² As Cardi notes:

⁵⁷ *ibid* 422-23.

⁵⁸ *ibid* 426.

⁵⁹ *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL), 213.

⁶⁰ T Clark and D Nolan, 'A Critique of *Chester v Afshar*' (2014) 34 OJLS 659, 664.

⁶¹ This is known as the 'risk theory of remoteness.' For more on the 'risk theory,' see: G Williams, 'The Risk Principle' (1961) 77 LQR 179; and M Stauch, 'Risk and Remoteness of Damage in Negligence' (2001) 64 MLR 191. As Hart and Honoré note, however, the risk theory of remoteness has difficulty explaining certain aspects of the law, including recovery where neither the extent of the harm nor the way it occurred was foreseeable, and recovery by those who were injured rescuing primary victims of the defendant's negligence (see, for example, *Chapman v Hearse* (1961) 106 CLR 112): HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 263-64. Such difficulties, however, apply equally to factual duty and so, notwithstanding that they pose problems for the risk theory of remoteness, do not affect the overall argument here that the remoteness enquiry encompasses the factual duty enquiry. See also (n 138).

⁶² Compare the comments of Glass JA in *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd* [1983] 2 NSWLR 268, 295-96, and Vines, Hanford and Harlow

Whether a court considers the defendant-plaintiff nexus in the context of proximate cause [i.e. remoteness] –“was this plaintiff within the scope of the risk created by the defendant's breach?” ... or as a matter of duty –“did the defendant owe a duty to this plaintiff?” ... the underlying issue is the same: “[S]hould the court hold the defendant liable to this plaintiff?” ... the inquiry is identical.⁶³

This observation is hardly new, and Nolan describes it as ‘academic orthodoxy.’⁶⁴ Lord Denning, for example, has said that remoteness and duty are simply ‘different ways of looking at one and the same question which is this: Is the consequence fairly to be regarded as within the risk created by the negligence,’⁶⁵ whilst Oliver LJ has stated, ‘Speaking for myself, I think that the question of the existence of a duty and that of whether the damage ... is too remote are simply two facets of the same problem.’⁶⁶ Numerous cases have also reached the same outcome via the two different paths; some judges deeming the damage too remote, others finding an absence of a duty.⁶⁷ Within academe, Weinrib describes the two issues as ‘frequently interchangeable,’⁶⁸ whilst Prosser wonders whether remoteness is nothing more than duty ‘under another name,’⁶⁹ such that the only difference between findings of no duty and findings that the damage suffered was too remote is merely ‘one of terminology.’⁷⁰ It should therefore be unsurprising that in the United States, §6 of the second discussion draft of the *Restatement (Third) of Torts: General Principles* confines the duty enquiry to notional questions only,⁷¹ whilst §7 of the *Restatement (Third) of Torts: Liability for Emotional and Physical Harm* explicitly states

(n 42) 152, who argue that the foreseeability enquiry at the duty and remoteness stages raise different issues, the former being an abstract enquiry, the latter, more particular. Though see the response to this claim in Luntz and others (n 42) 118-19.

⁶³ Cardi (n 52) 757 (footnotes omitted).

⁶⁴ Nolan (n 42) 572.

⁶⁵ *Roe v Minister of Health* [1954] 2 QB 66 (CA), 85 (Denning LJ). See also: Denning LJ’s discussion of the difference between duty and remoteness in *King v Phillips* [1953] 1 QB 429 (CA) at 441-42. (Note that although Denning LJ is speaking of ‘duty,’ he is clearly referring to the factual aspect of duty.)

⁶⁶ *P Perl (Exporters) Ltd v Camden LBC* [1984] QB 342 (CA), 353 (Oliver LJ).

⁶⁷ See, for example, *Woods v Duncan* [1946] AC 401 (HL), *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139, and *P Perl (Exporters) Ltd v Camden LBC* [1984] QB 342 (CA).

⁶⁸ EJ Weinrib, *The Idea of Private Law* (rev edn, OUP 2012) 158.

⁶⁹ W Prosser, ‘Palsgraf Revisited’ (1952) 52 MichLR 1, 12.

⁷⁰ *ibid* (fn 48). See also Smith (n 52) 225; Howarth, ‘Many Duties of Care - Or A Duty of Care? Notes from the Underground’ (n 51) 458; D Howarth, *Textbook on Tort* (LexisNexis UK 1995) 116; Deakin, Johnston and Markesinis (n 42) 104.

⁷¹ *Restatement (Third) of Torts: General Principles, Discussion Draft No 2* (2000) §6: ‘Findings of no duty ... are based on judicial recognition of special problems of principle and policy that justify the withholding of liability.’

that questions of foreseeability of the risk that materialised are *not* matters for duty, but matters for proximate cause (i.e. remoteness).⁷²

Where, then, the defendant's conduct creates a foreseeable risk, but an unforeseeable risk materialises, the matter is able to be resolved as a question of remoteness, and so the factual duty enquiry is, again, superfluous.

IV. Factual duty and the problem of the unforeseeable plaintiff

It seems, then, that factual duty is superfluous, performing no function not already able to be performed by either the fault or remoteness enquiries. Despite this, however, there is an argument that factual duty nevertheless remains necessary in order to deal with the problem of the unforeseeable plaintiff. In particular, notwithstanding that the same *outcome* can be achieved by dealing with the problem of the unforeseeable plaintiff as part of the remoteness enquiry, it can be argued that it must nevertheless be dealt with in the factual duty enquiry because, first, causing harm to an unforeseeable plaintiff does not amount to a 'wrong,' and, second, the 'wrong' in the law of negligence is the breach of a duty of care. If both of these premises are accepted, then factual duty *is* necessary after all.

This argument first arose in the context of two famous cases, *Palsgraf v Long Island Railway Co.*,⁷³ *Bourhill v Young*,⁷⁴ both of which involved the issue of how to deal with the problem of the unforeseeable plaintiff in light of the law of remoteness of the time, which was

⁷² *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010) §7, Comment j: 'Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice...' For more on the US approach to duty, see: Cardi (n 52); W Jonathan Cardi and Michael D Green, 'Duty Wars' (2007) *SCalLRev* 671; D Owen, 'Duty Rules' (2001) 54 *VandLRev* 767; John CP Goldberg and Benjamin C Zipursky, 'The Moral of McPherson' (1998) 146 *UPaLRev* 1733; and John CP Goldberg and Benjamin C Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 *VandLRev* 657.

⁷³ (1928) 248 NY 339; 162 NE 99 ('*Palsgraf*').

⁷⁴ [1943] AC 92. ('*Bourhill*').

governed by another famous case, *Re Polemis*.⁷⁵ It is worthwhile examining these cases in order to gain a better appreciation of the argument.

A. Palsgraf, Bourhill and Re Polemis

Although the problem of the unforeseeable plaintiff had first been alluded to by Parke B in *Langridge v Levy*,⁷⁶ and later by Brett J in the trial decision of *Smith*,⁷⁷ it was first dealt with explicitly by Cardozo CJ in the famous New York case of *Palsgraf*, ‘a law professor’s dream of an examination question.’⁷⁸ Two train guards were assisting a passenger onto the defendant’s train as it was pulling away from the station when they carelessly dislodged an innocuous-looking package from the passenger’s arms. The package turned out to contain fireworks, which exploded upon falling onto the tracks and thereby caused some scales on the other side of the platform to fall on and injure the plaintiff. In his leading judgment Cardozo CJ found for the defendant on the grounds that no duty had been owed to the plaintiff by the defendant’s guard: ‘The conduct of the defendant’s guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.’⁷⁹ In other words, causing harm to an unforeseeable plaintiff was not a ‘wrong.’ The UK courts had to wait another 15 years before they were forced to confront the problem of the unforeseeable plaintiff, but eventually did so in *Bourhill*. The plaintiff suffered a serious shock after hearing, but not seeing, the defendant negligently crash his motorcycle into

⁷⁵ *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560 (CA) (*‘Re Polemis’*).

⁷⁶ (1837) 2 M&W 519, 530; 150 ER 863, 868: (rejecting the view that ‘wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, anyone who is injured by the violation of it may have a remedy against the wrong-doer’).

⁷⁷ *Smith v London and South Western Railway Co* (1870) 5 CP 98 (Brett J): ‘But I am of opinion that no reasonable man could have foreseen ... [damage] to *the plaintiff’s* cottage... [Therefore] It seems to me that no duty was cast upon the defendants, in relation to *the plaintiff’s* property...’ (emphasis added). See also AL Goodhart, ‘The Unforeseeable Consequences of a Negligent Act’ (1928) 39 Yale LJ 449, 453 (later reprinted as ‘Chapter VII: The Palsgraf Case’ in Arthur L Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press 1931) (‘Brett, J dissented on the ground that the defendant had not been negligent in regard to this particular plaintiff, although the act of leaving the inflammable heaps might have been negligent in relation to others’); and JW Salmond, *The Law of Torts* (6th edn, Sweet & Maxwell 1924) 24 (‘there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others.’)

⁷⁸ William Prosser, *The Law of Torts* (4th edn, West Publishing Co 1971) 254.

⁷⁹ *Palsgraf* 341.

oncoming traffic some 45 feet away. The plaintiff was pregnant at the time of the accident and, as a result of the shock, suffered a stillborn child shortly thereafter. As the New York Court of Appeals had done in *Palsgraf*, the House of Lords denied the existence of a duty of care on the basis that whilst the defendant had been negligent in relation to someone, they had not been negligent in relation to the plaintiff:

Thus, in the present case John Young [the defendant] was certainly negligent in an issue between himself and the owner of the car which he ran into, but it is another question whether he was negligent vis-a-vis the appellant. In such cases terms like “derivative” and “original” and “primary” and “secondary” have been applied to define and distinguish the type of the negligence. If, however, the appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else.⁸⁰

Palsgraf and *Bourhill* essentially boil down to the idea that negligence is not an ‘abstract’ enquiry; that the same behaviour can be negligent in relation to one (foreseeable) consequence, but not negligent in relation to another (unforeseeable) consequence.⁸¹ But this all looks very familiar. To say that negligence is not an abstract concept is simply to say that the defendant is only responsible for the materialisation of foreseeable risks, which, as we saw above, is able to be dealt with as a matter of remoteness.

The immediate difficulty with classifying the unforeseeable plaintiff as a matter of remoteness, however, was *Re Polemis*, the leading case on remoteness at the time. In *Re Polemis* the defendant’s employees negligently dropped a plank of wood into the hold of the plaintiff’s ship as they were loading cargo. The dropped plank somehow created a spark which ignited petrol vapour in the hold, causing an explosion and the eventual destruction of the ship. In relation to the defendant’s liability the court held:

⁸⁰ *Bourhill* 108 (Lord Wright). Lord Russell made similar comments at 102: ‘Can it be said that [the defendant] could reasonably have anticipated that a person, situated as was the appellant, would be affected by his proceeding towards [the town of] Colinton at the speed at which he was travelling? I think not ... In my opinion, he owed no duty to the appellant, and was, therefore, not guilty of any negligence in relation to her.’

⁸¹ This was most famously expressed by Pollock in F Pollock, *The Law of Torts* (11th edn, Stevens 1920) 455: ‘Proof of negligence in the air, so to speak, will not do.’

To determine whether an act is negligent, it is relevant to determine whether any reasonable man would foresee that the act would cause damage; if he could not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it actually causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act...⁸²

Defendants were therefore liable for *all* the direct consequences of their 'negligence,' whether those consequences had been foreseeable or not. If, then, the unforeseeable plaintiff were a matter for remoteness, on no sensible interpretation of *Re Polemis* could a defendant escape liability on the basis that the harm (directly) caused by their negligence was suffered by an unforeseeable plaintiff; negligence *would* be an abstract enquiry.

Of course, if the court felt that this conclusion was objectionable, the obvious solution was surely to overrule the extremely unpopular⁸³ *Re Polemis*, and to replace it with a remoteness test based on foreseeability; the defendant would therefore only be liable for the foreseeable consequences of their negligence, and negligence would *not* be an abstract concept. However, the problem with this solution, at least according to the court, was that remoteness merely concerned the measure of damages payable as a result of the defendant's 'wrong,' whilst duty concerned whether the defendant had committed a 'wrong' in the first place; that is, it went to compensation rather than culpability. As Cardozo CJ stated in *Palsgraf*:

The law of causation, remote or proximate [i.e. remoteness], is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort.⁸⁴

Lord Wright made similar comments in *Bourhill*: 'The question of liability is anterior to the question of the measure of the consequences which go with the liability ... What is now being

⁸² *Re Polemis* 577 (Scrutton LJ).

⁸³ Davies, for example, said that 'It is no exaggeration to say that during its 40-year life *Re Polemis* became one of the most unpopular cases in the legal world.' Martin Davies, 'The Road From Morocco: Polemis Through Donoghue to No-Fault' (1982) 45 MLR 534, 534. See also JG Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 Can Bar Rev 471, 481: 'Criticism of the decision *In re Polemis* has been more vocal and persuasive than its defence.'

⁸⁴ *Palsgraf* 346.

considered is the question of liability.⁸⁵ This reasoning has received considerable support elsewhere.⁸⁶ If, then, the problem of the unforeseeable plaintiff was an issue of culpability rather than compensation, then it *had* to be dealt with as part of the duty enquiry. Factual duty was necessary after all.

To summarise, then, the argument that factual duty is *not* superfluous, goes something like this:

1. As negligence is not an abstract concept, the problem of the unforeseeable plaintiff *must* be relevant to whether the defendant committed a 'wrong' (i.e. the problem of the unforeseeable plaintiff goes to culpability rather than compensation); and
2. As the 'wrong' in the law of negligence is the breach of a duty of care, rather than the breach of a duty of care that causes damage that is not too remote (i.e. the duty of care is a 'real' duty), the problem of the unforeseeable plaintiff *must* be a matter for duty rather than remoteness; therefore
3. Factual duty *is* a jurisprudentially necessary element of the negligence enquiry after all.

Although *Re Polemis* no longer represents the law, and so, as we have seen, this argument is now of little *practical* effect, if the syllogism is nevertheless valid, the factual duty element must be necessary. Before we accept this conclusion, however, we will first explore the premises of the syllogism in further detail. It is most convenient to consider the second premise first.

⁸⁵ *Bourhill* 110. See also Lord Wright's comments in Wright, 'Re Polemis' (1951) 14 MLR 393, 399.

⁸⁶ This was most famously put by Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956 (HL), 984: 'What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence ... This, however, goes to culpability, not to compensation.' See also: *Bourhill* 101 (Lord Russell); *Woods v Duncan* [1946] AC 401 (HL), 437 (Lord Porter); OW Holmes and F Pollock, *Holmes-Pollock letters: the Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874-1932*, vol II (M De Wolfe Howe ed, Harvard University Press 1941) 83 (per Holmes); JF Wilson and CJ Slade, 'A Re-Examination of Remoteness' (1952) 15 MLR 458, 467.

B. The duty of care is a 'real' duty

The second premise of the claim that factual duty is necessary is that the 'wrong' in the law of negligence is the breach of a duty of care, rather than the breach of a duty of care causing damage that is not too remote. In modern terms, this is said to mean that the duty of care is a 'real' duty. This claim is based on the understanding that *all* civil 'wrongs' are based on breaches of a legal 'duty,'⁸⁷ an idea that can be traced back to the Roman lawyer, Gaius.⁸⁸ So, for example, the 'wrong' in the breach of a contract is the breach of the 'duty' to perform the contract, and the 'wrong' in the law of nuisance is the breach of the 'duty' to not use one's land in a way that interferes with a neighbour's use and enjoyment of their land. In the same way, the 'wrong' in the law of negligence is said to be the breach of the 'duty' to take care. That the 'wrong' in the law of negligence is the breach of duty of care *only*, is crucial to the claim that factual duty is necessary. In particular, if the 'wrong' were, instead, the breach of a duty to take care to avoid *causing damage that was not too remote*, then the problem of the unforeseeable plaintiff could simply be dealt with at the remoteness stage and so factual duty would *not* be needed to ensure that harm to an unforeseeable plaintiff did not amount to a 'wrong.'

On what basis, however, is the wrong in the law of negligence the breach of a duty to take care rather than the breach of a duty to take care to not cause damage that is not too remote? Despite the claim being crucial to the outcome in both *Palsgraf* and *Bourhill*, surprisingly, neither case offers any *actual* support for the proposition; indeed, in a case note written on *Palsgraf*, Prosser said of the reasoning: 'with due respect to the superlative style in which [the judgment is written] ... [It] beg[s] the question shamelessly, stating dogmatic propositions without reason or explanation.'⁸⁹ More recently however, considerable support for the proposition has been offered by McBride. According to McBride, duties of care are indeed

⁸⁷ Torts are generally thought of as civil 'wrongs,' whilst 'wrongs,' in turn, are generally thought of as breaches of legal duties: P Birks, 'The Concept of a Civil Wrong' in D Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 33; R Stevens, *Torts and Rights* (OUP 2007) 2.

⁸⁸ Gaius, *Institutes*, 3.88.

⁸⁹ Prosser (n 69) 7.

'real' duties, and so the 'wrong' in the law of negligence is the breach of the duty of care rather than the breach of a duty of care to not cause damage that is not too remote, because if it were not the case we would encounter four problems. First, it would mean that, 'paradoxically,' the law of negligence only protected claimants from defendants' carelessness *after* they had been harmed, effectively allowing defendants to behave as carelessly as they pleased prior to then.⁹⁰ Second, as the deliberate breach of a duty of care would not be a wrong, we could not explain why exemplary damages are routinely awarded against defendants for such breaches.⁹¹ Third, there would be no reason for the courts to ever award injunctions to prevent future carelessness if that carelessness were not a wrong in the absence of damage, yet the courts do this regularly.⁹² Fourth, we would be unable to explain why the courts distort the law on causation, in cases such as *Reeves v Commissioner of Police of the Metropolis*⁹³ and *McGhee v National Coal Board*,⁹⁴ to impose liability on defendants who have not, on orthodox views, caused any harm.⁹⁵ In light of these problems, McBride concludes that the view that duties of care must be real duties is therefore the preferable one.⁹⁶

The claim that duties of care are real duties is not, however, unproblematic. The biggest difficulty with the claim is that it deems a legal wrong to have been committed under the law of negligence without the claimant having suffered any actionable damage. Yet we know that this is simply not the law. In particular, whilst behaving in a manner that creates a risk of injury to another might be able to be legitimately described as a *moral* or *criminal* 'wrong,' insofar as the law of negligence is concerned, provided that the 'wrongdoer' is fortunate enough to avoid injuring anyone, he has committed no 'wrong' at all. As Buckland explains:

⁹⁰ N McBride, 'Duties of Care: Do They Really Exist?' (2004) 24 OJLS 417, 425.

⁹¹ *ibid* 426.

⁹² *ibid* 427.

⁹³ [2000] 1 AC 360 (HL).

⁹⁴ [1973] 1 WLR 1 (HL).

⁹⁵ McBride (n 90) 430.

⁹⁶ *ibid* 441. For general criticisms of McBride's argument, see Howarth, 'Many Duties of Care - Or A Duty of Care? Notes from the Underground' (n 51); and Dan Priel, 'Tort Law for Cynics' (2014) 75 MLR 703.

If I drive down Piccadilly at sixty miles an hour I am certainly careless, but if I get through without damaging anyone in any way I am under no liability at civil law to anyone. I may be a criminal, but that is another matter ... So far as civil law is concerned my carelessness is without any legal result whatsoever.⁹⁷

Indeed, that damage is an 'essential ingredient'⁹⁸ of the cause of action in negligence, rather than merely a requirement of recoverability, is 'not in doubt.'⁹⁹ As Fleming explains:

Actual damage or injury is a necessary element (the gist) of tort liability for negligence. Unlike assault and battery or defamation, where violation of a mere dignitary interest like personal integrity or reputation is deemed sufficiently heinous to warrant redress, negligence is not actionable unless and until it results in damage to the plaintiff.¹⁰⁰

Brennan J, too, has noted that, a 'duty of care is a thing written on the wind unless damage is caused by the breach of that duty.'¹⁰¹ If, then, the tort of negligence requires actionable damage to be complete, then the breach of a duty of care *alone* cannot amount to a legal wrong, and the claim that the 'duty' in the law of negligence is the duty to take care, must be wrong.

Other difficulties with the claim are highlighted by Nolan:

First, a "duty" of care is normatively unconvincing, since a right not to be exposed to risk is both counter-intuitive (do we really believe that a motorist who careers down Piccadilly at 60 miles an hour has violated the rights of all those he could have hit?) and philosophically problematic. Secondly, examples can be given which show that the duty of care cannot be a duty owed to others, at least if we accept the Hohfeldian correlation of such duties with claim rights. Suppose that A, a baby of six months, falls ill after eating a tin of baby food negligently manufactured by B eighteen months previously. A has a claim in negligence against B in such a case, but how could B have breached a duty he owed A, and how could A's rights therefore have been violated, before A had even been conceived? Thirdly, there are cases which indirectly demonstrate that duties of care are not really duties. In *Spartan Steel and Alloys Ltd v Martin & Co. (Contractors) Ltd*, for example, the same act of negligence by B caused A both property damage and pure

⁹⁷ WW Buckland, *Some Reflections on Jurisprudence* (Cambridge University Press 1945) 114. See also Lawson, 'The Duty of Care in Negligence: A Comparative Study' (n 28) 112; Birks (n 87) 37; and Morison in JG Fleming and WL Morison, 'Duty of Care and Standard of Care' (1953) 1 SydLR 69, 70-71.

⁹⁸ *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350 (CA), 375 (Oliver LJ). See also Nolan (n 42) 561.

⁹⁹ D Nolan, 'New Forms of Damage in Negligence' (2007) 70 MLR 59, 59. See also: J Stapleton, 'The Gist of Negligence, Part 1: Minimum Actionable Damage' (1988) 104 LQR 213; J Stapleton, 'The Gist of Negligence, Part 2: The Relationship Between "Damage" and Causation' (1988) 104 LQR 389.

¹⁰⁰ JG Fleming, *The Law of Torts* (9th edn, Law Book Co 1998) 216. An almost identical quote is reproduced in Margaret Beazley, 'Damage' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (10th edn, Thomson Reuters (Professional) Australia Limited 2011) 225.

¹⁰¹ *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218, 241. See also, *Harriton v Stephens* (2006) 226 CLR 52, 115 (Crennan J); *Brookfield Multiplex v Owners – Strata Plan No 61288* (2014) 88 ALJR 911 [124] (Bell and Keane JJ).

economic loss. Had the wrong in the case been the act of negligence itself, then all the loss A suffered as a result of that act should have been recoverable, but as it was the Court of Appeal allowed A to recover only for the property damage, and not the pure economic loss.¹⁰²

As Nolan notes, the evidence against the proposition that duties of care are real duties would appear to be ‘overwhelming.’¹⁰³ Lawson¹⁰⁴ and Zipursky¹⁰⁵ have expressed similar sentiments. The second premise underlying the claim that factual duty is required is therefore flawed. As well as invalidating the claim that factual duty is necessary, the conclusion that the duty of care is not a ‘real’ duty, and is, in fact, merely a label for an element of the negligence enquiry, also implies that the element of negligence enquiry typically known as the ‘breach,’ or ‘breach of duty,’ element is a misnomer, as there is no ‘duty’ being ‘breached.’ A more appropriate name for the stage is therefore the ‘fault’ or ‘standard of care’ stage, the former of which has been adopted in this thesis.

C. The problem of the unforeseeable plaintiff goes to culpability, not compensation

If the argument above, that the duty of care is not a ‘real’ duty, is accepted, then the claim that factual duty is necessary must fail, as negligence will not become an abstract concept by dealing with the problem of the unforeseeable plaintiff as part of the remoteness enquiry. If, however, the argument is rejected, then the claim still depends on the validity of first premise, being that that the problem of the unforeseeable plaintiff is relevant to the ‘wrong’ rather than to the extent of the liability for the wrong (i.e. to culpability rather than compensation). That is, only if the problem of the unforeseeable plaintiff is relevant to the ‘wrong,’ being the breach of a duty

¹⁰² Nolan, ‘Deconstructing the Duty of Care’ (n 42) 561-62 (footnotes omitted).

¹⁰³ *ibid* 562.

¹⁰⁴ Lawson, ‘The Duty of Care in Negligence: A Comparative Study’ (n 28) 112: ‘the formulation of the doctrine [as a duty *to take care*] is objectionable on analytical grounds, and ... it would be better to say that the duty is to avoid damaging the plaintiff by failing to take the requisite care rather than to take care to avoid damaging him.’

¹⁰⁵ B Zipursky, ‘Foreseeability in Breach, Duty and Proximate Cause’ (2009) 44 Wake Forest L Rev 1247, 1272: ‘The legal wrong in negligence is the negligent injuring of the plaintiff, not the failure of the defendant to conform his conduct to a standard of reasonable risk taking.’

of care, does it follow that the problem of the unforeseeable plaintiff *must* be part of the duty enquiry, and that factual duty is necessary after all.

The claim that the foreseeability of harm to the plaintiff is relevant to the wrong is not, in itself, overly problematic; after all, if it were otherwise, negligence would be an abstract concept, which few seem to agree should be the case. What is problematic, however, is the implication that foreseeability of harm to the plaintiff can somehow be isolated from the foreseeability of the other consequences of the defendant's carelessness, with the former going to culpability, and the latter going to compensation. One could, of course, overcome this problem by accepting that they the kind of harm, the extent of the harm, and the way the harm occurred, are *also* relevant to the wrong, but such a response would amount to little more than a relabelling of the 'remoteness' enquiry as 'factual duty,' thereby contradicting the first premise and conceding that remoteness is relevant to the definition of the 'wrong' after all. Accordingly, if the claim that factual duty is necessary is to be maintained, there must be some justifiable distinction between foreseeability of harm to the plaintiff, a question of culpability, and foreseeability of the other consequences of the careless conduct, which are apparently questions of compensation only. There are, however, three difficulties with such a claim: it draws arbitrary distinctions, the question of the foreseeability of harm to the plaintiff cannot be sensibly isolated from questions of the foreseeability of the kind of harm in any event, and it requires us to simultaneously adopt contradictory rationales.

i. The distinction is arbitrary

The first difficulty with the treating foreseeability of harm to the plaintiff as relevant to culpability, and foreseeability of the other consequences of the carelessness as relevant to compensation only is that it relies on an entirely arbitrary distinction. This is clearest in the case of foreseeability of harm to the plaintiff and foreseeability of the *kind* of harm suffered.

Consider, for example, *Thorogood v Van Den Berghs and Jurgens Ltd*,¹⁰⁶ in which the plaintiff suffered an injury to his hand after it became caught in the revolving blades of a fan that had been placed on the ground for testing. It was found at trial that, whilst it was *not* foreseeable that a trained man standing nearby, such as the plaintiff, would suffer physical injury by allowing his hand to come in contact with the fan, as the plaintiff did, it *was* foreseeable that a trained man standing nearby would be at risk of suffering physical injury by having *his necktie* caught in the blades. In other words, *some* kind injury to the particular plaintiff was foreseeable (i.e the ‘necktie’ kind), even though the kind actually suffered was not. Working from the basis that only foreseeability of harm to the plaintiff was relevant to the question of culpability, Asquith LJ held the defendant liable for the damage, notwithstanding that it was unforeseeable:

The foreseeability of the damage actually sustained is wholly irrelevant ... The actual damage may be wholly different in character, magnitude, or the detailed manner of its incidence, from anything which could have reasonably be anticipated.¹⁰⁷

On what basis, however, can it be said that foresight of the kind of damage is ‘wholly irrelevant’ to the wrong, whilst foresight of risk to the actual plaintiff is essential; that is, why would liability to an unforeseeable plaintiff imply negligence is an abstract concept, whilst liability for an unforeseeable kind of harm does not? Prosser described the position as ‘a fundamental and foolish inconsistency’,¹⁰⁸ whilst Goodhart objected:

[I]f we once reject the idea that an act has a general quality of wrongfulness where different persons are concerned, it would seem to follow logically that we must also reject the idea that an act has a general quality of wrongfulness where different consequences are concerned ... [I]f A cannot be negligent to B “in the air” [then] To hold A, who has been negligent to B in relation to certain foreseeable consequences, liable to B for unforeseeable consequences is no more reasonable than to hold A liable for such consequences if they happen to C.¹⁰⁹

Fleming, too, objected that that such a distinction:

¹⁰⁶ [1952] 2 KB 537 (CA) (*‘Thorogood’s Case’*).

¹⁰⁷ *Thorogood’s Case* 690.

¹⁰⁸ Prosser (n 69) 23.

¹⁰⁹ Goodhart (n 77) 465. See also Goodhart’s comments in ALG, ‘Obituary: Re Polemis’ (1961) 77 LQR 175, 177: ‘such a distinction [cannot] be supported on any obviously rational principle.’

introduces in to the law of negligence an element of stress which is difficult to justify on rational grounds. Both are aspects of the same problem of limitation of responsibility and cannot be divorced from each other by the verbal distinction between culpability on the one hand and compensation on the other.¹¹⁰

Accordingly, the claim that foreseeability of harm to the plaintiff is relevant to compensation, and foreseeability of the other consequences of the defendant's carelessness are relevant to compensation only, whilst justifying the necessity of factual duty and explaining the results in *Palsgraf* and *Bourhill*, relies on an entirely arbitrary distinction and has little normative attraction.

ii. Foreseeability of harm to the plaintiff cannot be distinguished from foreseeability of the kind of harm

The second difficulty with treating foreseeability of harm to the plaintiff as relevant to culpability, and the other consequences of the plaintiff's carelessness as relevant to compensation only, is that it implies that the foreseeability of harm to the plaintiff and the foreseeability of the exact kind of harm are able to be distinguished; yet, the problem of the unforeseeable plaintiff is less concerned with foresight of *some harm* to the particular plaintiff, than foresight of *the particular kind of harm* to the particular plaintiff.¹¹¹ Why this is so is best illustrated by an example. Assume that the facts of *Palsgraf* and *Bourhill* were slightly different, and that the package of fireworks had belonged to Mrs Palsgraf, and the car with which Mr Young collided had belonged to Mrs Bourhill. In both examples, the plaintiffs would undoubtedly have been able to recover for the damage caused to their property by the carelessness of the

¹¹⁰ Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (n 83) 496. See also *ibid*: 'It is, of course, pragmatically possible to maintain both the duty approach and the *Polemis* rule, and indeed interpret the latter in terms of a duty to protect others against unforeseeable consequences of negligent acts, but the essential inconsistency remains holding that one who can foresee harm to A is liable for unforeseen consequences to A and refusing to hold him liable for unforeseen harm to B. Whether the unforeseen harm is suffered by A or B is entirely fortuitous. The difficulty is fundamental...'

¹¹¹ See, for example, Dias, who is reluctant to treat the issues separately: RWM Dias, 'Trouble on Oiled Waters: Problems of *The Wagon Mound (No 2)*' (1967) 25 CLJ 62, 71-72. This is not to say, however, that the reverse is necessarily true. A particular *kind* of damage can be unforeseeable without any consideration of *who* suffers that damage. Take, for example, *Tremain v Pike* [1969] 1 WLR 1556 (Exeter Assizes), where a herdsman suffered a rare disease as a result of negligent exposure to rat urine. The particular kind of damage was unforeseeable to all classes of persons, and so was not dependant on the unforeseeability of the *kind* of damage to the particular plaintiff.

defendants. Yet, if this is the case, *some* injury to the particular plaintiff *would* have been a foreseeable consequence of the defendant's carelessness, and so the defendant *would* have been negligent 'vis-a-vis' the plaintiff. Would it therefore follow that the plaintiffs could recover for their personal injuries as well? Surely not, or the actual results of *Palsgraf* and *Bourhill* would rest on the fortuitous fact that the plaintiffs did not suffer any property damage, but only personal injury.¹¹² But if that is not the explanation, then what is? Obviously, the results rest on the basis that it was unforeseeable that the particular plaintiff would suffer the particular 'kind' of injury; that is, whilst it may have been foreseeable that the plaintiffs would suffer property damage, it was not foreseeable that they would suffer physical injury. The result, then, is that the basis of the denial of the duty was not that harm to the particular plaintiff was unforeseeable, but that the particular *kind* of harm suffered by the particular plaintiff was unforeseeable. The problem of the unforeseeable plaintiff is therefore a misnomer; the *real* problem is the unforeseeability of the exact *kind* of harm to the plaintiff.

Of course, if it is not injury to the particular plaintiff that needs to be foreseeable, but injury of the particular *kind* suffered by the particular plaintiff that needs to be foreseeable, then, not only do *Palsgraf* and *Bourhill* appear to directly contradict *Re Polemis*, which had explicitly stated that the exact 'kind' of damage was *not* required to be foreseeable for that damage to be recoverable, but we are now very close to saying the remoteness of the damage is relevant to the wrong, thereby contradicting the first premise and establishing that factual duty is unnecessary.

¹¹² Fleming describes such a result as 'capricious': JG Fleming, 'The Passing of *Polemis*' (1961) 39 Can Bar Rev 489, 497. The same 'capriciousness' can be illustrated by imagining that the cargo on the steamship *Thrasylvoulos* had belonged to a third party. As the defendant's carelessness only created a foreseeable risk of harm to the *ship*, and not the *cargo*, the defendant would therefore only be liable to the owner of the ship; that is, the 'wrong' was to the owner of the ship, not to the owner of the cargo. Now imagine that both the ship *and* the cargo belonged to the same party. Here, the defendant would be liable for the damage to the ship *and* the cargo; the 'wrong' was to the owner of the ship and so the defendant was liable for all direct consequences of that wrong. The defendant's liability for the cargo therefore seems to depend on who happens to own it. Goodhart (Goodhart (n 77) 466) and Dias (Dias, 'The Breach Problem and the Duty of Care' (n 28) 386) both argue that such an explanation is unsatisfactory, whilst Prosser describes it as 'utter nonsense' (Prosser (n 69) 23).

Although Cardozo,¹¹³ Lord Wright¹¹⁴ and others¹¹⁵ recognised the difficulty in isolating foresight of harm to the plaintiff from foresight of the kind of harm suffered, the first person to confront the obvious problem with this was E Anthony Machin. Machin accepted that factual duty required more than foresight of *any* injury to the particular plaintiff; however, it was not foresight of the 'kind' of injury that was also required, but foresight of injury to the particular plaintiff's affected 'interest',¹¹⁶ such as plaintiff's 'interest' in freedom from physical bodily injury, 'interest' in freedom from injury to chattels, 'interest' in freedom from injury to land, and 'interest' in freedom from nervous shock.¹¹⁷ As Machin explains:

[I]t is difficult to accept that reasonable foresight of injury to the one interest should be sufficient to ground an action in respect of actual injury to the other, any injury to which being *ex hypothesi* unforeseeable ... [I]f I know that little Tommy's mother is watching him from a second-floor window as he plays in the street, and I nevertheless drive my motor-car at a reckless speed towards him and thereby kill him under her eyes, and she suffers shock, I am surely liable to her in respect of it because shock is foreseeable. Now suppose that little Tommy, unknown to me, has a stick of dynamite in his pocket which explodes and physically injures his mother. I can foresee no physical injury to the mother whatsoever. Upon what principle should I pay for such physical injury, when all I could reasonably foresee was injury to a different interest of hers? A person standing in the street a quarter of a mile away who was hit by a fragment thrown out by the explosion would clearly have no cause of action of any kind against me. Why should the mother be placed in any better position, so far as recovery for unforeseeable physical injury is concerned, because she already has a right to recover in respect of shock?¹¹⁸

Machin's 'interest theory' certainly addressed the difficulties highlighted above. Distinguishing 'kind of harm' from 'interests,' reconciled the seeming conflict between *Palsgraf* and *Bourhill* and *Re Polemis* and explained the seeming overlap between the roles of factual duty and

¹¹³ *Palsgraf* 347: 'There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e. g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now.'

¹¹⁴ *Bourhill* 108 ('Her interest, which was in her own bodily security, was of a different order from the interest of the owner of the car'); *ibid* 110 ('[*Re Polemis*] must be understood to be limited ... to "direct" consequences to the *particular interest of the plaintiff* which is affected.')

¹¹⁵ See, for example: J Smith, 'Legal Cause in Actions of Tort' in Harvard Law Review Association (ed), *Selected Essays on the Law of Torts* (Harvard Law Review Association 1924) 649; Leon Green, 'The Palsgraf Case' (1930) 30 Colum L Rev 789, 790; F James, 'Scope of Duty in Negligence Cases' (1952) 47 NwULRev 778, 783.

¹¹⁶ EA Machin, 'Negligence and Interest' (1954) 17 MLR 405, 410.

¹¹⁷ *ibid* 418.

¹¹⁸ *ibid* 410.

remoteness; factual duty required foresight of injury to the particular plaintiff's affected 'interest', and once that duty had been breached, remoteness permitted recovery for all directly caused 'kinds' of harm whether they were foreseeable or not. The reason, then, that Mrs Palsgraf could not have recovered for her personal injury even if she had owned the package of fireworks is because there would have only been foresight of injury to her 'chattel-interest,' and not her 'body-interest.' For the same reason Mrs Bourhill could not have recovered for her personal injuries even if she had owned the car.¹¹⁹

The interest theory, however, was not unproblematic. First, it created even *more* arbitrary distinctions, now that the affected 'interest' was required to be foreseeable, whilst the 'kind' of harm, extent of harm, etc, inexplicably, were not.¹²⁰ Second, Machin's justification for requiring that damage to the affected *interest* be foreseeable, equally justified requiring that the *kind* of damage suffered be foreseeable, the exact proposition he was trying to disprove. In particular, how is the argument that 'it is difficult to accept that reasonable foresight of injury to the one interest should be sufficient to ground an action in respect of actual injury to the other, any injury to which being *ex hypothesi* unforeseeable,'¹²¹ any different to 'it is difficult to accept that reasonable foresight of one *kind of harm* should be sufficient to ground an action in respect of actual injury to another *kind of harm*, that was *ex hypothesi* unforeseeable?'¹²² It is, therefore, perhaps unsurprising that the stated aim of Machin's 'interest theory' was nothing more than 'a means to an end,'¹²³ and motivated more by pragmatism than logic; that is, Machin was *not* attempting to justify the necessity of factual duty requirement, but was merely attempting to provide an interpretation of *Palsgraf* and *Bourhill* that was reconcilable with *Re Polemis*: 'a

¹¹⁹ Similarly, in the *Re Polemis* example above, *neither* party could recover for the damage to the cargo, as different chattels involve different interests, so the interest in the cargo would have been a different to the interest in the ship.

¹²⁰ AL Goodhart, 'The Imaginary Necktie and the Rule in *Re Polemis*' (1952) 68 LQR 514, 515 (fn 7).

¹²¹ Machin (n 116) 412.

¹²² Similarly, Machin's 'little Tommy' example, quoted above, could equally be used to justify foresight of the same 'kind' of harm: 'Upon what principle should I pay for such physical injury [or damage of one 'kind'], when all I could reasonably foresee was injury to a different interest [or of a different kind] of hers.'

¹²³ Machin (n 116) 418.

compromise between the theory which requires foreseeability as a criterion both of duty and remoteness, and the theory which regards all direct damage as actionable provided some damage was foreseeable.¹²⁴ Whilst Machin may, indeed, have achieved this, he only did so by making the duty enquiry even more confusing than it was in the first place.

There was, however, a rationale for the interest theory that had not been advanced by Machin, a rationale that was, arguably, more convincing than any of his explanations: that the interest theory eschewed any reliance on the problematic concept of 'kind' of damage. After all, what was a 'kind' of damage? Was, for example, damage to an eye the same 'kind' of damage as damage to a foot?¹²⁵ Similarly, how broad or narrow was a 'kind' of damage meant to be? On the one hand, if the level of abstraction is set low enough, then almost no kind of damage will be foreseeable (i.e. the more specific the risk the less likely it will be foreseeable), whilst, on the other hand, vague generalisations of 'kinds' of harm will cover almost anything, and so every 'kind' of harm will be foreseeable.¹²⁶ Depending on the level of abstraction, both everything and nothing is foreseeable. Recently, Stevens summed up the problem as follows: 'there is no necessarily right answer to the question of what counts as the same [kind]¹²⁷ of damage, and no criterion by which it can be determined. The [kind] is wholly dependent on the level of generality with which the damage is described...'¹²⁸

In contrast to the comparatively fixed idea of 'interests,' the 'kind' of harm concept seemed wildly imprecise and problematic. Requiring foreseeability of harm to the plaintiff's

¹²⁴ *ibid* 419. That this was the only way to reconcile the cases, was often put forward as a reason in favour of such an interpretation: See, for example, Wilson and Slade (n 86) 468; Dias, 'Trouble on Oiled Waters: Problems of *The Wagon Mound (No 2)*' (n 23) 179. Of course, the fact that two cases *can* be interpreted consistently, says nothing about whether the cases were correctly decided in the first place.

¹²⁵ Williams (n 61) 181; Prosser (n 69) 23; Goodhart, 'The Unforeseeable Consequences of a Negligent Act' (n 77) 467.

¹²⁶ G Fridman and J Williams, 'The Atomic Theory of Negligence' (1971) 45 ALJ 117, 122. See also Fleming, 'The Passing of *Polemis*' (n 112) 520; Goodhart, 'The Imaginary Necktie and the Rule in *Re Polemis*' (n 120) 534.

¹²⁷ Stevens uses the word 'type', but this can be used interchangeably with 'kind'.

¹²⁸ Stevens (n 87) 155. See also *ibid* 156: 'Distinctions of this kind, based on an unstable concept, with no demonstrably correct result one way or the other, do no credit to our law.'

particular 'interest' therefore seemed a preferable and more stable option to foreseeability of the exact 'kind' of harm. But was this actually so? Consider, for example, *Smith*. The defendant train company had allowed dried grass cuttings to pile up close to its railway lines which were set alight by sparks from a passing locomotive. Wind carried the fire across an adjoining stubble field to the plaintiff's cottage over 200m away. The plaintiff's cottage was destroyed by the fire. Physical damage to the land adjoining the railway track was no doubt foreseeable, and so, according to the interest theory, the defendant was negligent vis-à-vis the owner of the stubble field's interest in the stubble field. Damage to the plaintiff's cottage, however, being so far away, was not a foreseeable consequence of the defendant's actions, meaning that, per the interest theory, the defendant had not been negligent vis-à-vis the plaintiff's interest in his cottage. So far, so good. The difficulty, however, comes when we hypothesise that the scrub field had belonged to the plaintiff.¹²⁹ Under the interest theory, this modification to the facts would mean that damage to the property interest of the plaintiff *would* have been foreseeable and so the plaintiff would have recovered for the damage to his cottage. The plaintiff's case, therefore, depended on who owned the adjoining scrub field. Such a capricious result, however, is clearly unsatisfactory. Whilst one might reply that the scrub field was on a separate title to the house, and so the subject of a separate property interest, this would imply that liability ought to depend on the nature of the property title, an equally capricious result.

One solution might be to define interests more narrowly, such that the interest in the scrub field is different to the interest in the house. But how narrow do we go? Is the interest in a house, for example, the same as the interest in an adjacent garage, and would it matter whether they were adjoined or detached? Would the interest in a house extend to the chattels inside the house, such as a painting, or even outside the house, such as a car in the driveway? And would

¹²⁹ The example is further discussed in: Williams (n 61) 185-86; and Fleming, 'The Passing of *Polemis*' (n 112) 525-27.

the interest in a painting extend to the interest in the frame, or the paint on the canvas?¹³⁰ Clearly, a line needs to be drawn somewhere. On the one hand, ‘interests’ cannot be defined too broadly (adjoining land involves the same interest), or we will be left with capricious results, and a hopelessly undemanding test for foreseeably endangering an ‘interest.’ On the other hand, ‘interests’ cannot be defined too narrowly (the interest in a painting’s canvas is separate to the interest in the paint on the canvas), or it will become extremely difficult to show that harm to a particular interest was ever foreseeable. Where, exactly, to draw the line clearly cannot be ‘supported by any obviously rational principle,’¹³¹ and so will necessarily involve some degree of flexibility. Of course, the moment we start relying on discretion and flexibility to distinguish between different interests, we are back to where we started, and any meaningful distinction between ‘kinds’ of harm and ‘interests’ ceases to exist; the interests theory is therefore subject to the same problems it was trying to overcome. Indeed, even Machin conceded that when interests start being treated flexibly, and subdivided further, it would ‘lead ultimately to a requirement of foreseeability of the very kind of damage which in fact occurred [and] [t]his would be incompatible with *Re Polemis*.’¹³² Requiring foreseeability of damage to a particular ‘interest’ of the plaintiff is therefore just as problematic as requiring foreseeability of the same ‘kind’ of damage, and so does not provide a convincing way for distinguishing between foreseeability of harm to the plaintiff and foreseeability of the kind of harm suffered, nor can it provide a way for *Palsgraf* and *Bourhill* to be read consistently with *Re Polemis*.

If foreseeability of harm to the plaintiff and foreseeability of the kind of harm suffered cannot be distinguished, then factual duty requires foreseeability of the particular kind of harm suffered by the particular plaintiff. Of course, if the *kind* of harm suffered by the particular

¹³⁰ The same difficulties arise in cases of the interest in bodily safety. Negligently exposing someone to spinning fan blades would surely give rise to liability for foreseeable physical maiming, but what if the plaintiff instead unforeseeably caught a chill. And would it matter if the chill was viral or bacterial? See Goodhart, ‘The Imaginary Necktie and the Rule in *Re Polemis*’ (n 120) 516.

¹³¹ ALG (n 109) 177.

¹³² Machin (n 116) 418.

plaintiff need be foreseeable, then the first premise, that causing harm to an unforeseeable plaintiff does not constitute a wrong, is, in fact: 'causing *an unforeseeable kind of* harm to a particular plaintiff is not a wrong,' or, in other words, causing harm that is too remote is not a wrong. Remoteness, then, *is* relevant to the wrong, and so the second premise contradicts the first premise. Factual duty is therefore not needed.

iii. We must simultaneously accept contradictory rationales

The third difficulty with treating foreseeability of harm to the plaintiff as relevant to culpability, and the rest of the consequences as relevant to compensation only, is that it relies on a rationale that contradicts the rationale underlying the first premise, being the claim that the wrong in the law of negligence is the breach of the duty of care rather than the breach of a duty of care causing damage that is not too remote. In particular, the claim that foreseeability of harm to the claimant is relevant to culpability rather than compensation is based principally on an objection to the idea of negligence being an abstract enquiry, and so rejects the idea of liability for carelessness without regard to the foreseeability of the actual consequences. The claim that the wrong in the law of negligence is the breach of a duty of care only, however, is based on the idea that the consequences of the defendant's carelessness are completely *irrelevant* to the wrong; indeed, the breach of the 'duty' occurs at the moment of the carelessness, regardless of the consequences that follow, or whether any consequences follow at all. On this logic, the only method of ensuring that derivative or parasitic claims do not occur is by limiting *compensation* to foreseeable losses; so the problem of the foreseeability of the consequences goes to *compensation*, not culpability. Accordingly, if we accept the first premise we must reject the second premise, and if we accept the second premise, we must reject the first premise. The claim that the wrong in negligence is the breach of the duty of care only, *and* that foreseeability of harm to the plaintiff is relevant to the wrong whilst the rest of the consequences of the carelessness are relevant to compensation only, is therefore inherently contradictory. The conclusion, that factual duty is necessary, can therefore not be justified.

V. Why factual duty entered the duty enquiry and why it remains

Factual duty would therefore seem to be entirely superfluous; not only can the exact same outcome be achieved via the fault and remoteness enquiries, but the idea that it is nevertheless necessary to ensure that causing harm to an unforeseeable plaintiff did not amount to a 'wrong' is unconvincing. Given these problems, one may ask, why, then, did the courts in *Palsgraf* and *Bourhill* introduce the problematic factual duty concept at all, when, as we have seen, the same result could have been achieved, and the above-mentioned difficulties avoided, if *Re Polemis* had been overruled and the unforeseeable plaintiff had simply been dealt with as a matter for remoteness? The answer must surely be that the reliance on factual duty was nothing more than an artifice for the purpose of circumventing the well-established rule in *Re Polemis*. What other explanation can there be? Why create so many analytical difficulties in such an important cause of action when they could have all been avoided by overruling a single case? A reluctance to overrule *Re Polemis* is surely the answer.

After the Privy Council handed down the judgment in *The Wagon Mound (No 1)*, however, there was no longer any good reason for factual duty to remain; not only was it no longer necessary to ensure that *Re Polemis* remained good law, but, as we have seen, the foreseeability-based test of remoteness rendered the factual duty enquiry functionally superfluous.¹³³ Additionally, the reasoning relied on in *Palsgraf* and *Bourhill*, that ostensibly justified the existence of the factual duty in the first place, was expressly disapproved. In particular, as to the claim that the breach of the duty of care was the 'wrong,' whilst remoteness merely went to the measure of consequences that go with the 'wrong,' the court said:

¹³³ Although *The Wagon Mound (No 1)*, a Privy Council decision, did not technically overrule *Re Polemis*, it was soon expressly approved by English courts: *Smith v Leech Brain & Co* [1962] 2 QB 405 (QB); *Hughes v Lord Advocate* [1963] AC 837 (HL). Though note (n 138).

[In relation to the proposition] “This, however, goes to culpability not to compensation.” It is with the greatest respect to that very learned judge and to those who have echoed his words, that their Lordships find themselves bound to state their view that this proposition is fundamentally false.

It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded.¹³⁴

Remoteness, in other words, was *not* foreign to the ‘wrong,’ and so there was no reason for the unforeseeable plaintiff to be a matter of duty rather than remoteness to avoid negligence being an abstract enquiry. The court also disapproved of any meaningful distinction between foreseeability of harm to the plaintiff and foreseeability of the kind of harm suffered:

[I]f it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary ... It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacre.¹³⁵

In other words, remoteness was a question of the foreseeability of the risk,¹³⁶ requiring that both harm to the plaintiff *and* the kind of harm suffered by the plaintiff be foreseeable. There was, therefore, little point asking the same question at the duty stage, too.

Accordingly, following *The Wagon Mound (No 1)*, it was abundantly clear that factual duty ought to no-longer remain part of the duty enquiry. Notwithstanding this, however, more than fifty years later, factual duty remains alive and well, an orthodox part of the duty enquiry that is relied on in higher courts regularly,¹³⁷ despite the remoteness enquiry remaining largely

¹³⁴ *ibid* 425. For a more recent statement of this position, see Lord Hoffmann in *Kuwait Airways Corp v Iraq Airways Co* (No 6) [2002] 2 AC 883 (HL), 1106: ‘One cannot separate questions of liability from questions of causation. They are inseparably connected. One is never simply liable; one is always liable for something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability.’

¹³⁵ *ibid* 425-26.

¹³⁶ JC Smith, ‘The Mystery of Duty’ in L Klar (ed), *Studies in Canadian Tort Law* (Butterworths 1977) 33.

¹³⁷ See (n 49).

the same.¹³⁸ What, however, explains this? If factual duty is so clearly superfluous, why has it not been consigned to the annals of legal history? It seems there are two reasons. First is the persistent belief that if we are to avoid imposing a 'duty' to take care to avoid causing unforeseeable harm, the duty *of care* stage must have a foreseeability requirement. Indeed, as we saw in Chapter Three, the belief that a defendant cannot be expected to exercise reasonable care towards the world at large, but only to those he can reasonably foresee could be affected by his actions, is the principal modern justification for retaining the foreseeability requirement.¹³⁹ Though, as we have also seen, such a justification is based on the mistaken belief that a 'duty' of care is a *real* duty rather than a mere label for an element of the negligence enquiry. The confusion has led Nolan to state that the 'duty' label is nothing more than a 'confusing and inappropriate ... misnomer.'¹⁴⁰ Second, is the reluctance among courts to discard well-established authority. In particular, much like the judges in *Palsgraf* and *Bourhill* were reluctant to overrule the well-established *Re Polemis*, thereby bringing factual duty into existence in the first place, modern judges seem reluctant to discard the well-established factual duty. Although such reluctance could be justified on the grounds that 'it would also be foolish and mischievous [to discard such a well-established rule], because [to do so] would inflict much too great a shock on ingrained habits of legal thought,'¹⁴¹ as Gibson notes, 'fallacious or superfluous concepts must not be preserved in the law simply because they provide members of

¹³⁸ There have been, however, a number of changes to the remoteness enquiry, which arguably undo the effect of *The Wagon Mound (No 1)*. In particular, the eggshell-skull rule (that the defendant is responsible for the full extent of a plaintiff's injury, even though it was unforeseeable due to some unusual sensitivity of the plaintiff) and unusual value rule (that a defendant is responsible for negligently caused damage, even where the its degree is unforeseeably high, such as dropping a Ming vase that appeared to be a fake, or running over a millionaire in the belief they were a vagrant) potentially make a defendant liable for damages beyond those that were reasonably foreseeable. For criticism of the rules, see: Stevens (n 87) 155-58; A Beever, *Rediscovering the Law of Negligence* (Hart 2007) 162-66. For defences of the rules, see: Williams (n 61) 193-98. Stauch (n 61) 207-214. See also the discussions in RWM Dias, 'Remoteness of Liability and Legal Policy' (1962) 20 CLJ 178, 186; Smith, 'Clarification of Duty - Remoteness Problems through a New Physiology of Negligence: Economic Loss, a Test Case' (n 52) 240, 243; Smith, 'The Mystery of Duty' (n 136) 33-34; Gibson (n 24) 208-209; Wilson and Slade (n 86) 469.

¹³⁹ See Section V.A.

¹⁴⁰ Nolan, 'Deconstructing the Duty of Care' (n 42) 563. See also Gibson (n 24) 191; Fleming and Morison (n 97) 70-71.

¹⁴¹ Winfield (n 3) 58.

the legal profession with mementoes of their youth.¹⁴² It seems, then, that this is just another one of those times, in the long history of the common law, where the rationale for a case has been decisively rejected, yet the rule it created has survived.

VI. Why does it matter?

Even if the preceding argument is accepted in its entirety, one might still wonder, ‘does it *really* matter’? In particular, just because the same conclusion can be reached via two different paths does not mean that one of the paths is necessarily ‘superfluous’ and should be removed.¹⁴³

According to Lord Steyn in *Rees v Darlington Memorial Hospital NHS Trust*,¹⁴⁴ for example, provided that same result is achieved, the ‘the difference in method is not of great importance.’¹⁴⁵ One may even go so far as to argue that the ‘right’ result is more likely to be reached when two paths lead there rather than one. However, whilst this is an attractive argument, there are nevertheless a number of benefits to removing factual duty from the negligence enquiry and confining the duty stage to notional duty questions only. First, it would prevent the unhelpful confusion between notional and factual issues.¹⁴⁶ This would promote greater transparency in judicial reasoning, as decisions based on notional considerations would need to expressly articulate why those notional considerations were relevant and warranted a particular conclusion, rather than, as is often believed to be the case,¹⁴⁷ being disguised as

¹⁴² Gibson (n 24) 215.

¹⁴³ See, for example, James (n 115) 784-85. Though, compare the position in the United States, where the allocation of an issue to duty or remoteness will determine whether it is an issue for the judge or an issue for the jury: see, for example, the discussion in *Cardi* (n 52) 794-804.

¹⁴⁴ [2004] 1 AC 309 (HL) [30].

¹⁴⁵ *ibid* [30]. Lord Steyn was, in fact, talking about the distinction between duty of care and actionable damage, but the point remains. See also the comments of Sir Murray Stuart-Smith in *Vellino v CC of Greater Manchester* [2002] 1 WLR 218 (CA) [62].

¹⁴⁶ See also the discussion in Nolan, ‘Deconstructing the Duty of Care’ (n 42) 579-81.

¹⁴⁷ It has been suggested that *Bourhill*, for example, was a notional decision disguised as a factual decision: ‘[the] finding that the claimant was unforeseeable masked [notional] concerns which militated against imposing a duty of care. Was the decision that Mrs Bourhill was owed no duty of care really attributable to the fact that she was not a reasonably foreseeable victim of John Young’s negligent driving? There seems little doubt that the reason consideration which motivated the House of Lords was the fact that the damage suffered by the claimant was shock-induced’ (Lunney and Oliphant (n 42) 134). See also: Richard Kidner, ‘Resiling From the Anns Principle: The Variable Nature of Proximity in Negligence’ (1987) 7 LS 319,

factual issues. Second, determining when a duty of care does or does not exist would be greatly simplified, as there would no longer be a need to formulate tests that accommodate both factual and notional considerations.¹⁴⁸ Confusing concepts such as ‘proximity’ and, at least in some circumstances,¹⁴⁹ the ‘scope’ of the duty of care, would therefore no longer be required. Third, the negligence enquiry would be more coherent, as each stage of the enquiry would deal with a discrete issue: duty would deal with whether the situation ought to be subject to the laws of negligence, the fault stage would deal with the quality of the defendant’s behaviour, causation would deal with whether the harm was attributable, as a matter of fact, to the defendant’s conduct, and remoteness would deal with whether the defendant had been careless in relation to the risk that materialised. Indeed, as Smith notes, until the duty stage is confined to notional questions only, the law will continue to be indecisive, inconsistent, and unpredictable.¹⁵⁰

VII. Conclusion

As well as encouraging courts to think about duty in terms of general principles, Lord Atkin’s neighbour principle also encouraged academics to think about what the duty enquiry was really doing. Although early commentary dismissed the duty concept as little more than a ‘fifth wheel on the coach,’ closer analysis of the concept itself, rather than purely on Lord Atkin’s foreseeability-based formula, soon revealed that it in fact performed a dual function, involving both factual and notional elements. The focus of the factual duty enquiry is, like Lord Atkin’s neighbour dictum, on whether harm to the claimant was a foreseeable consequence of the defendant’s carelessness, whilst the focus of the notional enquiry is on whether the law of

325; Jenny Steele, ‘Scepticism and the Law of Negligence’ (1993) 52 CLJ 437, 453; RFV Heuston, ‘Donoghue v Stevenson in Retrospect’ (1957) 20 MLR 1, 17; Fleming, ‘Remoteness and Duty: The Control Devices in Liability for Negligence’ (n 83) 491-93; Beever (n 138) 408.

¹⁴⁸ See also Nolan, ‘Deconstructing the Duty of Care’ (n 42) 582-85.

¹⁴⁹ For more on the different ways that the ‘scope’ label is used, see Chapter Five, Section II.E.

¹⁵⁰ Smith, ‘Clarification of Duty - Remoteness Problems through a New Physiology of Negligence: Economic Loss, a Test Case’ (n 52) 231.

negligence ought to apply to the broad situation to which the particular facts belong. Whilst the notional aspect of the duty enquiry is 'invaluable,' the factual aspect would appear to be entirely superfluous, or, as Buckland would say, a 'fifth wheel on the coach.' In particular, it will necessarily be present where the other elements of the negligence enquiry have been satisfied, and will only ever be absent where either the fault or remoteness elements are absent also. *Palsgraf* and *Bourhill*, however, argued that, even if the same result could be achieved at the remoteness stage, factual duty is nevertheless required, as harming an unforeseeable plaintiff does not constitute a 'wrong,' and the wrong in the law of negligence is the breach of a duty of care, not the breach of a duty of care causing damage that is not too remote. However, this argument both relied on a problematic understanding of the meaning of 'wrong,' as well as requiring arbitrary and problematic distinctions between the various consequences of the defendant's careless behaviour to be drawn. Despite these problems, factual duty remains an orthodox part of the duty enquiry, most likely for the same reason it entered the law in the first place; a reluctance to overrule existing authority. Whilst such reluctance might be understandable prior to the Practice Statement of 1966, the presence of factual duty today is actively harmful, and should be removed from the negligence enquiry. The duty enquiry, then, is best understood as a purely notional question. We will now examine the notional duty enquiry further in Chapter Five.

5. Notional Duty

*[T]he more general issue of how far the principles of liability for negligence should be extended is a familiar one, and one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the negligence principle in *McAlister (Donoghue) v Stevenson*, almost 70 years ago. That case introduced the principle that a person could be held liable only for reasonably foreseeable harm. But it also anticipated that not all reasonably foreseeable harm might be caught. This posed the issue with which courts still struggle today: to what situations does the law of negligence extend?*

- CJC and Major J in *Cooper v Hobart* (2001) 206 DLR (4th) 193 [21].

[T]he court must ask in every case: Is this a situation in which the law requires, or is going now to require, the defendant to exercise care in the interests of the plaintiff, or is it a situation in which the defendant may unreasonably create risks for the plaintiff with impunity?

- William Morison in Fleming J and Morison W, 'Duty of Care and Standard of Care' (1953) 1 Sydney Law Review 69, 70.

I. Introduction

Whether or not we accept that factual duty is superfluous, there can be little doubt that the bulk of duty jurisprudence relates to the notional duty enquiry, which, as we have seen, determines whether the law of negligence applies to the 'situation' to which the facts belong. Absent a notional duty, the defendant may carelessly cause harm to the claimant with impunity. Ultimately, the existence of a notional duty is a 'normative'¹ question, and the issue for the court is whether the law of negligence *ought* to apply to the particular situation. Notional duty explains why, for example, a defendant is legally responsible for carelessly causing the claimant to suffer physical injury or property damage, but is not, without more, legally responsible for carelessly failing to provide the claimant with a benefit (i.e. causing loss through an omission), or carelessly causing harm that is purely economic in nature. As Lord Rodger explained in *D v East Berkshire Community Health NHS Trust*:²

¹ Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33, 37; D Howarth, 'Duty of Care' in K Oliphant (ed), *Common Law Series: The Law of Tort* (3rd edn, LexisNexis 2015) 12.10; P Cane, 'Another Failed Sterilisation' (2004) 120 LQR 189, 192.

² [2005] 2 AC 373 (HL).

[T]he world is full of harm for which the law furnishes no remedy. For instance, a trader owes no duty of care to avoid injuring his rivals by destroying their long-established businesses. If he does so and, as a result, one of his competitors descends into a clinical depression and his family are reduced to penury, in the eyes of the law they suffer no wrong and the law will provide no redress ... A young man whose fiancée deserts him for his best friend may become clinically depressed as a result, but in the circumstances the fiancée owes him no duty of care to avoid causing this suffering ... The same goes for a middle-aged woman whose husband runs off with a younger woman ... However badly one of them may have treated the other, the law does not get involved in awarding damages.³

Identifying which situations do and do not attract a notional duty is, of course, relatively straightforward; one need only consult a tort law textbook to see whether the situation is subject to a notional duty or not. In this chapter, however, we are not so much interested in identifying the exact black letter boundaries of the law of negligence, as in exploring the general method by which those boundaries are determined, and what properties those determinations have. In particular, we will examine the ‘categorical’ nature of notional duty, the relevance of assumptions of responsibility to the notional duty enquiry, the propriety of relying on policy considerations in determining the outcome of the notional duty enquiry, and whether the notional duty enquiry is necessary at all.

II. The ‘categorical’ nature of notional duty

Aside from their being normative in nature, perhaps the other principal feature of notional duty determinations is that, save for those that depend on an assumption of responsibility,⁴ they relate to ‘situations,’ or ‘categories of case.’⁵ In particular, notional duty determinations, unlike factual duty determinations, ‘transcend the particular dispute’⁶ to establish a rule that applies to

³ *ibid* 410.

⁴ See Section III below.

⁵ Nothing seems to turn on the distinction between the two terms, and so they will be used interchangeably.

⁶ EW Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) 5-10.

a broad type of situation, rather than just being ‘tickets good only for a single ride.’⁷ It is this generality that gives notional duty decisions their precedential value. As Nolan explains:

[N]otional duty determinations are binding precedents, so that through decisions on duty appellate courts can exercise effective control over the boundaries of negligence liability and provide litigants, trial lawyers and lower court judges with clear guidance as to where those boundaries lie.⁸

In *Hill v Chief Constable of West Yorkshire*,⁹ for example, the plaintiff, acting on behalf of her daughter’s estate, sued the police for their failure to apprehend the Yorkshire Ripper before he murdered her daughter. The question for the court was not simply ‘whether *the* defendant owed *the* plaintiff a duty of care,’ but whether the general *situation* could give rise to a claim in negligence; in particular:

[W]hether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals...¹⁰

Similarly, in *White v Jones*,¹¹ the plaintiffs, who were intended beneficiaries under a will, sued the testator’s solicitor for carelessly failing to include them in the will prior to the testator’s death. Again, the relevant question was not ‘whether *the* defendant owed *the* plaintiffs a duty of care,’ but whether, in principle, ‘solicitors are liable to the intended beneficiaries who, as a result of their negligence, have failed to receive a benefit which the testator intended they receive.’¹²

By ‘transcending’ the particular facts of the case, categorical determinations provide clear guidance to future courts faced with similar fact scenarios. In particular, future courts do

⁷ W Jonathan Cardi and Michael D Green, ‘Duty Wars’ (2007) *S CalLRev* 671, 732.

⁸ D Nolan, ‘Deconstructing the Duty of Care’ (2013) 129 *LQR* 559, 568. See also ‘comment j: The proper role for foreseeability’ in §7 of the *Restatement (Third) of Torts: Liability for Emotional and Physical Harm*: ‘Determinations of no duty are categorical while foreseeability cannot be determined on a categorical basis. Foreseeability necessarily depends on the specific facts of the case and hence is appropriately addressed as part of the negligence determination.’

⁹ [1989] AC 53 (HL).

¹⁰ *ibid* 59B (Lord Keith)

¹¹ [1995] 2 AC 207 (HL).

¹² *ibid* 252 (Lord Goff).

not need to ask ‘was the harm foreseeable?’ or ‘was there sufficient proximity?’ but simply, ‘do the facts of the case come within an existing notional duty situation?’

The categorical nature of notional duty undoubtedly bears a strong resemblance to the pockets approach to duty. Indeed, when courts speak of duty as relating to different ‘categories of cases,’ it is often not clear whether they are endorsing the pockets approach or the categorical nature of duty determinations.¹³ However, it is important to realise that they are nevertheless separate ideas; the categorical nature of notional duty is simply a reference to how notional duty determinations should be *expressed*, whilst the pockets approach refers to a particular method by which notional duty determinations can be *justified*. The categorical nature of notional duty determinations is therefore not subject to the objections that have been made to the pockets approach; in particular, unlike the pockets approach, the categorical nature of notional duty does not entail a rejection of general duty tests, as on no understanding of duty tests do they confine the existence of a duty to the facts of the case, nor does it have anything to say about how novel fact-scenarios are determined. Despite their similarity, then, the categorical nature of notional duty should *not* be equated with nor seen as an endorsement of the pockets approach, nor should it be seen as subject to the same objections; and so whether one supports the pockets approach to duty or not, duty determinations, howsoever resolved, should be expressed categorically.

Despite the importance of expressing notional duty determinations categorically, or as relating to certain situations, this aspect of the duty enquiry is underexplored. In this section we will therefore examine the idea of notional duty ‘situations’ and ‘categories’ further.

¹³ See, for example, *Cooper v Hobart* (2001) 206 DLR (4th) 193 [41] (McLachlin CJC and Major J); *Design Services Ltd v Canada* (2008) 293 DLR (4th) 437 [28] (Rothstein J); *Perre v Apand* (1999) 198 CLR 180, 217 (McHugh J).

A. Notional duty situations are both inclusionary and exclusionary

It is commonly claimed that the role of notional is to identify the situations that should *not* be subjected to the laws of negligence rather than the situations that *should*; in other words, that notional duty is exclusionary in nature. According to Lord Goff in *Smith v Littlewoods Organisation Ltd*,¹⁴ for example:

[W]e have nowadays to appreciate that the broad general principle of liability for foreseeable damage is so widely applicable that the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not.¹⁵

Similarly, both Stevens and Ibbetson have described the role of notional duty under the present law as to identify the islands of non-liability within an ocean of liability;¹⁶ again the implication being that notional duty determinations identify the situations where liability should *not* exist only. On this understanding, *all* situations are inclusionary, unless they are explicitly identified as exclusionary. It is in this sense that notional duty is often referred to as a ‘control device;’ in particular, working from the assumption that *all* carelessly caused harm gives rise to liability, notional duty, by identifying the various situations in which carelessly caused harm does not give rise to liability, ‘prevent[s] the incidence of liability from getting out of hand.’¹⁷ The ‘control device’ view of notional duty is usually contrasted to the ‘rights-based’ view of notional duty, whereby all situations are exclusionary, unless there is some good reason why they should be inclusionary.¹⁸

¹⁴ [1987] AC 241 (HL).

¹⁵ *ibid* 280 (Lord Goff).

¹⁶ DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 192-93; R Stevens, *Torts and Rights* (OUP 2007) 21.

¹⁷ Prue Vines, Peter Hanford and Carol Harlow, ‘Duty of Care’ in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (10th edn, Thomson Reuters (Professional) Australia Limited 2011) 151-52. See also JG Fleming, ‘Remoteness and Duty: The Control Devices in Liability for Negligence’ (1953) 31 *Can Bar Rev* 471, 473-74.

¹⁸ See, for example, EJ Weinrib, ‘The Disintegration of Duty’ in M Stuart Madden (ed), *Exploring Tort Law* (Cambridge University Press 2005) 158: ‘Being harmed is merely a fact—that he or she is now less advantageously situated than before—that in itself has no correlative normative significance ... Harm matters only inasmuch as it stands under a right, for only when the duty breached by the defendant is correlative to the plaintiff’s right do the parties occupy correlative normative positions. Accordingly, if the loss of which the plaintiff is complaining is not the subject matter of a right ... then the defendant is not

As Nolan notes, however, ‘although it is commonly asserted that notional duty is essentially negative or exclusionary, the claim seems to be controversial, and it is not clear what, if anything turns on it.’¹⁹ Indeed, the claim that notional duty is about identifying no-liability situations only, whilst conceivable in theory, does not seem to reflect what occurs in practice. In particular, when a court is faced with a notional duty problem, although a determination that the situation does *not* give rise to a notional duty clearly creates an *exclusionary* situation, a determination that the situation *does* give rise to a notional duty clearly creates an *inclusionary* situation.²⁰ If it were otherwise, and notional duty determinations were exclusionary only, then only exclusionary determinations would create precedent, whilst inclusionary determinations would merely represent a drop in the abyss of the ocean of liability, and this simply does not describe the precedential value of pro-duty determinations.²¹

Similarly problematic is the assumption that the starting point in the law of negligence is that *all* carelessly caused harm is compensable (i.e. that there is an ocean of liability), which provides the foundation for the claim that notional duty is exclusionary in nature. Again, whilst such a position seems conceivable in theory, there seems to be little case law to support it. Indeed, it is almost impossible to find a decision where the existence of a notional duty was based on the relevant starting point; that is, in the absence of *any* arguments one way or the other, the existence of a notional duty was determined *solely* on the basis that harm was suffered by the claimant.

Yet, notional duty is more than an ‘uncultivated wilderness’²² of discrete inclusionary and exclusionary situations. On the contrary, notional duty is best understood as consisting of a small number of broad inclusionary and exclusionary situations that are subject to a larger

under a duty of care to the plaintiff. In the old language of the law, harm is then mere *damnum absque injuria*.’ See also A Beever, *Rediscovering the Law of Negligence* (Hart 2007) 10.

¹⁹ Nolan (n 8) 563.

²⁰ Though note (n 34)

²¹ A clear example of such an inclusionary situation is *White v Jones* [1995] 2 AC 20 (HL).

²² ‘The Duty of Care Towards One’s Neighbour’ (1883) 18 LJ 618, 619.

number of narrow exclusionary and inclusionary situations.²³ Carelessly caused physical injury, for example, gives rise to a broad inclusionary situation. Though, this is subject to a number of narrow exclusionary situations, including where the physical injury occurs in the course of armed conflict,²⁴ or as a result of the carelessness of the claimant's mother whilst the claimant was in utero.²⁵ Carelessly caused property damage also gives rise to a broad inclusionary situation,²⁶ as does carelessly caused psychiatric injury,²⁷ the latter of which is, at least in the UK, subject to a *partial* exclusion where the claimant was a 'secondary victim'.²⁸ Carelessly caused purely economic loss, however, gives rise to a broad *exclusionary* situation, which is subject to a number of *inclusionary* situations, including where the purely economic loss resulted from a solicitor's failure to include the claimant as a beneficiary in a will,²⁹ a damaging reference letter,³⁰ and, in Canada at least, the purchase of a defective building.³¹ Damage that is the result of a careless failure to provide a benefit, which can also include the failure to prevent harm caused by third parties, also gives rise to a broad exclusionary situation; though this, too, is subject to narrower inclusionary situations, including, *inter alia*, special rules relating to prisons³² and emergency services.³³ These are, of course, only a small number of the many exceptions,

²³ The same point is made in Nolan (n 8) fn 32.

²⁴ See, for example, *Shaw Savill & Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, 361-62; *Mulcahy v Ministry of Defence* [1996] QB 732 (CA); *Smith v Ministry of Defence* [2014] 1 AC 52 (HL). Note that in Australia the immunity does not extend to injuries sustained in peacetime accidents: *Groves v The Commonwealth* (1982) 165 CLR 113.

²⁵ See, for example, *Dobson v Dobson* [1999] 2 SCR 753, Congenital Disabilities (Civil Liability) Act 1976, s 1(1). A duty will be imposed, however, in both in Australia and the UK, where the negligence is in relation to the driving of a motor vehicle; the justification being that the mother would be indemnified by compulsory insurance: *Lynch v Lynch (by her tutor Lynch)* (1991) NSWLR 411 (CA); Congenital Disabilities (Civil Liability) Act 1976, s 2. As to the adequacy of this reasoning, see I Malkin, 'A Mother's Duty of Care to her Foetus While Driving: A Comment on *Dobson v Dobson* (and *Lynch v Lynch*)' (2001) 9 TLJ 109.

²⁶ Arguably there is an exclusionary exception where the damage was caused by the conduct of a third party, but this 'exception' is better understood as resulting from an omission, and so an exclusionary situation to begin with.

²⁷ See, for example, *Page v Smith* [1996] 1 AC 155 (HL); *Tame v New South Wales, Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.

²⁸ *Alcock v Chief Constable of South Yorkshire* [1992] AC 310 (HL). The exclusion is 'partial' because secondary victims can nevertheless recover where additional criteria are met.

²⁹ See, for example, *White v Jones* [1995] 2 AC 20 (HL), *Hill v Van Erp* (1997) 188 CLR 159.

³⁰ See, for example, *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL).

³¹ See, for example, *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193.

³² See, for example, *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).

³³ See, for example, *Kent v Griffiths (No3)* [2001] QB 36 (CA).

some narrower than others, that exist to the main broad inclusionary and exclusionary situations. It is therefore perhaps better to conceive of the law of negligence as consisting of a number of seas (rather than oceans), some of liability, others of non-liability, subject to a number of smaller islets (rather than islands) of non-liability or liability depending on the nature sea. Admittedly, it is not as simple, nor as catchy, as the ocean/island analogy, but it nevertheless seems to be a much more accurate, and helpful, representation of the law.³⁴ It is important to note that assumptions of responsibility also provide an important basis for overcoming exclusionary situations (mostly to *broad* exclusionary situations, but arguably also to the narrower exceptional exclusionary situations), and so are discussed in Section III below.

B. The ‘relationship’ and ‘interest’ views of notional duty

It has thus far been suggested that the categorical nature of notional duty relates to particular ‘situations.’ The term ‘situation’ is used as it has the benefit of allowing a broad range of circumstances to be taken into account when explaining the precise limits of the notional duty determination. There are, however, two competing views that argue that notional duty determinations can, in fact, be explained in much narrower terms: the ‘relationship view’ of notional duty, which claims that notional duty situations, in fact, relate to different categories of ‘relationships,’ and the ‘interest view’ of notional duty, which claims that they, in fact, relate to a variety of protected ‘interests.’

³⁴ It might be objected that, on this understanding, pro-duty decisions in seas of liability *do* represent little more than drops rather than recognising specific inclusionary situations. Though this does indeed often appear to be the case. See, for example, the opinion of Lord Toulson in *Michael v The Chief Constable of South Wales Police* [2015] 2 WLR 343, concerning whether there can be notional duty in relation to individual members of the public who suffer personal injury through the activities of criminals the police have failed to apprehend. Lord Toulson held, at [116], ‘The question is ... not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles [i.e. that liability does not ordinarily exist in relation to omissions] which would cover the facts of the present case.’ In other words, the issue was whether an *exception* to the general exclusionary rule should be made rather than whether the particular situation ought to be inclusionary in the first place. A similar position appears to exist in relation to the broad inclusionary situations, where courts are generally reluctant to recognising exceptions.

According to the relationship view, notional duty is about identifying which relationships ought to be subject to the laws of negligence. Examples of such relationships are manufacturer and consumer, teacher and student, occupier and entrant, driver and passenger / other road user, doctor and patient, police and prisoner, employer and employee, solicitor and client, etc. The relationship view of notional duty has attracted considerable support. According to Fleming, for example, ‘everyone agrees that a duty must arise out of some “relation” ... between the parties,’³⁵ whilst according to Hepple, the notional duty question is about ‘the question of which relationships ought to be protected [by the law of negligence].’³⁶ Smillie, too, has suggested that the notional duty enquiry is simply about ‘the categories of relationships which attract a duty of care.’³⁷ The relationship view of notional duty has been similarly influential in the courts, with both the High Court of Australia³⁸ and Supreme Court of Canada³⁹ having repeatedly suggested that the existence of a duty depends on the category of relationship in question. Arguably, the relationship view of notional duty is even implicit in Lord Atkin’s neighbour dictum, which was based on the idea that ‘in English law there must be, and is, some general conception of *relations* giving rise to a duty of care, of which the particular cases found in the books are but instances.’⁴⁰

³⁵ JG Fleming, *The Law of Torts* (9th edn, Law Book Co 1998) 151. Though his use of scare quotes, and his subsequent qualification ‘but what that relation is no one has ever succeeded in capturing a precise formula,’ would suggest that he does not endorse the view himself.

³⁶ B Hepple, ‘Negligence: The Search for Coherence’ (1997) 50 CLP 69, 81.

³⁷ JA Smillie, ‘Principle, Policy and Negligence’ (1984) 11 NZULR 111, 111.

³⁸ *Jaensch v Coffey* (1984) 155 CLR 549, 578 (Deane J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 [61] (McHugh J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 [13] (Gleeson CJ); *Sullivan v Moody* (2001) 207 CLR 562 [47] (Gleeson CJ, Gaudon, McHugh, Hayne and Callinan JJ); *Vairy v Wyong Shire Council* [2005] 223 CLR 422 [27] (McHugh J), 443 (Gummow J); *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 [22] (French CJ and Gummow J)

³⁹ *Cooper v Hobart* (2001) 206 DLR (4th) 193 [31]-[32] (McLachlin CJC and Major J); *Odhavji Estate v Woodhouse* (2003) 233 D.L.R. (4th) 193 [47] (Iacobucci J); *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620 [21] (McLachlin CJC).

⁴⁰ *Donoghue v Stevenson* [1932] AC 562 (HL), 580 (Lord Atkin) (emphasis added). See also the comments in Norman A Katter, *Duty of Care in Australia* (LBC Information Services 1999) 29: ‘The conclusion which may be drawn at this point is that Lord Atkin considers the underlying principle of general application giving rise to a duty if care is based on the relationship between the parties.’ Though, as we saw in Chapter Three, it could be argued that Lord Atkin’s comments were confined to ‘relationships’ in the factual duty sense only.

Despite its popularity, however, the relationship view of notional duty is highly problematic. Whilst it is indeed true that certain relationships are *usually* the subject of a duty of care, it is equally true that the category of relationship is *not* the reason that the duty arises. This is evident for two reasons. First, the same relationship can give rise to a duty in one situation and not another. In *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*,⁴¹ for example, the defendant carelessly cut off the electricity supply to the plaintiff's factory. As a result the plaintiff suffered both purely economic loss and property damage. Despite the 'relationship' between the plaintiff and defendant being identical in relation to both kinds of damage, the court held that the defendant owed a duty in respect of the property damage only. Under the relationship view, the result cannot be explained. A second problem with the relationship view of notional duty is that it stretches the term 'relationship' beyond all meaning.

As Howarth notes:

Most defendants have had no relationship at all with their claimants. The driver of a car who carelessly runs down a pedestrian is hardly likely to have met the pedestrian on a previous occasion, and is certainly not allowed to escape liability by saying, 'Never seen him before in my life'. To describe the act of hitting someone as a 'relationship' is simply perverse. The usual explanation is that the parties are 'fellow road users'. But that is a relationship hardly different from 'fellow inhabitant of the country' or even 'fellow human being'...

The relational view of negligence claims that the reason we have a duty of care is some relationship, or relation, that we have with our potential victims. The objection to that view is that it entails either a perverse or a superfluous view of what counts as a relationship.⁴²

The claim that the existence of a notional duty depends on the particular category of 'relationship' in question is therefore unconvincing.

⁴¹ [1973] QB 27 (CA), 37 (*'Spartan Steel'*).

⁴² David Howarth, 'Many Duties of Care - Or A Duty of Care? Notes from the Underground' (2006) 26 OJLS 449, 464. See also David Howarth, 'Duty of Care' in Ken Oliphant (ed), *The Law of Tort* (2nd edn, LexisNexis Butterworths 2007) 12.36, where Howarth describes the use of the term 'relationship' in this sense as 'apt to lead to enormous artificiality, if not absurdity ... [and] doing violence to the English language.' Arguably even more 'absurd' is that, whilst a driver and pedestrian *are* in a 'relationship,' a mother and her unborn child are *not* in a 'relationship': see (n 25).

Perhaps in light of the difficulties with the relationship view of notional duty, a second view emerged which claimed that the focus of notional duty is to determine which ‘interests,’ or ‘kinds of harm,’⁴³ are worthy of protection.⁴⁴ So, for example, the interest in personal property and bodily safety are interests the law deems should be protected, and so are subject to a notional duty, whereas the interest in not suffering purely economic loss and the interest in receiving a benefit (i.e. not suffering loss through an omission) are interests the law deems should not be protected, and so are not subject to a notional duty.⁴⁵ The interest view of notional duty is attractive, as it not only appears to explain many of the cases, including *Spartan Steel*, but it also provides an understanding of the law of negligence that is much more in line with many of the nominate torts, which are also often understood as protecting against the invasion of specified interests.⁴⁶ The interest view of notional duty has therefore gained considerable support. Fleming, for example, has argued that the ‘Recognition of a duty of care is the outcome of a value judgment that the plaintiff’s *interest*, which has been invaded, is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant.’⁴⁷ Millner has also argued that the notional duty enquiry ‘is to do with the range

⁴³ ‘Interests’ and ‘kinds of harm’ are typically equated. See, for example, Nolan (n 8) 583; Gerhard Wagner, ‘Comparative Tort Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 1013-15.

⁴⁴ The interest view of *notional* duty should not be conflated with the interest view of *factual* duty (the ‘interest theory’), explored in Chapter Four, as they ask entirely different questions: the former asks whether the type of interest *ought* to be protected, the latter asks whether the particular interest was *foreseeably* infringed.

⁴⁵ For examples of other non-protected interests, see: MA Millner, *Negligence in Modern Law* (Butterworths 1967) 35-45; F James, ‘Scope of Duty in Negligence Cases’ (1952) 47 *NwULRev* 778, 786-87; 789-90; 798.

⁴⁶ Defamation, for example, protects one’s interest in reputation, whilst private nuisance protects one’s interest in the use and enjoyment of one’s land. See, for example, Fleming, ‘Remoteness and Duty: The Control Devices in Liability for Negligence’ (n 17) 473-74; AM Dugdale and MA Jones, *Clerk & Lindell on Torts* (20th edn, Sweet & Maxwell 2010) 1-25 et seq. cf R Stevens, ‘Rights and Other Things’ in D; Nolan and A Robertson (eds), *Rights and Private Law* (Hart 2012) 133-38.

⁴⁷ Fleming, ‘Remoteness and Duty: The Control Devices in Liability for Negligence’ (n 17) 486 (emphasis added). See also JG Fleming, ‘The Action Per Quod Servitum Amisit’ (1952) 26 *ALJ* 122, 127: ‘[T]he central problem of [duty is] whether the plaintiff’s interest is worthy of legal protection...’

of interests which the law sees fit to protect against negligent violation.⁴⁸ The interest view of duty has also been influential in the courts.⁴⁹ As Nolan explains:

Traditionally, the core of the notional duty question has been the issue of protected interests: which human interests are given general protection by the law of negligence, which limited protection, and which no protection at all. This issue is accommodated within the duty framework by formulating the duty in terms of the nature of the interest invaded, and so considering the existence of a duty separately in respect of each kind of damage suffered by the claimant. It follows that a finding that the defendant owed the claimant a duty of care in respect of one kind of damage does not entail that there was a duty in respect of a different kind of damage, which explains why in the *Spartan Steel* case the claimant company was unable to recover for its pure economic loss, even though the defendants' negligence also caused it actionable property damage.⁵⁰

Like the relationship view of duty, however, the interest view is not unproblematic, and frequently has difficulty explaining the law. The interest in bodily safety, for example, whilst protected against most negligent invasions, is *not*, as we saw above, protected where the invasion occurs in the course of armed conflict,⁵¹ or by the carelessness of the claimant's mother whilst the claimant was in utero.⁵² Similarly, whilst there is no general protection against suffering purely economic loss, protection *is* afforded where the loss resulted from a negligently prepared employment reference letter,⁵³ or where it is the result of a solicitor's failure to include an intended beneficiary in a will.⁵⁴ The same interest is therefore protected against negligent interference in some situations but not others. Indeed, the interest view of duty only seems to be able to account for the existence or absence of a notional duty in the *broad* inclusionary and exclusionary situations, but is unable to account for the exclusionary and inclusionary exceptions; in other words, it explains the seas (or, as Nolan says, the 'core' of the notional duty question⁵⁵), but not the islets. Accordingly, the claim that notional duty is about identifying which interests ought to be protected, whilst accurate in very broad terms, fails to

⁴⁸ Millner (n 45) 27.

⁴⁹ See for example, *Tame v New South Wales*; *Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317, 374-75 (Kirby J); *Harriton v Stephens* (2006) 226 CLR 52, 118 (Crennan J).

⁵⁰ Nolan (n 8) 569-70 (footnotes omitted).

⁵¹ See (n 24).

⁵² See (n 25).

⁵³ *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL).

⁵⁴ *White v Jones* [1995] 2 AC 207 (HL).

⁵⁵ See (n 50).

(and indeed is *unable* to) account for any of the exceptional situations, as in such cases, the interest is simply not the focus of the analysis. Again, it is therefore unconvincing as an explanation of what the notional duty ‘situations’ represent.

Accordingly, the wide variety of circumstances that are taken into account in notional duty determinations simply cannot be explained in terms of protected ‘relationships’ or ‘interests,’ or any other similarly narrow concept *alone*. On the contrary, notional duty determinations need to be defined across a number of dimensions, including the kind of damage suffered by the claimant⁵⁶ (i.e. was the harm physical, psychiatric, or purely economic?), *and* the way the harm occurred (i.e. was it a direct consequence of the defendant’s conduct or merely a consequence of their failure to act or prevent the harm?), *and*, potentially, the nature of the relationship between the parties⁵⁷ (i.e. was the defendant a judicial figure, barrister, or public authority, or was the claimant an unborn child or rescuer?). Only a term as broad as ‘situation’ can take into account such a variety of aspects and allow the existing law to be explained.⁵⁸

C. The level of generality of the notional duty situation

Even where notional duty situations are defined in terms of the kind of damage, the way it occurred, and the status of the relationship between the parties, there still remains the problem of the level of generality with which the situation should be formulated. Consider, for example, a publican who fails to prevent an intoxicated patron from leaving the local tavern, and the patron is killed in a motor vehicle accident, as a result of their intoxication, shortly thereafter. Is the issue for the court whether *anyone* can be legally responsible for failing to prevent another from injuring themselves as a result of their own inebriation, or something narrower, such as whether

⁵⁶ Or, alternatively, the relevant ‘interest’ of the claimant.

⁵⁷ Arguably the relevant factor is the *status of one of the parties* (i.e. that the defendant is a judge, barrister, or mother) rather than the *relationship between the parties*, but given that the status is only significant within particular relationships (i.e. the status of a barrister is only important when the claimant is a client, judicial status is only important when the claimant is a party to proceedings, and the status of a mother is only important when the claimant is the mother’s unborn child), the later view seems to be the better one.

⁵⁸ Though note Nolan’s argument, discussed in Section V below, that by ‘deconstructing’ notional duty, the ‘situations’ could be explained in much simpler terms, if not discarded altogether.

a *publican* can be legally responsible for failing to prevent an intoxicated patron injuring themselves as a result of their own inebriation?⁵⁹ Similarly, where a visitor suffers physical injury after tripping on the uneven concrete surface of a driveway whilst visiting a garage sale,⁶⁰ is the issue for the court whether a notional duty ought to exist in relation to physical injury caused to a visitor by reason of the state of the occupier's *driveway*, or whether a notional duty ought to exist in relation to physical injury caused to a visitor by reason of the state of the occupier's *property in general*? Despite the 'extraordinary malleability'⁶¹ of the notional duty 'situation, the way it is formulated is of considerable importance. This is true not only for the case that is before the court, as it will determine the sorts of reasons that will need to be advanced in support of and against the existence of the formulated duty (i.e. narrower propositions are usually easier to establish), but for future cases too, as how the situation is formulated determines the precedential value of the case (i.e. broader propositions are of greater precedential value). Surprisingly, however, the courts have offered little guidance on the topic, save for vague-to-the-point-of-meaningless comments such as, 'The appropriate level of specificity when formulating the scope and content of the duty will necessarily depend on the circumstances of the case.'⁶² Whilst there is, of course, no 'right' level of generality, there are nevertheless a number of important considerations that ought to be borne in mind.

On the one hand, courts should be careful not to formulate notional duty situations too broadly. In particular, where an *inclusionary* category is too broad, it is likely that the decision will ultimately extend to situations that were not originally envisaged, thereby forcing the decision to be quickly reconsidered, or for liability in those categories of case to be artificially

⁵⁹ See *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390. Both situations essentially concern whether an inclusionary exception ought to be made to the general exclusionary nature of harm caused by omissions.

⁶⁰ See *Neindorf v Junkovic* (2005) 222 ALR 631. As above, both situations concern whether an inclusionary exception ought to be made to the general exclusionary nature of harm caused by omissions.

⁶¹ Nolan (n 8) 581. For examples of the varying levels of generality, see *ibid* 580-81.

⁶² *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 372 (French CJ and Gummow J). See also Dawson J in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, at 343: '[T]he nature and extent of the duty in the particular instance depends upon the circumstances of the case.'

limited at other stages of the negligence enquiry. For example, a determination that *all* drivers owed a notional duty to *all* road users, whilst unproblematic in relation to carelessly caused physical injury, *would* be problematic in relation to carelessly caused damage that was purely economic.⁶³ Indeed, as we saw above, this is precisely the problem with the relationship view of notional duty; it is simply too broad. Where an *exclusionary* category is too broad, there is a danger that the determination could lead to harsh results, again, requiring the decision to be overturned or artificially extended elsewhere.⁶⁴ The old exclusionary rule for *all* purely economic loss, for example, was departed from, at least partly it seems, on the basis of the injustice it created.⁶⁵

On the other hand, overly narrow categories are similarly problematic, principally because they have limited precedential value. It is clear, for example, that a determination that ‘an occupier has a duty to take care that visitors are not physically injured by reason of the state of the occupier’s property’ has far greater precedential force than a determination that ‘occupiers of residential property have a duty to take care that visitors are not physically injured by reason of the state of their driveway.’ Indeed, in *Neindorf v Junkovic*,⁶⁶ a case involving this precise issue, Kirby J advocated the wider formulation:

[I]n deciding whether or not a duty of care exists, it is necessary to ask what the scope of the purported duty is. However, by and large, the relevant inquiries in this regard are conducted at a relatively general level of abstraction ... It is firmly established that an occupier owes a duty of care to entrants in respect of risks of physical injury arising out of the condition of the occupier’s premises. There is no need for the scope of this duty to be defined with any greater precision than this in the instant case.⁶⁷

⁶³ For example, where a driver carelessly breaks down on the motorway and thereby causes other road users to be delayed in getting to work, miss important meetings, wages, overtime pay, etc.

⁶⁴ And as we saw in Chapter Four, in the case of *Palsgraf v Long Island Railway Co* (1928) 248 NY 339; 162 NE 99 and *Bourhill v Young* [1943] AC 92 (HL), it is often better for courts to overrule a problematic decision than to try to circumvent it.

⁶⁵ See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

⁶⁶ (2005) 222 ALR 631. Here, Mrs Junkovic tripped on a 10-12mm gap in the concrete driveway of Mrs Neindorf’s home, where a garage sale was being held.

⁶⁷ *ibid* [50], [56].

Not only are wider formulations more helpful in clarifying the law for future courts and lawyers, but it is also questionable whether experienced courts, particularly at the ultimate appellate level, should be spending their limited time and resources debating the existence of a duty in a situation that is so narrow that it barely transcends the facts of the case.⁶⁸

Getting the right balance between overly broad and overly narrow notional duty formulations is therefore important. Ideally, the situation should be defined as broadly as possible, so as to maximise the precedential value of the determination, but not so broad as to open the doors too wide or rule out otherwise justifiable claims. When formulating the relevant notional duty situation, courts should bear this tension in mind.

D. Notional duty situations and questions of fault

As Kirby J has noted, it is becoming ‘all too common’⁶⁹ in recent times, for notional duty situations to be framed in terms of the behaviour of the defendant that is alleged to have been careless. That is, the court approaches the notional duty enquiry on the basis of whether or not there was a ‘duty to do X.’ For example, rather than asking whether there should be a notional duty in relation to physical injury caused to a passenger (or pedestrian, or other road user) by a driver’s careless driving, the court instead asks whether there was a ‘duty’ to drive at a reasonable speed, or a ‘duty’ to drive at a reasonable distance from the car in front. Formulations of notional duty in terms of the allegedly careless behaviour, like overly narrow notional duty formulations, tend to have little (and, in the case of the former, often *no*) precedential value; however, the real objection to the former type of formulation is that it conflates issues of law (whether a duty should exist in this situation) with issues of fact (whether

⁶⁸ Though, this is not to say that decisions that recognise narrow categories cannot have other precedential value. *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL), for example, whilst only applying to auditors in a *categorical* sense, also created a rule with ostensibly universal application.

⁶⁹ *Neindorf v Junkovic* (2005) 222 ALR 631 [52].

the behaviour was careless).⁷⁰ The point is well made by McHugh J, who has noted that using such formulations:

Create[s] the risk that they will be treated as stating legal propositions and convert what is a question of fact into a question of law. Hence, their use invites error in analysis, particularly the analysis of judicial precedents.... The common law has no need to – and does not – categorise the cases in which the defendant was held to have breached a standard of care.⁷¹

The ‘well known phenomenon’⁷² of subsuming questions of fault into the notional duty formulation is especially common in the High Court of Australia.⁷³ In *Vairy v Wyong Shire Council*,⁷⁴ for example, the plaintiff suffered serious spinal injuries after diving into shallow water on land controlled by the defendant local authority. The issue for the court was whether the defendant was liable for failing to erect any signs prohibiting diving or warning of the dangers of doing so. On the question of duty, Gummow J said, ‘The essential issue on the *Vairy* appeal [is] the content of the duty of care, namely, the alleged requirement of a warning or a prohibition by the Council.’⁷⁵ In other words, the issue for the court was whether the defendant had a ‘duty’ to put up a sign warning the plaintiff of the dangers of diving in the pool. Ultimately, Gummow J found that no such ‘duty’ existed. Confusingly, Gummow J then went on to conclude that:

The trial judge erred in merging the question of the scope or content of the conceded duty of care and the question of breach. The content of the duty did not include, whatever else it may have included, an obligation to warn (still less to prohibit) of the kind contended for by the plaintiff.⁷⁶

Gummow J adopted a similar approach to the duty question in *Mulligan v Coffs Harbour CC*.⁷⁷ On almost identical facts to *Vairy*, again Gummow J argued that the relevant issue for the court was

⁷⁰ Though, framing the notional duty situation broadly avoids both problems.

⁷¹ *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 433-34.

⁷² Nolan (n 8) 578.

⁷³ Though it is not confined to them. For a UK example, see *Sam v Atkins* [2005] EWCA Civ 1452, and the discussion in Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) 33.

⁷⁴ (2005) 223 CLR 422 (*Vairy*).

⁷⁵ *ibid* 442.

⁷⁶ *ibid* 454.

⁷⁷ (2005) 223 CLR 486 (*Mulligan*).

whether the 'scope of the duty ... include[d] an obligation to warn the plaintiff about the risk of diving in the creek by reason of its variable depth.'⁷⁸ Again, he concluded that the 'scope' of the duty did not extend so far.

Formulations of notional duty situations in terms of the allegedly careless conduct, by conflating issues of law with issues of fact,⁷⁹ give rise to three difficulties. First, they conflate the issue of whether a notional duty exists with the separate question of whether the defendant's behaviour was reasonable, discrete issues which require an evaluation of entirely independent considerations. In particular, whether a notional duty exists is, as we have seen repeatedly, a normative question, and the issue for the court is whether, *assuming the defendant was careless*, liability in negligence *ought* to apply to the particular situation. Such an enquiry invites considerations that have nothing to do with the reasonableness of the defendant's conduct. So, for example, purely economic loss is generally not recoverable, even where the defendant had been careless, because, for example, permitting such claims would lead to indeterminate liability. Whether the defendant has been careless, however, involves an assessment of the particular facts of the case *only*. When the notional duty situation is formulated in terms of the allegedly careless conduct, the focus of the analysis therefore shifts from whether, assuming the conduct *was* careless, liability should exist, to whether the conduct was careless in the first place. In *Kuhl v Zurich Financial Services Australia Ltd*,⁸⁰ for example, the plaintiff was injured when his arm was sucked into an industrial-strength vacuum hose that was passed to him by an employee of the defendant. As to whether a duty existed, according to French CJ and Gummow J, the relevant issue was whether the 'scope of the duty' included 'a duty to take additional reasonable precautions with respect to the passing of the hose so as to avoid causing injury to

⁷⁸ *ibid* 497. See Gummow J's approval of this formulation at *ibid* 499.

⁷⁹ Which, as Kirby J notes, should still be 'properly quarantined': *Neindorf v Junkovic* [2005] 222 ALR 631 [54].

⁸⁰ (2011) 243 CLR 361.

those receiving the hose.’⁸¹ Unsurprisingly, as to whether a ‘duty’ was owed, the court focussed on the particular facts of the case, including whether it was foreseeable that an injury could occur through the passing, opposed to the use, of the hose.⁸² Clearly, however, whether the injury was a foreseeable consequence of the defendants conduct relates to the reasonableness of the conduct, and not whether, assuming the passing of the hose *was* careless, the situation could, in principle, give rise to liability in negligence in the first place; a question which, considering directly caused physical injury is *the* archetypal notional duty situation, would surely have been answered in the affirmative. The same approach was adopted by Gummow J in *Mulligan*, discussed above, when he held that in determining the relevant ‘scope’ of the duty, it was appropriate to examine the issue by reference to ‘considerations, albeit not propositions of law, touching on the readily apparent danger of [the] activity...’;⁸³ again, a consideration more relevant to the question of fault than to whether liability *should* exist in the first place.

The problem is evident in lower courts too. In *McPhersons Ltd v Eaton & Ors*,⁸⁴ the defendant hardware store sold asbestos sheeting to the plaintiff’s employer. The plaintiff later developed mesothelioma as a result of working the asbestos sheeting. On the issue of duty, Ipp JA held that the relationship of vendor and purchaser, or vendor and end consumer, does not *automatically* give rise to a duty of care (even in relation to carelessly caused physical injury); ‘something more’ was required,⁸⁵ as ‘[w]ithout the requirement of some additional factor, a retailer would continuously be at risk if it did not investigate hazardous characteristics of all products sold by it.’⁸⁶ According to Ipp JA, that ‘something more’ was evidence that the

⁸¹ *ibid* 374.

⁸² *ibid* [31]: ‘If it was not reasonably foreseeable that the passing of the hose exposed the receiver of the hose to any greater risk than when it was used for its intended purpose, there is no occasion for the scope of the duty to extend beyond that already owed to the user of the hose.’ Again, this formulation presupposes that the normal risk does not give rise to any duty, which can only be on the basis that exposing the plaintiff to the risk involved when the hose is used ‘for its intended purpose’ was not careless.

⁸³ *ibid* 499.

⁸⁴ [2005] NSWCA 435 (‘*McPhersons*’).

⁸⁵ *McPhersons* [82] (Ipp JA).

⁸⁶ *ibid* [83] (Ipp JA).

defendant 'ought to' have known of the dangers of the asbestos. In other words, the existence of a 'duty' depended on whether the defendant was at fault, not on whether, *assuming the vendor was careless and therefore ought to have known of the dangers of the asbestos*, vendors ought to be liable for any physical harm that results to the ultimate consumer of the dangerous products they have carelessly sold, a question that since *Donoghue v Stevenson*⁸⁷ was decided in 1932 has consistently been answered in the affirmative.

A second problem with formulating notional duty situations in terms of the allegedly negligent conduct, being a 'duty to do X,' is that it pre-empts questions of fault. In particular, if the court finds there is a 'duty to do X,' the fault enquiry simply becomes, whether or not the defendant did 'X;' whereas if the courts finds there is no 'duty to do X,' the fault enquiry is not even enlivened. As Howarth explains:

[If] the duty of care is capable of being characterised as a duty to refrain from doing precisely what it was that the defendant did, or as a duty to do no more than precisely what the defendant did, the investigation of whether there has been a breach becomes superfluous. In the former case, there is always liability, and in the latter case there can never be liability.⁸⁸

A particularly clear example of the notional duty formulation pre-empting the fault stage occurred in Gaudron J's judgment in *Romeo v Conservation Commission (NT)*.⁸⁹ The plaintiff, whilst heavily intoxicated, suffered serious injuries after falling from the top of a 6.5m cliff on a nature reserve under the control of the local council. As the area was a designated tourist area, the plaintiff argued that the defendant council was negligent for failing to install a fence or other barrier along the cliff. On the 'central issue ... [of] the content of the duty of care owed by the [defendant],'⁹⁰ Gaudron J held that

The actions of the Commission in constructing the road and providing parking facilities were calculated to encourage people to visit the particular area from which the

⁸⁷ [1932] AC 562.

⁸⁸ David Howarth, 'Negligence After Murphy: Time to Re-Think' (1991) 50 CLJ 58, 72. See also *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 [106] (McHugh J).

⁸⁹ (1998) 192 CLR 431 ('Romeo').

⁹⁰ *ibid* 456.

appellant fell. And it was foreseeable that at least some would leave their cars and walk towards the clifftop, perhaps to obtain a better view, perhaps, simply, to stretch their legs. And it was also foreseeable that not all would be astute to take care for their own safety. In that context, it seems to me unarguable that, having provided access and car parking facilities, *there was a duty of care to provide fencing along the clifftop in the area near the car park*, although not in areas not readily accessible from it. That duty was a duty to provide fencing of a kind that would prevent visitors from straying too near the clifftop, not a low log fence as the trial judge appears to have had in mind in holding that a fence would not have made any difference in this case.⁹¹

As to the question of fault, Gaudron J was open that, on her construction of the duty, the question was already answered:

As the duty of care is, in my view, limited to the fencing of the clifftop in the vicinity of the car parking area, no question arises as to the reasonableness of that measure. More precisely, the Commission's argument as to the impracticability of fencing the entire clifftop is simply irrelevant. And as there was a duty to fence, the argument that the appellant was well acquainted with the area and aware of its terrain and dangers is irrelevant to the question whether there was a breach by the Commission of its duty of care.⁹²

The third problem with 'dressing up'⁹³ issues of breach as issue of notional duty is that it can lead to procedural difficulties. First, it confuses the respective roles of judge and jury (at least in the remaining jurisdictions that still use juries for civil trials - Victoria, Australia, for example); it is for the judge to determine whether and in what broad circumstances a notional duty exists, and for the jury to determine whether, on the particular facts of the case, the defendant's conduct could be considered careless. Second, and more significantly, is that keeping issues of law and fact separate is important for a properly functioning appellate review process, given that permission to appeal is often confined to questions of law; and, in any event, judges tend to be more reluctant to interfere with determinations of fact than determinations of law.⁹⁴

Formulations of notional duty situations in terms of the behaviour that is alleged to have been negligent, or in terms of a 'duty to do X,' are therefore objectionable on analytical grounds; they conflate separate issues and shift the focus from the normative issue of whether the law of

⁹¹ *ibid* 459.

⁹² *ibid*.

⁹³ Nolan (n 8) 578

⁹⁴ See, for example, the discussion of Major J in *Galaske v O'Donnell* (1994) 112 DLR (4th) 109 [54]-[61].

negligence *ought* to apply to the particular situation to whether the defendant's behaviour was careless, they pre-empt questions of fault, and they give rise to a number of procedural difficulties. Whilst Fleming is relatively gentle in his criticism of such formulations, merely commenting that 'this method of expression is best avoided',⁹⁵ perhaps Nolan's criticism is more appropriate: 'It follows that the fault issue cannot legitimately be subsumed into notional duty, and the confusion of issues of fault and notional duty has rightly been condemned as an error.'⁹⁶

E. The 'scope' of the duty

A number of the above examples illustrate that notional duty issues are occasionally referred to in terms of the 'scope' of the duty, or, alternatively, the 'content' or 'extent' of the duty. So, for example, a court might say the 'scope' of the duty owed by a driver to a passenger extends to directly caused physical injury, but does not extend to purely economic loss.⁹⁷ The scope of the duty language is especially popular in the High Court of Australia. Whilst the term 'scope of the duty' is often used, as the previous example illustrates, as a reference to the precise nature of the notional duty situation, it is also used in a number of competing, and often confusing, ways, and it is important to be aware of the varying meanings ascribed to the term so as to be clear when the court is referring to the notional duty situation, and when they are referring to something else entirely.

In its usual sense, the 'scope of the duty' is simply a synonym for the 'precise notional duty situation.' This understanding of the 'scope' of the duty was well illustrated by Gummow J, who said in *Road Traffic Authority of NSW v Dederer*⁹⁸ that '[d]uties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less

⁹⁵ Fleming, *The Law of Torts* (n 35) 117-118.

⁹⁶ Nolan (n 8) 579.

⁹⁷ Say, if the driver's careless driving caused the passenger to arrive at work late and so miss out on wages.

⁹⁸ (2007) 324 CLR 330.

expansive depending on the relationship in question.⁹⁹ Indeed, it would be meaningless to say, for example, that a driver owes a duty to his passenger without more; one would need to specify that a driver owes a duty to a passenger *with respect to physical injury caused by their careless driving*. In this sense, the ‘scope’ of the duty simply expresses the extent of the situation covered by the notional duty, and so is unobjectionable.

In a second sense, the ‘scope of the duty’ is often used to refer to the appropriate *standard* of care. For example, the ‘scope’ or ‘content’ of the duty owed by a driver to a passenger, is to drive carefully, without exceeding the speed limit, or driving too closely to the car in front. As we have just seen, this form of expression is often the result of the court conflating the notional duty and fault issues, such as in *Mulligan*, where Gummow J spoke of the ‘duty ... to warn the plaintiff about the risk of diving in the creek by reason of its variable depth,’¹⁰⁰ or in *Romeo*, where Gaudron J spoke of a ‘duty of care to provide fencing along the cliff top in the area near the car park.’¹⁰¹ On other occasions, however, it seems clear that the court has distinguished between the issues of notional duty and fault, and the expression of the relevant standard of care in terms of the content of the duty is simply the result of a poor wording. For example, also in *Romeo*, Hayne J said:

It was not (and could not be) seriously suggested that the respondent in this case owed no duty of care to members of the public that might go to areas which it manages. The real subject for debate was what that duty required of it, for it is only when the content or scope of the duty is identified that questions of breach and causation of damage can be considered. So, too, in *Nagle v Rottnest Island Authority* ... the central question was not whether the Board owed any duty of care to those visitors lawfully visiting the island, it was what that duty of care required it to do.¹⁰²

Similarly, in *Jones v Bartlett*,¹⁰³ Gummow and Hayne JJ commented that:

[I]t would be of no utility merely to conclude that the duty is to be expressed simply as one to take reasonable care to avoid a foreseeable risk of injury to a person in the

⁹⁹ *ibid* [43]. See also Morison in JG Fleming and WL Morison, ‘Duty of Care and Standard of Care’ (1953) 1 SydLR 69, 69-70: ‘The question is not simply Did the defendant owe a duty? but What kind of duty?’

¹⁰⁰ *Mulligan* 497.

¹⁰¹ *Romeo* 459.

¹⁰² *ibid* 487.

¹⁰³ (2000) 205 CLR 205.

situation of the [plaintiff]. That would leave unanswered the critical questions regarding the content of the terms 'reasonable' and hence the content of the duty of care, matters essential for the determination of this case, for without them the issue of breach cannot be decided.¹⁰⁴

Speaking in terms of 'duty,' when the court is, in fact, referring to the relevant standard of care, is, of course, unnecessarily confusing and a method of expression best avoided.

The scope of the duty is also often used in a third sense, referring to an independent stage in the negligence enquiry that places limits on the circumstances in which an already imposed duty to take care applies. Indeed, there is considerable authority in the High Court of Australia explicitly suggesting that the enquiry into the *scope* of the duty is independent to the enquiry into the *existence* of a duty. In *Romeo*, for example, Kirby J stated that, as he understood the law, the 'standard questions' involved in the negligence enquiry were, 'The duty of care issue ... The scope of the duty issue ... The breach issue...[and] The causation issue.'¹⁰⁵ He re-affirmed this formulation in *Graham Barclay Oysters Ltd v Ryan*¹⁰⁶ and *Modbury Triangle Shopping Centre Pty Ltd v Anzil*.¹⁰⁷ Similarly, in *Cole v South Tweed Heads Rugby League Football Club Ltd*,¹⁰⁸ in determining whether the defendant football club owed a duty to a patron who became so intoxicated at the club's bar that she was struck by a motor vehicle shortly after leaving, Gleeson CJ said:

In the circumstances of this case, it is of little assistance to consider issues of duty of care, breach, and damages, at a high level of abstraction, divorced from the concrete facts. In particular, to ask whether the respondent owed the appellant a duty of care does not advance the matter... Of course the respondent owed [the appellant] a duty of care. There is, however, an issue concerning the nature and extent of the duty.¹⁰⁹

To suggest that the existence of a duty and the scope of the duty are separate enquiries is, of course, wrong, as it completely misconstrues the role of the notional duty enquiry. As we have

¹⁰⁴ *ibid* [167].

¹⁰⁵ *ibid* 475 [115]. Though later dicta of Kirby J suggests that he did not necessarily agree with the construction. See especially: *Neindorf v Junkovic* [2005] 222 ALR 631 [51]-[55].

¹⁰⁶ (2002) 211 CLR 540, 622.

¹⁰⁷ (2000) 205 CLR 254, 274 ('*Modbury*').

¹⁰⁸ (2004) 217 CLR 469 ('*Cole*').

¹⁰⁹ *ibid* 472. See also Gleeson CJ's comments in *Modbury* 263.

seen, a notional duty does not exist in the abstract and cannot be divorced from the broad circumstances in question; a finding that a notional duty exists must *already* dictate the circumstances in which the defendant is required to take care (i.e. the 'situation') and so is *already* limited to a particular 'scope.' Indeed, to suggest that a separate enquiry is needed to impose such limits makes one wonder how the anterior question as to the existence of a duty is determined in the first place. In *Cole*, for example, Gleeson CJ presumably based the existence of a duty purely on the occupier/visitor relationship of the defendant and plaintiff; but, as we have seen, without reference to the kind of harm suffered by the plaintiff or the way it occurred, the mere fact that the plaintiff was a visitor is not enough to give rise to a notional duty. Understood in this sense, the scope of the duty is a completely superfluous concept, and any perceived need for the scope of the duty in this sense, is due to a misunderstanding of the role of duty.

Finally, the scope of the duty is also occasionally used in a fourth sense, as limiting the extent of the defendant's liability to the materialisation of only those risks that made their conduct careless in the first place. The most well-known example of this use of the 'scope of the duty' is Lord Hoffmann's speech in *South Australia Asset Management Corporation v York Montague Ltd*,¹¹⁰ where the court had to determine whether the defendant was responsible for *all* the consequences of a negligence overvaluation of the claimants' property, including a drop in the property market, or only those that resulted from the valuation being wrong, namely the claimant banks receiving less security for loans than they would have required had the valuation been correct. Speaking throughout in terms of the 'scope of the duty,' Lord Hoffmann stated that:

[A] person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong.¹¹¹

¹¹⁰ [1997] AC 191 (HL) ('SAAMCO').

¹¹¹ *ibid* 214.

As Nolan points out, however, this sense of the scope of the duty is little more than an ‘unhelpful and pointless reformulation of the remoteness issue.’¹¹² Indeed, as we saw in Chapter Four, the remoteness issue *already* confines the liability of defendant to the materialisations of those risks that made their conduct careless in the first place; and so, for the same reasons that there is no need for factual duty to perform the same task, there is also no need for it to be done under the ‘scope of the duty’ label, whether as a separate element of the negligence enquiry or as a synonym for factual duty. Writing extra-judicially, Lord Hoffmann even conceded that his use of the ‘scope of the duty’ label in *SAAMCO* was ‘inappropriate’ and that he would try to ‘mend [his] language in the future.’¹¹³

If the scope of the duty language is to be used at all, it should be confined to the first use, referring to the precise details of the notional duty situation; the other three senses in which it is used are superfluous and apt to mislead.

III. Assumptions of responsibility

Since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹¹⁴ was decided in 1963, the law has been clear that, even where the facts of the case fall into a broad exclusionary situation, a duty may nevertheless exist where the defendant ‘assumed a responsibility’ towards the claimant.¹¹⁵ Although *Hedley Byrne* and assumptions of responsibility tend to be associated exclusively with cases involving purely economic loss, as McBride and Bagshaw note, this is a ‘common misconception,’¹¹⁶ as there is no sign that the Law Lords in *Hedley Byrne* intended for their comments to be confined in such a way. Indeed, today assumptions of responsibility play a

¹¹² Nolan (n 8) 579.

¹¹³ Lord Hoffmann, ‘Causation’ (2005) 121 LQR 592, 596.

¹¹⁴ [1964] AC 465 (HL) (*‘Hedley Byrne’*).

¹¹⁵ Arguably, an assumption of responsibility provided a justification for the existence of a notional duty even prior to *Hedley Byrne*. It has been argued, for example, that the existence of the duty in *Stansbie v Troman* [1948] 1 KB 48 (CA), a case decided more than a decade before *Hedley Byrne*, was based on an assumption of responsibility: *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL), 272 (Lord Goff); and Nicholas J McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) 187 (fn 194).

¹¹⁶ *Ibid.* Indeed, they go as far as labelling the claim ‘nonsense’: *ibid.*

crucial role in establishing the existence of a duty in cases involving purely economic loss, *and* omissions / third party liability,¹¹⁷ and it is even arguable that an assumption of responsibility could provide the basis for a duty in *any* exclusionary category.¹¹⁸

A. A distinctive type of justification

Assumptions of responsibility are typically thought to provide a distinctive type of justification for the existence of a notional duty; in particular, the notional duty does not arise because ‘this broad situation ought to be subject to the laws of negligence,’ but because, ‘even though this broad situation ought to *not* be subject to the laws of negligence, the defendant assumed a responsibility to the defendant and so ought to be bound by it.’ Indeed, this was the understanding of Lord Devlin himself in *Hedley Byrne*:

I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken...¹¹⁹

The uniqueness of the assumption of responsibility type justification is often explained in terms of ‘consent,’ or the ‘voluntariness’ of the undertaking.¹²⁰ In particular, in those situations where a notional duty is recognised whether we consent to it being recognised or not, our obligation to not carelessly cause damage is imposed *by the law*; where, however, the notional duty is based on an assumption of responsibility, our obligation to not carelessly cause damage is based on

¹¹⁷ See, for example: *Michael v The Chief Constable of South Wales Police* [2015] 2 WLR 343 (HL) (Lord Toulson); *Mitchell v Glasgow City Council* [2009] 1 AC 87 (HL) (Lord Hope); *Watson v British Boxing Board of Control* [2001] QB 1134 (CA) (Lord Phillips MR); *Barret v Ministry of Defence* [1995] 1 WLR 1217 (CA) (Bedlam LJ); and *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL) (Lord Goff).

¹¹⁸ For example, although there does not seem to be any case on point, the combat immunity would arguably not apply if an officer gave an explicit undertaking to a soldier that a particular mission would be safe, and, after participating in the mission in reliance on the undertaking, the soldier was injured as a result of the mission, in fact, being unsafe, as the arguments against liability in that situation *generally* would not necessarily answer the objection that the officer breached an explicit undertaking.

¹¹⁹ *Hedley Byrne* 529.

¹²⁰ Stevens, *Torts and Rights* (n 16) 10, 12; Beever (n 18) 273. cf K Barker, ‘Unreliable Assumptions in the Modern Law of Negligence’ (1993) 109 LQR 461, 470-73; Andrew Robertson and Julia Wang, ‘The Assumption of Responsibility’ in Kit Barker, Ross Grantham and Warren Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart 2015) 55-57.

‘the objective manifestation of consent for which we are responsible.’¹²¹ The distinctiveness of the assumption of responsibility justification for the existence of a duty has even led to some claiming that it does not belong in the law of negligence,¹²² or even the law of tort,¹²³ at all, as it more closely resembles an obligation that arises as a result of the law of contract.

B. Criticism

As we saw in Chapter Three, however, justifying the existence of a notional duty on the basis that the defendant ‘assumed a responsibility’ towards the claimant has been criticised on the basis that, far from providing an independent type of justification, an ‘assumption of responsibility’ is merely a label for the conclusion that a notional duty should be imposed.¹²⁴ In support of this claim, critics tend to point to cases such as *White v Jones*,¹²⁵ where the defendant was *deemed* to have assumed a responsibility to the claimant ‘in law,’¹²⁶ despite the parties never having even communicated with each other, directly or indirectly, or *Smith v Eric S Bush*,¹²⁷ where the defendant was held to have assumed a responsibility towards the plaintiff, again, despite the parties never having met or communicated, and despite the defendant *expressly* disclaiming any responsibility.¹²⁸ It is undeniably difficult to see such uses of the concept of assumption of responsibility as anything but fictitious; however, it does not follow from the fact that *some* cases use the concept of assumption of responsibility fictitiously, that the concept is meaningless. Indeed, those who claim assumptions of responsibility are a separate type of justification for the existence of a notional duty agree that cases such as *Smith*

¹²¹ Stevens, *Torts and Rights* (n 16) 12

¹²² Beever (n 18) 273.

¹²³ For an overview of these claims, see Paul Mitchell, ‘*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Torts* (Hart 2010) 187-88.

¹²⁴ See Section VII.

¹²⁵ [1995] 2 AC 207 (HL) (‘*White v Jones*’).

¹²⁶ *ibid* 268 (Lord Goff).

¹²⁷ [1990] 1 AC 831 (HL) (‘*Smith v Eric S Bush*’). The express disclaimer was held to be of no effect by virtue of section 2(2) of the Unfair Contract Terms Act (1977), and so could not provide a basis for the failure to assume a responsibility. Though, it was noted that, as far as the common law was concerned, the disclaimer *was* effective (Lord Griffith at 856), and that if the case had arisen prior to 1977 the disclaimer would have prevented the assumption of responsibility from arising (Lord Jauncey at 853).

¹²⁸ See, for example, the criticism to this effect in: Barker (n 120) 466-67; Robertson and Wang (n 120) 59-60, 65-67.

v Eric Bush and *White v Jones* are *not* helpful illustrations of what it means to assume a responsibility. According to McBride and Bagshaw, for example:

Of course, the courts have in the past found that a defendant ‘assumed a responsibility’ to a claimant [fictitiously] ... but in those cases the courts were guilty of abusing the concept – in those cases the courts wanted to find that the defendant owed the claimant a duty of care for such-and-such a reason and they simply *said* that the defendant ‘assumed a responsibility’ to the claimant in order to provide themselves with some legal justification for their finding that the defendant owed the claimant a duty of care.¹²⁹

Indeed, even in his speech in *White v Jones*, Lord Goff was explicitly clear that the existence of a duty was *not* based on the defendant assuming a responsibility to the claimant,¹³⁰ but on the basis of the ‘impulse to do practical justice.’¹³¹ To say that assumption of responsibility is a meaningless concept on the basis of such cases, is therefore unconvincing.

Accordingly, if the concept of assumption of responsibility is to have any meaning, it must be understood more narrowly, referring only to circumstances where the defendant has *clearly* indicated that the claimant can rely on them in some respect, whether it be the performance of an activity, provision of services, or supply of information.¹³² This certainly seemed to have been the original intention of Lord Devlin, who said in *Hedley Byrne* that an assumption of responsibility will only exist where the relationship between the parties is, ‘in the words of Lord Shaw in *Nocton v Lord Ashburton* ... “equivalent to contract,” that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.’¹³³ Of course, short of requiring potential defendants

¹²⁹ McBride and Bagshaw (n 115) 175. McBride and Bagshaw then cite Lord Goff’s speech in *White v Jones* as a particularly transparent example of this. See also Stevens, *Torts and Rights* (n 16) 35, 43; and Beever (n 18) 305. Arguably, this even follows from the narrower formulation of what it means to assume a responsibility in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 (HL).

¹³⁰ *White v Jones* 262: ‘[T]he *Hedley Byrne* principle cannot, in the absence of special circumstances, give rise on ordinary principles to an assumption of responsibility by the testator’s solicitor towards an intended beneficiary.’

¹³¹ *ibid* 259.

¹³² This is not to suggest that the claimant must *actually* rely on the representation, just that the defendant has indicated that the claimant *may* rely on the representation. For why reliance is not necessary, see Stevens, *Torts and Rights* (n 16) 14-15.

¹³³ *Hedley Byrne* 529.

to explicitly state ‘I consent that I will take care in the performance of this task and accept responsibility for the consequences of my careless failure to do so,’ determining when the defendant has indicated that the claimant can rely on them will not always be clear. It is for this reason that the question of whether the defendant has assumed a responsibility must be determined objectively.¹³⁴ Yet, by not requiring the defendant to *explicitly* assume responsibility, it is often said that a notional duty is therefore imposed rather than voluntarily assumed, such that the concept of assumption of responsibility is meaningless after all. According to Robertson and Wang, for example, ‘What is called an “objective test” almost inevitably becomes a question as to whether it is reasonable to impose the obligation on the defendant.’¹³⁵ Yet such a criticism would appear to conflate two separate issues: whether the defendant’s conduct can be said to have *objectively indicated to the claimant* that they can rely upon them in relation to the performance of an activity, etc, with whether the claimant *should* be able to rely on the defendant’s performance of an activity, etc.¹³⁶ That they are separate issues can easily be seen from a comparison with the law of contract, where there appears to be no suggestion that the objective test governing acceptance of an offer¹³⁷ inevitably becomes a question of whether the obligation imposed by the contract is reasonable.¹³⁸ Accordingly, if a consent-based or voluntarily assumed obligation can be imposed on the basis of an objective assessment of an offeree’s conduct in the law of contract, it is not clear why a consent-based or voluntarily assumed obligation cannot also be imposed on the basis of an objective assessment of the potential defendant’s conduct in the law of tort.

¹³⁴ *Smith v Eric S Bush* 862; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), 181; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL), 654.

¹³⁵ Robertson and Wang (n 120) 57.

¹³⁶ Though, admittedly, as Robertson and Wang note, the cases do not always illustrate such a distinction; *ibid* 57-58. See especially, the comments of Lord Goff in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), 181 (equating an objective test with whether responsibility ‘should be held to have been assumed’) and Lord Hoffmann *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 (HL) [36] (suggesting that whether a responsibility was assumed depends on questions of ‘fairness’ and ‘policy’).

¹³⁷ Edwin Peel, *Treitel: The Law of Contract* (13th edn, Sweet & Maxwell 2011) 2-016.

¹³⁸ See also: Stevens, *Torts and Rights* (n 16) 36 (‘Although determining whether there has been an assumption of responsibility has been criticised as artificial, there is no more artificiality in discerning either a contractual or non-contractual undertaking.’); Beever (n 18) 304.

If we therefore understand the concept of assumption of responsibility narrowly, and as focussing on whether the defendant can be said to have objectively indicated that they can be relied upon in the performance of some activity, etc, then it starts to attain some meaning. Indeed, when the concept is understood sufficiently narrowly, even critics of the concept occasionally concede that it has some explanatory force.¹³⁹ Few would dispute, for example, that an explicit undertaking to take care in the performance of an activity would give rise to a consent-based notional duty. Of course, if the concept has explanatory force in *some* circumstances, albeit narrowly defined ones, then the assumption of responsibility concept *is* useful after all, and the criticism of the assumption of responsibility concept is not so much aimed at the concept itself, so much as how the concept is applied, and where, precisely, the line between assuming a responsibility and not assuming a responsibility should lie.

C. How assumptions of responsibility fit into the notional duty enquiry

Notwithstanding, then, that legitimate disagreement exists over where the line between assuming a responsibility and not assuming a responsibility should lie, assumptions of responsibility *do* appear to provide an independent basis for the existence of a notional duty; again, it is not because ‘this broad situation ought to be subject to the laws of negligence,’ but because, ‘even though this broad situation ought *not* be subject to the laws of negligence, the defendant assumed a responsibility to the defendant and so ought to be bound by it.’ Regardless of where one believes the line should lie, however, it seems clear that the concept must be understood quite strictly if it is to have any meaning. In particular, it must depend on the exact nature of any representation made by the defendant; this, in turn, will depend on the precise facts of the case. Of course, if an assumption of responsibility depends on the precise

¹³⁹ See, for example, Robertson and Wang, who agree that *Williams v Natural Life Health Foods* [1998] 1 WLR 830 (HL), was based on the ‘defendant manifest[ing] ... consent to the obligation in question’: Robertson and Wang (n 120) 56 (fn 56).

facts of the case, a finding that the defendant assumed a responsibility will *not* apply to a broad situation, nor will it create any precedent; it is for this reason that cases like *White v Jones*, *Smith v Eric S Bush*, *Spring v Guardian Assurance plc*,¹⁴⁰ which all clearly apply beyond their facts, and *are* justified on whether a notional duty *should* exist in a broad situation, are better understood as *categorical* determinations, rather than on the basis that the defendant assumed a responsibility. Assumptions of responsibility are therefore best understood as *exception* to the categorical nature of duty.¹⁴¹ Additionally, as assumptions of responsibility will only be relevant in exclusionary categories, it only need be considered *after* the court has found that the facts of the case fall into an exclusionary category; in this sense, an assumption of responsibility is a *secondary* method by which a notional duty may be established. The notional duty stage ought therefore logically be approached in two stages. First, the court must determine whether the type of situation to which the facts belong ought to be subject to the laws of negligence. If so, a notional duty exists, and the court can consider the issue of fault. If, however, the court determines that the law of negligence ought *not* apply to the broad situation, and so the facts of the case fall into an *exclusionary* notional duty situation, the court can move to the second stage, and consider whether, despite the finding that the law of negligence should not apply to the situation *generally*, it should nevertheless apply to the particular facts of the case because the defendant assumed responsibility for their conduct, being the conduct that was ultimately careless; if so, a notional duty will exist, if not, the case is over.

There are a number of benefits to approaching the notional duty enquiry in this structured way. First, it clearly explains how assumptions of responsibility interact with the general duty tests. As we saw in Chapter Three, this has given rise to much confusion in the past;

¹⁴⁰ [1995] 2 AC 296 (*'Spring v Guardian'*).

¹⁴¹ Admittedly, on this understanding, it is arguable that the 'notional duty' terminology, which was defined above as concerning *categories* of case, is inappropriate. It will, however, continue to be used, as both issues concern justifications for the imposition of the laws of negligence and so are logically dealt with together. Further, provided it is clear that assumptions of responsibility form an *exception* to the categorical nature of duty, the introduction of new and potentially confusing terminology seems unnecessary.

some arguing that assumptions of responsibility are merely evidence of ‘proximity,’ others arguing that assumptions of responsibility are an alternative test, though without being clear which test is to be preferred in which circumstances.¹⁴² Even *Customs and Excise Commissioners v Barclays Bank plc*,¹⁴³ though providing *some* guidance on the issue, only did so via a number of separate speeches, and left a number of questions unanswered.¹⁴⁴ Under the approach outlined above, the relationship is clear: the court begins by determining whether the broad situation ought to be subject to a notional duty, and only where that question is answered in the negative, does the existence of an assumption of responsibility become relevant. Second, it discourages fictitious uses of the assumption of responsibility concept. In particular, as the court will first consider whether a notional duty ought to exist in a category of case, cases like *White v Jones*, and *Smith v Eric Bush*, which clearly relate to broad situations rather than any assumption of responsibility, are more likely to be explained in categorical terms, such that the need and opportunity for courts to explain the existence of a duty in such cases in terms of assumptions of responsibility will be diminished. Third, it will reduce the burden placed upon general duty tests, and simplify them accordingly, as the tests will no longer be forced to justify the imposition of both consensual *and* non-consensual obligations under the same rubric, a futile mission that was abandoned in Roman times,¹⁴⁵ nor will they need to insist that, even in the case of explicit undertakings, the court must still explain why it is ‘fair, just, and reasonable’ that such undertakings give rise to a notional duty, an obviously superfluous exercise.

Assumptions of responsibility therefore seem to provide an independent type of justification for the imposition of the law of negligence, and so the existence of a notional duty, at least where assumptions of responsibility are understood in sufficiently narrow terms. Admittedly determining when someone has assumed a responsibility is not always

¹⁴² See Chapter Three, Section VII.

¹⁴³ [2007] 1 AC 181 (HL) (*‘Customs and Excise Commissioners’*).

¹⁴⁴ See, for example, the commentary in M Lunney and K Oliphant, *Tort Law: Text and Materials* (5th edn, OUP 2013) 446.

¹⁴⁵ Gaius *Institutes* 3.88.

straightforward, but it is no more difficult than determining when a contract has been accepted in the absence of explicit acceptance. As any assumption of responsibility will depend on the precise facts of the case, rather than the broad situation generally, assumptions of responsibility are best seen as a secondary method by which to establish a notional duty, as well as an exception to the generally categorical nature of such determinations. By approaching the notional duty enquiry in this manner, however, the interaction between the assumption of responsibility and more general tests becomes clear, assumptions of responsibility are less likely to be fictitious, and general tests will not have to do quite so much work. Assumptions of responsibility therefore play a different, but important role in notional duty determinations.

IV. The use of policy considerations

As we have seen, the existence of a notional duty is a normative issue; that is, the question for the court is whether a notional duty *ought* to exist. Whilst a clear assumption of responsibility tends to provide a justification for the existence of a notional duty in itself,¹⁴⁶ when determining whether a particular *situation* ought to be subject to a notional duty, courts frequently rely on considerations of ‘policy,’ which, as we saw in Chapter Three, concern considerations of community welfare, as opposed to considerations of interpersonal justice. Indeed, this is hardly surprising, as whether the law of negligence ought to apply to a broad situation that transcends the particular facts of the case, will inevitably lend itself to consideration of, albeit not necessarily *exclusive* consideration of,¹⁴⁷ factors that also transcend the particular facts of the case.¹⁴⁸

¹⁴⁶ That is, as we have seen, because the defendant consented to it.

¹⁴⁷ Importantly, non-policy reasons can also be relevant to the notional duty enquiry, as there is no reason why considerations of principle cannot also apply to broad situations. For example, that a notional duty exists in relation to physical injury directly caused to a passenger by a driver’s careless driving could be justified on the basis of the close relationship of the parties as well as the parties’ legitimate expectations, rather than because it is beneficial for society, just as the general absence of a notional duty in relation to omissions can be, and usually is, explained on the basis that the recognition of a duty would impose too

The use of policy-based arguments in determining the outcome of notional duty issues is, however, highly controversial. Beever, for example, argues that it is both ‘impermissible’ and unnecessary,¹⁴⁹ whilst Stevens claims that the attractions of policy-based arguments ‘should be resisted,’ as, although they make ‘the law of torts seem exciting and interesting ... The law of torts is much more boring than is commonly supposed.’¹⁵⁰ Courts should, instead, according to critics, rely on considerations of ‘principle.’¹⁵¹ Whilst this debate about the appropriate role of policy-based reasoning is hardly new,¹⁵² it has risen in prominence in recent years due to the increased influence of rights-based theories of private law, most of which tend to reject the use of policy-based reasoning.

What, however, is it about policy-based reasoning that is thought to be so problematic? According to the critics of policy-based reasoning, there are four primary objections: first, judges are not qualified to rely on policy-based arguments; second, the use of policy-based arguments requires the balancing of incommensurables; third, the use of policy-based arguments violates the rule of law; and fourth, the use of policy-based arguments leads to a less coherent body of law. This section will examine these arguments in further detail.¹⁵³

great an interference on individual’s freedom of action (see, for example, Lord Hoffmann in *Stovin v Wise* [1996] AC 923 (HL), 946).

¹⁴⁸ Indeed, as Nolan notes, policy-free accounts of the law tend to ignore the notional aspect of the duty enquiry altogether: Nolan (n 8) 564.

¹⁴⁹ Beever (n 18) 29.

¹⁵⁰ Stevens, *Torts and Rights* (n 16) 307. See also, Weinrib (n 18) and EJ Weinrib, *The Idea of Private Law* (rev edn, OUP 2012).

¹⁵¹ For the remainder of this thesis, the approach to resolving notional duty determinations that permits policy considerations will be called ‘the policy based approach,’ whilst the approach that prohibits policy considerations will be called ‘the principle based approach.’

¹⁵² See, for example, the comments of Burrough J in *Richardson v Mellish* [1892] 2 Bing 229, 252; 130 ER 294, 303 (‘I, for one, protest ... against arguing too strongly upon public policy; - it is a very unruly horse, and once you get astride it you never know where it will carry you’) and Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121 (‘The objection, that a contract is immoral or illegal ... sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so’). See also the discussion in SM Waddams, *Principle and Policy in Contract law* (Cambridge University Press 2011) ch 5.

¹⁵³ Importantly, most of these arguments are advanced against the use of policy-based reasoning in private law, tort law, or the law of negligence *generally*, rather than the notional duty enquiry in

A. Judges are not qualified to rely on policy considerations

The most commonly advanced argument against the use of policy considerations is that judges are not qualified to rely on them. There appear to be three reasons for this belief: that judges lack political legitimacy, that judges lack technical competence, and that judges often lack sufficient evidence.

The argument that judges lack the political legitimacy to rely on policy considerations is based on the view that, in a liberal democracy such as ours, considerations of policy are most appropriately dealt with by a democratically elected Parliament, and not by the judiciary.¹⁵⁴ In particular, it is for the community to determine what is in its best interests and what policies it wishes for the law to reflect, and a democratically elected legislature is, at least in theory, the best way of achieving this. The judiciary, on the other hand, do not usually make their political views public and are not appointed on the basis of those views in any event (again, at least in theory). Accordingly, if judges are permitted to rely on policy considerations, there is no method of ensuring that such considerations in any way reflect the views of the public; indeed given the limited interaction of judges with members of the public, and the small section of the 'socio-economic elite' from which judges and the lawyers arguing before them are drawn, it is difficult to see how they could.¹⁵⁵ Judges are therefore thought to lack the political legitimacy to rely on, and thereby implement within the law, reasons of policy. None of this is to say, of course, that the judges are not well meaning, or even to deny that what they believe to be in the best interests of the community has a more rational basis than what the community believes to be in

particular. However, the notional duty falls within all these areas and is, in any event, the principal area of private law, tort law, and the law of negligence, in which these arguments are encountered.

¹⁵⁴ Beever (n 18) 54; Stevens, *Torts and Rights* (n 16) 308; D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 ABR 110; Weinrib (n 18) 208-209; John Smillie, 'Who Wants Juristocracy?' (2005-2008) 11 Otago L Rev 183.

¹⁵⁵ Beever (n 18) 54.

their best interests; it is, however, undemocratic, and to suggest otherwise is, according to Beever, 'incredible.'¹⁵⁶

The argument that judges lack the technical competence to rely on policy-based reasons is based on the view that they do not have the necessary training or educational background to properly assess the legitimacy of policy-based concerns or how best to implement them. They should, therefore, not base a decision on, say, the potential economic consequences of that decision, as they are not only unqualified to determine whether such economic consequences are good or bad, but they are also often not qualified to determine the likely consequences of the decision in the first place. This is hardly surprising; after all, judges, and the lawyers on whose arguments they rely, are trained in the law, not in social policy or economic theory.¹⁵⁷ Parliament, on the other hand, employs and is able to rely on specially trained policy advisers, with expertise in economics, social welfare, etc. As Beever notes:

Why would [the public] be prepared to spend considerable effort and taxpayers' money setting up ministries containing expert policy analysts in order to ensure that ministers get the best advice possible, and yet be prepared to allow judges with little or no social policy training, advised by lawyers with little or no social policy training, to make social policy choices...¹⁵⁸

Without the necessary technical competence to assess policy concerns, it is thought that courts should therefore avoid relying on them altogether.

The argument that, even if judges did have the necessary political legitimacy and technical competence, they nevertheless often lack sufficient evidence to properly assess policy concerns, is principally based on the limitations of the forum. Indeed, courts are subject to significant institutional limitations, including the rules of evidence and the adversarial nature of proceedings - the advocate's role being to win his or her case rather than to present relevant

¹⁵⁶ Ibid 54.

¹⁵⁷ Stevens, *Torts and Rights* (n 16) 309; Weinrib (n 18) 167; Weinrib (n 18) 208-209; C Witting, 'Tort Law, Policy and the High Court of Australia' (2007) 31 MULR 569, 580.

¹⁵⁸ Beever (n 18) 173.

facts or to find the truth.¹⁵⁹ Relevant evidence may also not be presented because it is too expensive for the parties to justify, too time consuming for a trial between two parties, or too complex for a single judge to consider. In the absence of such evidence, it is argued that courts may therefore resort to ‘speculation,’¹⁶⁰ which comes with the ‘associated risk of errors.’¹⁶¹ In *Hill v Chief Constable of West Yorkshire*,¹⁶² for example, the claimant, acting on behalf of her daughter’s estate, sued the police for their failure to apprehend the Yorkshire Ripper before he murdered her daughter. In finding that no duty of care existed, Lord Keith refused to exclude the possibility that a finding of liability could encourage ‘detrimentally defensive’ policing, despite no evidence being given on this point.¹⁶³ Similarly, in *Macfarlane v Tayside Health Board*,¹⁶⁴ a wrongful birth/conception case, despite all their Lordships disclaiming any reliance on policy, one of the reasons the court found that no duty existed was, at least according to Lord Bingham in a later case, that such a decision would ‘offend the community’s sense of how public resources should be allocated.’¹⁶⁵ Again, the court had heard no evidence on the consensus of public opinion, and so such a conclusion was merely the judge’s best guess.¹⁶⁶ It goes without saying that courts should not be basing decisions on speculation as to the consequences of a decision for the community, and given that, it seems, courts often do not have sufficient evidence to do otherwise, advocates of the principle-based approach believe they should therefore avoid relying on considerations of policy altogether.

¹⁵⁹ Witting (n 157) 580.

¹⁶⁰ NJ McBride and R Bagshaw, *Tort Law* (3rd edn, Pearson Longman 2008) 202. See also, P Cane, ‘Consequences in Judicial Reasoning’ in J Horder (ed), *Oxford Essays in Jurisprudence* (OUP 2000).

¹⁶¹ C Witting, ‘The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence’ (2008) 71 MLR 621, 633. See also K Burns, ‘The Way the World is: Social Facts in High Court Negligence Cases’ (2004) 12 TLJ 215, 232.

¹⁶² [1989] AC 53 (HL).

¹⁶³ *ibid* 63 (Lord Keith). Similar concerns were expressed by Lords Carswell, Hope and Brown in *Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of Sussex Police* [2009] 1 AC 225 (HL) at [108], [76], and [132]. Compare the views of McLachlin CJ in *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620 [57]-[58]. See also, Stevens, *Torts and Rights* (n 16) 309-10; A Robertson, ‘Rights, Pluralism and the Duty of Care’ in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart 2012) 454-55; Jonathan Morgan, ‘Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics’ (2009) 125 LQR 215, 215.

¹⁶⁴ [2000] 2 AC 59 (HL).

¹⁶⁵ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (HL) 316 (Lord Bingham).

¹⁶⁶ Stevens, *Torts and Rights* (n 16) 311.

It would therefore seem that judges are neither politically legitimate nor technically competent to assess policy-based arguments, and, in any event, often lack sufficient evidence to properly assess such concerns. Yet, not everyone accepts these conclusions and numerous objections to the above arguments have been raised. As to the claim that judges lack the necessary political legitimacy, both Cane¹⁶⁷ and Dworkin¹⁶⁸ have questioned why the same objection is not raised to judicial consideration of questions of interpersonal justice. In particular, why is it undemocratic for unelected judges from a small and unrepresentative section of society to determine our legal rights based on their personal political views, but not undemocratic for those same judges to determine and prioritize our legal rights on the basis of their personal views on interpersonal justice? It might be objected here that it is because judges are experts in the latter but not in the former.¹⁶⁹ But, as Priel points out, this response simply begs the question. In particular, what is it that makes judges experts on questions of principle but not experts on questions of policy? It cannot be because they are exposed to the former and not the latter because, not only *are* judges exposed to questions of policy in public law, but even if they were not, given there is apparently no objection to judges becoming experts to issues interpersonal justice through exposure, the principal objection would be overcome by simply exposing judges to policy in the same way they are exposed principle, thereby making them experts in questions of policy too.¹⁷⁰ The second claim, that judges are not technically competent, is also disputed. Robertson, for example, questions whether it is correct that policy decisions should only be made *by* experts rather than *on the advice of* experts.¹⁷¹ Many members of Parliament, for example, have no training at all in matters of public policy, whilst those who do are invariably required to make decisions outside their individual areas of

¹⁶⁷ P Cane, 'Rights in Private Law' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart 2012), 55.

¹⁶⁸ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 23-28.

¹⁶⁹ See, for example, Allan Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (OUP 2013) 306; P Birks, 'Equity in Modern Law: An Exercise in Taxonomy' (1996) 26 WALR 3, 97.

¹⁷⁰ Dan Priel, 'Private Law: Commutative or Distributive?' (2014) 77 MLR 308, 323-24.

¹⁷¹ Robertson (n 163) 455-56.

expertise, and so often have no choice but to rely on the advice of experts. If parliamentarians are able to rely on experts, despite not being experts themselves, then it is not clear why the judiciary cannot do the same (i.e. when expert evidence is tendered). The third claim, that judges rarely have sufficient evidence on which to appropriately assess policy-based concerns, has also been questioned. First, it has been doubted how often this problem actually arises. As Robertson points out, matters of policy, such as the content of community values, can often be informed by readily available evidence, including reports of Royal Commissions and Law Reform Commissions.¹⁷² Second, even if *some* cases exist in which judges lack sufficient evidence to appropriately assess policy-based concerns, it does not follow that judges should be prevented from assessing policy-based concerns in *all* cases, including those where sufficient evidence *is* available. Third, as pointed out by Morgan, Law Commissions, Government and Parliament are *themselves* often required to undertake law reform on a 'speculative basis,' because certain evidence may be too expensive to obtain (on a cost-benefit analysis);¹⁷³ again, it is not clear why this only becomes objectionable when done by the judiciary. It may be objected here that Parliament is nevertheless in a better position than courts to assess policy concerns because of their superior resources. Whilst, it is certainly true that courts have fewer resources than Parliament, and so access to *less* evidence, it does not follow that access to *less* evidence is the same as access to *insufficient* evidence.

As well as the above responses to the specific claims made by advocates of the principle-based approach, numerous other, more general, objections have been made to the claim that the judiciary is unqualified to consider policy-based arguments. First, under the Human Rights Act 1998, judges are *required* to take policy considerations into account when determining the scope of certain rights and any limits that ought to be placed upon them.¹⁷⁴ Accordingly, as

¹⁷² Ibid 454.

¹⁷³ Morgan (n 163) 220.

¹⁷⁴ For example, the 'Right to respect for private and family life,' recognised in Article 8.1 of Schedule 1, may, by virtue of Article 8.2, be 'interfered with' where it is 'necessary in a democratic society in the

Morgan points out, 'If in such cases judges can be trusted to weigh the costs (to the individual) against the benefits (to society) of the challenged legislation, why should the same judges become incapable of a similar exercise when deciding tort cases?'¹⁷⁵ Second, the legislature often leaves the content of large areas of private law to be determined entirely by the courts, so that if considerations of community welfare are to be taken into account in these areas of law at all, it must *necessarily* be done by the courts.¹⁷⁶ Third, even if courts do occasionally get it wrong, whether because the decision does not reflect the views of the wider community or because the court did not have the appropriate resources or evidence, ultimate control rests with the legislature anyway, and so the legislature can always substitute a court's decision with their own.¹⁷⁷ Fourth, even if the problems with judicial use of policy-based arguments are conceded, it is debatable whether judges ignoring the potentially undesirable social consequences of their decisions is a better alternative;¹⁷⁸ indeed, as noted by Pollock LCB in *Egerton v Brownlow*:¹⁷⁹

My Lords, it may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it.

The argument that judges are not qualified to rely on policy is therefore problematic, and, quite aside from these problems, there exist a number of arguments why judicial use of policy considerations is nevertheless desirable.

interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'; such considerations are clearly considerations of policy. The rights protected by Articles 9 to 11 of Schedule 1 are similarly limited (though the exact wording of the grounds for limiting the rights varies).

¹⁷⁵ Morgan (n 163) 221.

¹⁷⁶ S Waddams, 'Private Right and Public Interest' in M Bryan (ed), *Private Law in Theory and Practice* (Routledge 2008) 19; P Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reforms of Tort Law' (2005) 25 OJLS 393, 411.

¹⁷⁷ H Luntz and others, *Torts: Cases and Commentary* (7th edn, Lexis Nexis 2013) 148. Compare Dworkin (n 168) 18.

¹⁷⁸ Morgan (n 163) 221; Robertson (n 163) 456.

¹⁷⁹ (1853) 4 HLC 1, 151; 10 ER 359, 419.

B. The policy-based approach requires the balancing of incommensurables

A second, and very common, argument against the use of policy-based reasons is that it requires the balancing of ‘incommensurables.’ In particular, by allowing policy based reasons to be considered, judges may end up having to weigh considerations of interpersonal justice against considerations of community welfare, which are, according to critics, fundamentally different and so incommensurable. Weinrib, for example, argues that there is a ‘disjunction between justice and policy considerations’ and so queries how judges are:

to determine whether in a given case the policy considerations are more important than the justice considerations that they can displace. How is this balancing of incommensurables to be done? ...[Requiring courts to balance such incommensurable considerations] puts into circulation two different normative currencies between which no rate of exchange exists.¹⁸⁰

Stevens agrees, believing that asking courts to balance incommensurables is like asking a judge ‘which is the greater of three kilos or six metres,’ or ‘to determine whether Mozart or chocolate is better. The goods are incommensurable.’¹⁸¹

Whilst it is clear that critics of policy based reasoning are against the balancing of incommensurables, it is not entirely clear whether this is because they believe incommensurables *cannot* be balanced, or that they *should not* be balanced. If the objection is that incommensurables *cannot* be balanced, then it is not clear why the same objection is not made to Parliament regularly doing exactly that.¹⁸² In the absence of such an objection, the argument that incommensurables *cannot* be balanced is difficult to maintain. If, on the other hand, the objection is that incommensurables *should not* be balanced, the similar absence of any objection to such balancing being undertaken by Parliament surely means that what is really being objected to is the balancing of incommensurables *by judges*, rather than the balancing of

¹⁸⁰ EJ Weinrib, ‘Does Tort Law Have a Future?’ (2000) 34 ValULRev 561, 567.

¹⁸¹ Stevens, *Torts and Rights* (n 16) 310.

¹⁸² The right to a fair trial, for example, is balanced against the public cost of providing such trials (in, say, increased expenditure on legal aid, funding for expert evidence, etc): Dworkin (n 168) 72-73.

incommensurables *per se*. But, if this is the case, then the objection to the policy-based approach on the grounds that it requires the balancing of incommensurables is simply the objection about the competence of the judiciary in disguise.

The argument that the policy-based approach requires the balancing of incommensurables therefore appears to be little more than a re-wording of the argument that judges are unqualified to rely on policy considerations. Accordingly, it must also be subject to the same problems and limitations.

C. The use of policy considerations violates the rule of law

A third argument against the use of policy-based reasons is that their use violates one of the most fundamental tenets of the rule of law: that the law should be certain and predictable.¹⁸³ In particular, it is thought that the consequence of denying any distinction between principle and policy is that *no* type of argument becomes off limits and so *any* kind of consideration may be taken into account when determining the outcome of the notional duty enquiry. As Todd, for example, writes, when questions of policy are permitted, ‘the question of responsibility for negligence may [therefore] be argued in an almost unlimited range of circumstances, and all kinds of considerations may be taken in to account in deciding how it ought be resolved.’¹⁸⁴ A policy-based argument may therefore be found to justify almost any conclusion.¹⁸⁵ In addition to the ‘unlimited’ number of potentially relevant arguments is the fact that, in a legal system where judges are not required to make their political views public,¹⁸⁶ and in which different judges have different conceptions of what is in the community’s best interests,¹⁸⁷ parties have no way of knowing which arguments will appeal to judges and how much weight they will assign

¹⁸³ ‘Clarity of laws’ is one of Fuller’s eight requirements for a legal system: L Fuller, *The Morality of Law* (Yale University Press 1964) 39, 63.

¹⁸⁴ S Todd, ‘Negligence: Breach of Duty’ in S Todd (ed), *The Law of Torts in New Zealand* (3rd edn, Brookers 2005) 151.

¹⁸⁵ Beever (n 18) 28

¹⁸⁶ Compare the position in the United States: Stevens, *Torts and Rights* (n 16) 312-13.

¹⁸⁷ McBride and Bagshaw (n 160) 191.

to them.¹⁸⁸ The combined effect of the ‘unlimited’ range of potentially relevant arguments and the inability to know how such arguments will be weighted means that predicting the method of determination of private law disputes becomes extremely difficult. As Beever notes, ‘the problem with this ... is that it is just not law. If judges are constrained only by their beliefs as to these and similar issues, then we have the rule of judges, not the rule of law.’¹⁸⁹

Two objections, however, can be made to this argument. Firstly, one might dispute that the policy-based approach allows consideration of an ‘unlimited’ range of potential arguments. Certainly, the policy-based approach permits a *wider* range of arguments to be considered than the principle-based approach, but this does not mean the range of available arguments is *unlimited*. Robertson, for example, argues that there are numerous constraints on the use of policy-based arguments in resolving private law disputes, including: institutional constraints, which, by ensuring judges state their reasons publically, prevent them from relying on unorthodox justifications as such justifications risk being overturned on appeal;¹⁹⁰ common law method and convention, including the doctrine of precedent, which prevents judges from departing from the outcomes of previous cases;¹⁹¹ consistency and coherence, which ensures consistency between related principles and bodies of law;¹⁹² bipolarity and the need for justice to both parties, meaning that the judge’s primary task is to do justice to both the plaintiff and the defendant, and not to give effect to their personal conception of the greater good by focusing *only* on considerations of community welfare.¹⁹³ HLA Hart, too, in one of his recently published ‘lost’ essays, has similarly observed that, regardless of a judge’s personal beliefs, they are nevertheless always obliged to act judiciously, so that:

¹⁸⁸ R Bagshaw, ‘Tort Law, Concepts and What Really Matters’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009) 258.

¹⁸⁹ Beever (n 18) 7.

¹⁹⁰ A Robertson, ‘Constraints on Policy-Based Reasoning in Private Law’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009) 268.

¹⁹¹ *Ibid* 269.

¹⁹² *Ibid* 271.

¹⁹³ *Ibid* 272.

[Even] if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide a remedy if they do indulge their whim.¹⁹⁴

Such constraints place significant limits on the number of arguments able to be relied upon and so on a judge's ability to give effect to their personal views, thereby reducing the ostensible capriciousness of the policy-based approach.

The second objection to the claim that the use of policy-based reasons violates the rule of law is that it is not clear to what extent prohibiting policy-based arguments, and relying exclusively on principle-based arguments, would fare any better, as judges are only likely to resort to policy considerations in 'hard' cases, where the outcome is uncertain and unpredictable in any event. In particular, whilst there may be a plethora of possible policy-based arguments at the court's disposal in novel cases, and knowing which arguments a judge will rely on and how they will weigh them will be extremely difficult to predict, the fact that considerations of interpersonal justice can also be wide, varied, and potentially conflicting, will give rise to similar difficulties. As Cane notes, it is 'implausible to think that courts ... may not frequently be confronted by significant conflicts of rights that may be incommensurable.'¹⁹⁵ Whose interests are to be preferred when a person's tree branches hang over into their neighbour's property, for example, and whose interests are to be preferred when one person may be required to sacrifice another's life in order to save their own?¹⁹⁶ Although such questions do not raise matters of policy, they nevertheless do not give rise to obvious answers, as there is no 'mathematical formula or single yardstick'¹⁹⁷ for the ordering of considerations of interpersonal justice.

¹⁹⁴ HLA Hart, 'Discretion' (2013) 127 Harv L Rev 652, 657.

¹⁹⁵ Cane, 'Rights in Private Law' (n 167) 49.

¹⁹⁶ R Stevens, 'The Conflict of Rights' in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009), 142.

¹⁹⁷ Stevens, *Torts and Rights* (n 16) 337. See also Stevens, 'The Conflict of Rights' (n 196) 141.

In response to these objections it has been argued that, whilst prohibiting policy-based reasons will not give rise to a simple algorithm that can be used to resolve notional duty issues, the task is nevertheless made *simpler*, and therefore *more* predictable, by virtue of the fact that the range of reasons in play is relatively restricted.¹⁹⁸ There are, however, three difficulties with this response. First, fewer reasons in play cannot necessarily be equated with greater certainty and predictability. In particular, whilst fewer reasons might mean that it is easier to predict *the reasons that will be relied on*, it does not follow that it will be easier to predict the *outcomes* of cases; judges will still have much discretion in how they will *apply* principles to facts, and predicting how they will do this will be far from straightforward. Indeed, given that principle-based reasons tend to be framed at a higher level of abstraction than policy-based reasons, predicting outcomes may actually be *more* difficult. Second, even if we assume that the use of policy-based reasons does give rise to a higher degree of uncertainty than the exclusive use of principle-based reasons, to then conclude that using the former violates the rule of law whilst using the latter does not would involve arbitrary line drawing; that is, it assumes that one side of the line violates the rule of law whilst the other does not, but fails to explain why the line lies there rather than somewhere else. Third, again assuming that the use of policy-based reasons gives rise to a higher degree of uncertainty than the use of principle-based reasons, to conclude that the use of policy-based reasons ought to therefore be prohibited outright presents a false choice. As Bagshaw notes:

[One objection to the policy-based approach is that it carries] an unacceptably high risk of inconsistency and unpredictability. By contrast, approaches based on a number of tightly defined 'rights' [i.e. those that rely exclusively on principle] require few computations ... No doubt the concerns behind these criticisms are substantial, but it seems an overreaction to respond by insisting on reversion to a minimalist law of tort chiefly celebrated for the ease for which it can be explained. Such an overreaction misses the fact that there are legal techniques for *managing and controlling* such concerns, for seeking to steer and control innovation.¹⁹⁹

¹⁹⁸ Stevens, 'The Conflict of Rights' (n 196) 141. See also A Beever and C Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 MLR 320; 332, and Beever (n 18) 48-9.

¹⁹⁹ Bagshaw (n 188) 257.

The claim that the use of policy-based reasons violates the rule of law is therefore problematic. Not only is the use of policy-based reasons not as open-ended as is claimed, but the use of principle-based arguments give rise to similar uncertainty and unpredictability. Whilst it could be argued that the principle-based arguments only is nevertheless simpler, this is far from obvious, and does not imply that the outright prohibition of policy-based reasons is a preferable alternative in any event.

D. The use of policy-based arguments makes the law less coherent

The final substantive argument advanced against the use of policy is that it produces a body of law that is less ‘coherent’ than the body of law produced by reliance on arguments of principle only. By this it is meant that the law will be more internally consistent and unified and so more able to ‘sit comfortably alongside other basic private law principles.’²⁰⁰ Coherence is clearly an ideal worth striving for, as the more coherent a set of rules, the easier they will be to understand and apply.

How coherent, then, is the law produced when considerations of policy are permitted? As we have seen, allowing policy-based arguments permits a wide variety of considerations to be taken into account when determining the outcome of a notional duty enquiry. The result of this is that different ‘pockets’ are often justified on entirely independent bases. For example, some decisions rely on the desire to discourage free riding,²⁰¹ whilst others rely on the desire to avoid imposing a heavy financial or administrative burden on public bodies.²⁰² Despite no single consideration explaining the outcome of *all* duty cases, when the different types of cases are

²⁰⁰ JW Neyers, ‘The Economic Torts as Corrective Justice’ (2009) 17 TLJ 162, 167. See also Cane, ‘Rights in Private Law’ (n 167) 38; Weinrib (n 150) 12.

²⁰¹ J Stapleton, ‘Duty of Care Factors: a Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998), ‘Convincing factor’ ‘countervailing to the recognition of a duty’ number (11). See, for example, *Morgan Crucible Co v Hill v Samuel & Co* [1991] Ch 295 (CA), 303; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241,283-290 (McHugh J).

²⁰² *Ibid*, ‘Convincing factor’ ‘countervailing to the recognition of a duty’ number (4). See, for example, *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL); *Van Colle v Chief Constable of the Hertfordshire Police*; *Smith v Chief Constable of Sussex Police* 1 AC 225 (HL).

looked at in isolation, the same types of arguments are consistently used to explain similar outcomes (i.e. like cases are treated alike) and so form reasonably rational and coherent subsets.²⁰³ According to Smith, a set of rules that rests on independent *but non-contradictory* bases is weakly-coherent.²⁰⁴ Allowing policy-based considerations, then, despite allowing judges to rely on different considerations in different types of cases, produces a body of law that is weakly coherent, because the different considerations that are used to justify decisions in different types of cases are non-contradictory and relatively rational when looked at in isolation from one another.

According to Beever, however, weak coherence is not enough, as we must also know why a particular consideration was relied upon in one case and not another.²⁰⁵ We need to know why, for example, the fact that a claimant is a free rider is important in duty cases involving pure economic loss, but not important in duty cases involving personal injury. A set of rules that lends itself to such an explanation, and so forms a unified system, is, according to Smith, *strongly* coherent.²⁰⁶ The policy-based approach, however, by allowing conceptually independent reasons to explain different types of cases, *by definition* possesses no underlying structure or logic.²⁰⁷ As Weinrib explains, again in relation to the duty of care:

The invocation of such independent policies entails the disintegration of duty as a systematic and coherent concept. Given the heterogeneity of the available policies and different weightings of the various policies in the balancing process, a systematically unified conception of duty based on (in Lord Atkin's words) "the element common to all cases in which [a duty] is found to exist" is out of the question. The variety of policies and the shifting balance among them leaves no place for a common element on which the various duties (again in Lord Atkin's words) "must logically be based." In these circumstances there can only be different specific kinds of duty, with each kind

²⁰³ This is, of course, not to say that irreconcilable cases do not exist with almost identical fact scenarios.

²⁰⁴ SA Smith, *Contract Theory* (OUP 2004) 11. Although Smith is using 'coherence' as a criterion by which to evaluate an 'interpretive legal theory,' as this is ultimately judged by reference to the body of law the theory would produce, his definitions of coherence are therefore equally appropriate to evaluate the body of law produced by prescriptive theories. The descriptor 'weak' is actually Beever's, Smith merely refers to a 'less-demanding' and 'more-demanding' version: Beever (n 18) 21-2.

²⁰⁵ Beever (n 18) 24.

²⁰⁶ Smith (n 204) 11. Note also (n 204) above.

²⁰⁷ Weinrib, 'The Disintegration of Duty' (n 18) 145-46.

representing the particular policies or the particular balance among policies that are recognized as decisive in situations of that sort.²⁰⁸

The body of law produced by allowing policy considerations, then, by relying on a diverse range of independent considerations, despite being non-contradictory when looked at in isolated pockets and so able to be described as weakly coherent, lacks any underlying or unifying structure and so cannot be described as strongly coherent.

Where, however, policy-based reasons are prohibited, and considerations of principle are relied on exclusively, the body of law produced *can* be considered strongly coherent. Indeed, where the outcome of the notional duty enquiry is determined solely on the basis of the unified conception of interpersonal justice, the law will clearly be more coherent than where a diverse range of independent policy considerations are permitted; that is, the law is far easier to comprehend and understand when all cases can be explained by a single underlying principle, rather than an ad hoc selection of independent policy concerns. Accordingly, Beever claims that when considerations of principle are relied upon exclusively, the law of negligence ‘possesses a conceptually coherent, indeed conceptually *unified*, structure ... [and] the various stages of the negligence enquiry ... are seen as parts of a conceptually integrated whole...’²⁰⁹ Excluding considerations of policy, then, produces a simpler, more unified and more coherent body of law relating to the notional duty enquiry.

Smith, however, at least in relation to contract law, questions whether such a high degree of coherence is actually necessary:

[H]uman actions, including law-making actions, may be perfectly intelligible even when they are not unified in the sense just described ... Unless one assumes (as few people do) that all reasons for acting can, in the end, be reduced to a single master principle, it is accepted as perfectly intelligible, indeed appropriate, that people act for different reasons in different situations. Charity is an appropriate response to certain kinds of situations; in another situation, courage may be appropriate. Neither charity nor courage, however, seems reducible to the other, or to a third master value. The same

²⁰⁸ Ibid 177 (footnotes omitted).

²⁰⁹ Beever (n 18) 30. See also Weinrib, ‘The Disintegration of Duty’ (n 18) 7.

must be true of legal systems... I conclude, then, that a requirement of perfect unity seems not only unattainable in practice, but also inappropriate in theory.²¹⁰

Accordingly, even if the prohibition of policy based reasons does produce a *more* coherent body of law, such a high degree of coherence is arguably unnecessary, and weak coherence is sufficient.

E. Summary

The case against the use of policy-based reasons is therefore not unproblematic, as even if policy-based reasons were prohibited, many of the problems attributed to such reasoning would remain, albeit to a lesser degree. The case against the use of policy-based reasoning therefore seems to be less about *eliminating* problems than *reducing* them. Whether or not the benefit involved with lessening these problems outweighs the cost of prohibiting policy-based arguments altogether is, however, open to question.

V. The need for notional duty

The need for a duty of care concept has been questioned for decades. As we saw in Chapter Four, as early as the 1930s the concept was being described as ‘superfluous’²¹¹ and ‘an unnecessary fifth wheel on the coach’²¹² on the basis that its function was already sufficiently performed elsewhere in the negligence enquiry. As we have also seen, these criticisms were directed at the factual aspect of the duty enquiry only, and ignored the notional aspect entirely. Indeed, early commentary on the notional aspect of the duty enquiry described it as, far from being a fifth wheel on the coach, both ‘necessary’²¹³ and ‘indispensable.’²¹⁴ Even today, there is widespread agreement that no legal system can allow *all* carelessly caused losses to be

²¹⁰ Smith (n 204) 12 (emphasis added). Cf Beever (n 18) 24.

²¹¹ Percy Winfield, ‘Duty in Tortious Negligence’ (1934) *Colum L Rev* 41, 43, 66.

²¹² WW Buckland, ‘The Duty to Take Care’ (1935) 51 *LQR* 637, 639.

²¹³ FH Lawson, ‘The Duty of Care in Negligence: A Comparative Study’ (1947) 22 *TullRev* 111, 112.

²¹⁴ RWM Dias, ‘The Duty Problem in Negligence’ [1955] *CLJ* 198 204.

recoverable under the law of negligence,²¹⁵ and that notional duty plays an important role in achieving this.

A. Attacks on notional duty

However, whilst the desirability of the *function* of notional duty is rarely called into question, the idea that this function needs to be achieved via an independent stage of the negligence enquiry (i.e. as part of the duty stage) has been; in particular, it has been suggested that the function of notional duty, like the function of factual duty, can be satisfactorily performed by the other elements of the negligence enquiry, thereby rendering the *entire* duty stage superfluous. Gibson, for example, in one of the earliest attempts to show that notional duty was superfluous, argued that, although duty performed a dual role,²¹⁶ ‘nothing would be lost except a potential source of confusion if the “duty of care” notion were entirely discarded...’²¹⁷ Yet in his duty-free alternative to the existing negligence enquiry, the first question the court needed to address was whether the ‘type of conduct’ or ‘type of activity’ is one in which the ‘the law of negligence [ought to] exercise control.’²¹⁸ In other words, there was no ‘notional duty’ stage, but there was a stage that performed an almost identical, albeit narrower,²¹⁹ function. Some years later, Howarth also claimed that ‘[t]here is nothing in the concept of the duty-situation that cannot be dealt with adequately under the headings of fault, cause and damage’²²⁰ and that the concept is ‘probably superfluous.’²²¹ Yet, whilst he, like Gibson, suggested (and sometimes convincingly demonstrated) that *some* of the traditionally notional duty issues could be dealt with at other

²¹⁵ See, for example: Vines, Hanford and Harlow (n 17) 151-52; Stevens, *Torts and Rights* (n 16) 307.

²¹⁶ R Dale Gibson, ‘A New Alphabet of Negligence’ in Allen M Linden (ed), *Studies in Canadian Tort Law* (Butterworths 1968) 190-91: ‘The general test for determining whether a “duty of care” exists is, of course, reasonable foresight of unreasonable risk to the plaintiff...[yet] While recognising the general principle of responsibility to anyone within the range of reasonable foresight, the courts have chosen not to apply it in a few exceptional circumstances.’

²¹⁷ *Ibid* 192

²¹⁸ *Ibid* 194-95.

²¹⁹ In particular, Gibson argues that questions about the kinds of harm that are recoverable, typically dealt with at a notional duty question, can be considered under the ‘harm’ (i.e. actionable damage and causation) heading: *ibid* 202.

²²⁰ Howarth, ‘Negligence After Murphy: Time to Re-Think’ (n 88) 68.

²²¹ D Howarth, *Textbook on Tort* (LexisNexis UK 1995) 158

stages of the negligence enquiry, he nevertheless concluded that there remained a role for notional duty in determining whether ‘the type of case under discussion’ should come within the purview of the law of negligence, or whether the law should instead grant ‘the defendant an immunity against liability in negligence.’²²² Again, a stage practically identical to the notional duty enquiry retained an important role in dealing with notional duty issues. Shortly after Howarth, Hepple, too, argued that the ‘redundant and incoherent concept of notional duty’ can be abandoned,²²³ because:

In the ordinary negligence action only three questions have to be asked: (1) was the defendant entitled to take the risk? (the fault issue); (2) if not, would the damage have occurred had the defendant acted without fault? (the factual causation issue); and (3) was the kind of damage to this class of plaintiff within the scope of the risk? (the remoteness issue). When it is sought to extend liability into new areas not covered by precedent, the starting point should be that loss lies where it falls, unless it can be shown that liability for negligence will empower individuals to acquire the information and knowledge which they need to control their situations, while at the same time distributing losses effectively and deterring harmful conduct.²²⁴

The final qualification, of course, even though not enumerated, is a clear equivalent to the notional duty enquiry.

In each of the above critiques, then, one of the elements in the reimagined formulas for determining liability for negligence closely resembles the notional duty enquiry, even if performing a more limited role and masquerading under a different name. It is therefore hardly surprising that none of the attempts to eradicate notional duty from the negligence enquiry have had any significant impact, and notional duty has never looked to be in any real danger of being abandoned.

A far more sophisticated attempt to attempt to ‘loosen the grip’²²⁵ of notional duty (and duty in general), however, has recently been provided by Nolan. Like the above critics, Nolan,

²²² Howarth, ‘Negligence After Murphy: Time to Re-Think’ (n 88) 93-94.

²²³ Hepple (n 36) 93.

²²⁴ Ibid 93-94.

²²⁵ Nolan (n 8) 560.

too, argues that the various notional duty issues can be ‘reallocated’²²⁶ to the other stages of the negligence enquiry; though, unlike the above critics, Nolan details how this can be done, rather than merely suggesting that it is possible,²²⁷ as well as advancing various reasons why it *should* be done. Immunities, for example, such as the combat and advocate’s immunity, can be dealt with as defences;²²⁸ liability for the deliberate actions of a third party, can be dealt with as matters of legal causation;²²⁹ whilst the ostensibly notional duty issue of liability for secondary victims of psychiatric harm can, in fact, be resolved as part of the remoteness enquiry.²³⁰ Protected ‘interests’ (i.e. the *kinds* of damage that are recoverable, such as physical injury and property damage, but not pure economic loss), ‘the heartland of notional duty’,²³¹ Nolan argues, can be reallocated to the actionable damage element of the negligence enquiry.²³² Using this technique, categorical issues have disappeared from the notional duty enquiry almost entirely,²³³ leaving only the question of notional duties that arise from assumptions of responsibility (or what Nolan terms, ‘acquired rights’) remaining. Nolan concedes, however, that reclassifying obligations that arise from assumptions of responsibility is not so straightforward, and that there is a ‘strong argument’ that notional duty be retained for such questions.²³⁴ Categorical exceptions to broad exclusionary categories, including cases such as *White v Jones*, are similarly unable to be accounted for. Accordingly, although Nolan is able to reduce notional duty to a considerably narrower enquiry, and provide a number of convincing reasons why it is

²²⁶ Ibid 567.

²²⁷ Indeed, according to Nolan, one of the principal reasons earlier critiques of notional (and factual) duty have failed is because they have ‘not been supported by a detailed demonstration of the way in which the issues currently considered under the duty umbrella could be accommodated within other stages of the negligence enquiry.’ *ibid* 560.

²²⁸ Ibid 574.

²²⁹ Ibid 570.

²³⁰ Ibid 571. Cf *Beever* (n 18) 407-409; Fleming, ‘Remoteness and Duty: The Control Devices in Liability for Negligence’ (n 17) 492-93.

²³¹ Nolan (n 8) 575.

²³² Ibid 575.

²³³ The ‘almost’ qualifier refers to the point made below about categorical exceptions to broad exclusionary categories, including cases such as *White v Jones* and *Spring v Guardian*.

²³⁴ Nolan 575, 587.

desirable to do so,²³⁵ *some* issues dealt with under the notional duty rubric nevertheless remain unallocated; in particular, the problem of which circumstances give rise to recovery for purely economic loss and the failure to provide a benefit (i.e. when *inclusionary* exceptions, whether categorical or based on assumptions of responsibility, can be made to broad *exclusionary* categories).

It seems, then, that whilst many of the issues presently dealt with at the notional duty stage can be reallocated to other parts of the negligence enquiry, *some* simply cannot be. A notional duty stage, in some sense, would therefore seem to be required. Of course, the conclusion that something resembling a notional duty cannot be *completely* abandoned, raises two interesting questions. First, given that it seems quite clear that many notional duty issues can relatively easily be reallocated to other stages of the negligence enquiry (immunities to defences, liability for deliberate acts of third parties to legal causation, etc), why is the notional duty enquiry so broad, and not simply confined to identifying exceptions to the general non-recoverability rule for pure economic loss and failures to provide a benefit? Second, if *some* notional duty element is required to be present in the negligence enquiry, then why is the (notional) duty stage unique to the common law?

B. Why is the notional duty enquiry so broad?

In relation to the first question, the wide variety of issues that are dealt with at the notional duty enquiry can, in large part, be put down to two reasons. First is the ease with which just about any question about the appropriate scope of liability for negligence can be framed as a notional duty question, including, as we have seen, questions about the kinds of damage that are recoverable, the way the harm occurred, and the status and nature of the relationship between the parties. Second is that framing issues about the scope of liability for negligence in terms of notional duty allows judges a wide degree of flexibility with respect to the types of reasons they

²³⁵ Ibid (n 8) 575-83.

rely on to justify their decisions. In particular, the notional duty stage allows courts to determine the boundaries of liability for negligence in accordance with what is ‘fair, just, and reasonable,’ or by reference to a list of ‘salient features’ of indeterminate content and length. Such leeway is not, however, at least at the moment, given to judges in determining whether a new type of defence ought to be recognised, or whether a new kind of damage ought to be recognised, as such questions tend to be governed more by concrete rules than flexible general principles. Faced, then, with whether a new kind of harm *ought* to be recoverable, it is far easier to approach the issue on what is fair, just, and reasonable, than via the comparatively uncharted waters of what amounts to actionable damage. This is, of course, a result of the black letter law, and not any structural or doctrinal impediment; however, until that changes, and more guidance, or flexibility, is given to judges on when they can recognise new defences, kinds of actionable harm, etc, the preference to deal with such questions at the, arguably doctrinally inferior, duty stage, is unlikely to change.

C. Comparison to other legal systems

Moving to the second question, if *some* notional duty element is required in the negligence enquiry, then why is the duty enquiry, and therefore notional duty, unique to the common law? The answer seems to be that, at least in some sense, it is not, as *functional* equivalents to notional duty can be found in numerous other legal systems. Indeed, Lawson, Oxford’s first professor of Comparative Law, has written that ‘a comparison with Roman law and a number of other legal systems ... proves that such a duty of care, or some other requirement substantially identical with it, can hardly be avoided.’²³⁶ Under the Romans’ *Lex Aquilia*, for example, which governed liability for wrongful damage to property (*damnum iniuria datum*), a defendant’s liability was limited to the killing, burning, breaking, and, later, spoiling, (*occidet, userit, fregerit, ruperit, and corruperit*) of the claimant’s property as a result of their bodily actions (*corpore corpoi*); that is, liability was limited to *physical* damage to the claimant’s property caused by the

²³⁶ Lawson (n 213) 113

defendant's *positive* conduct. Later Roman law, however, under the *actio in factum*, does appear to have permitted recovery for indirectly caused non-physical damage, such as the facilitation of the escape of a slave or animal.²³⁷ Despite such a rule ostensibly permitting recovery for loss caused by omissions and loss that is purely economic in nature, as Lawson also notes:

[I]t has always been an accepted doctrine that Roman law gave an action for omissions in exceptional circumstances. Indeed, if we leave to one side obvious cases where a defendant failed to take precautions which his previous positive acts had necessitated, the only clear instance is the familiar case where one man lit a furnace and another, having taken over the job of watching it, negligently fell asleep and let the fire spread; and in that case it seems that the omissions must be coupled with an assumption of responsibility which, to use the terminology of the English law, raised a duty of care.²³⁸

Similarly, as we saw in Chapter Two, under the early common law liability for carelessly caused harm was restricted to a finite number of discrete situations (or 'forms of action'), including the negligent performance or non-performance of an undertaking, and the negligent loss of control of dangerous forces. Where the plaintiff suffered harm in a situation that was not covered by one of the existing forms of action, he was without a remedy.²³⁹ Functional equivalents of notional duty are also visible in modern civil systems. Section 823(1) of the German Civil Code, for example, also known as the Bürgerliches Gesetzbuch, or BGB, limits liability for carelessness to conduct that injures 'the life, body, health, freedom, property or another right'²⁴⁰ of the claimant. Notably, the focus of §823(1) is on acts rather than omissions, and the list of protected interests does not include a general economic interest. Liability for omissions and for purely economic loss is nevertheless permitted in specified circumstances; the former, where the

²³⁷ Ibid 113-116. See also WW Buckland, AD McNair and FH Lawson, *Roman Law and Common Law* (2nd edn, Cambridge University Press 1965) 367-70.

²³⁸ Lawson (n 213) 115.

²³⁹ As Winfield notes, 'The question was not "Is there a duty?" but, "Was the defendant in fact a bailee, common carrier, or the like and, if so, what excuse has he to offer for the harm that has occurred?': Winfield (n 211) 49).

²⁴⁰ Section 823(1): 'A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.'

defendant has breached an 'affirmative safety duty';²⁴¹ and the latter, where the loss was caused by a public official's breach of an official duty (§839), where the loss was intentionally inflicted in a manner than was 'contrary to public policy' (§826), where the loss was caused by the breach of a statute 'intended to protect another person' (§823(2)), or where the loss was the result of an interference with the claimant's 'right to do business' (included as 'another right' in §823(1)). The Principles of European Tort Law adopt a similar approach to the BGB, with Article 1.101 recognising a 'Basic Norm' of liability for damage caused by the fault of another, and Article 2:102 specifying that this protection only extends to certain 'interests,' and that 'protection of pure economic interests ... may be more limited in scope.'²⁴² Less obvious, however, is article 1382 of the French Civil Code, which provides that 'Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.' *Prima facie*, the scope of the section is unlimited and nothing resembling a notional duty is in sight. Behind the scenes, however, limits on liability for carelessly caused loss do exist. As Lawson explains:

The typical code enunciating a general principle of liability for negligent damage is the French ... and it is from an examination of [this law], which I cannot help think has been unduly cursory, that an impression has been gained that a law can properly dispense with the duty of care or any analogous technique ... But it is common knowledge that the articles are too general to tell us much about the French law of civil responsibility, which must be found in the text-books and reports; and, on perusing these, we find that the actual solutions of particular cases are not so different from those of English, or, for that matter, German law.'²⁴³

So, for example, the French courts limit the scope of the interests protected by the law of negligence through their interpretation of the word 'damage.'²⁴⁴ Similarly, liability for purely economic loss, despite not being formally recognised as concerning a conceptually distinct kind

²⁴¹ Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) 85, 252. See also, Wagner 1017-1020; Basil Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, Hart 2002) Ch 2.

²⁴² Article 2:102(4).

²⁴³ Lawson (n 213) 118

²⁴⁴ van Dam (n 241) 169: 'French law does not provide an a priori limitation as to protected interests. It has been up to the courts to decide which interests are to be protected and which not, solely on the basis of the word *dommage* in article 1382 CC.'

of harm, seems to be the subject of an ‘autonomous’²⁴⁵ area of case law and subject to a generally more restrictive approach to recoverability; in particular, it is limited by, first, being judged by a higher standard of ‘*faute*’ (i.e. a higher standard of care) than liability for personal injury or property damage,²⁴⁶ and, second, needing to be ‘personal, certain, and legal’ and ‘immediately and directly’ caused by the defendant’s carelessness,²⁴⁷ obstacles that are often unable to be overcome when the loss is purely economic in nature.²⁴⁸ And liability for omissions, despite seemingly being equated with liability for acts in article 1383,²⁴⁹ is restricted to situations where the defendant has breached an affirmative duty, these being established by the courts on the basis of what a reasonable person would do in the same circumstances.²⁵⁰

Functional equivalents of notional duty therefore appear to be present in a number of other legal systems. Can we conclude, however, as Lawson did, that ‘a duty of care, or some other requirement substantially identical with it, can hardly be avoided’? To some extent, yes: but only if we are looking for *functional* equivalents, being some set of rules that prevents *all* carelessly caused harm being compensable. Such a conclusion is not, however, particularly surprising; after all, *no* legal system could allow recovery for all carelessly caused loss, and so if we define ‘notional duty’ as simply the set of rules that prevent all carelessly caused loss from being compensable, then of course equivalents to ‘notional duty’ will be found in other legal systems. Even Nolan’s duty-free version of the law of negligence has a *functional* equivalent to notional duty, albeit in the form of a set of rules that is redistributed throughout the other

²⁴⁵ Christophe Radé and Laurent Bloch, ‘Compensation for Pure Economic Loss Under French Law’ in Willem H van Boom, Helmut Koziol and C Witting (eds), *Pure Economic Loss* (Springer 2004) 44.

²⁴⁶ van Dam (n 241) 210.

²⁴⁷ As van Dam notes, these latter restrictions stem from the provisions in the Code relating to damages for contractual liability: *ibid* 319, 353.

²⁴⁸ For more on liability for pure economic loss under French law, see *ibid* 210; Radé and Bloch (n 245); Mauro Bussani and Vernon Valentine Palmer, ‘The Liability Regimes of Europe - their Façades and Interiors’ in Mauro Bussani and Vernon Valentine Palmer (eds), *Pure Economic Loss in Europe* (Cambridge University Press 2003) 126-31; Wagner (n 241) 1015-1017.

²⁴⁹ The section reads: ‘Everyone is liable for the damage he causes not only by his act, but also by his negligence or his imprudence.’ See also van Dam (n 241) 57-57, 252-53.

²⁵⁰ *Ibid* 252. It is also notable that the reasonable person is judged according to a reasonable adult: *ibid* 272-73.

stages of the negligence enquiry; indeed, that is the entire point of his argument. Insofar as a singular notional duty *element* is concerned, however, nothing resembling it is apparent; the closest equivalent would appear to be §823(1) of the BGB, but even that could arguably be described as defining the different kinds of actionable damage. Yet, whilst no equivalent of ‘notional duty’ as an *independent* element of the negligence enquiry appears to exist in any of the legal systems discussed above, it is particularly noteworthy that none of them has been able to limit recovery for purely economic loss or the failure to provide a benefit within a framework consisting of *singular* concepts of fault, causation, and damage; either an independent test or element is required, or an alternative definition of one of the primary elements is adopted.

D. Is notional duty necessary?

Is, then, notional duty necessary? In its present form, the answer is surely no, as many of the issues presently dealt with under the notional duty banner are able to be dealt with at other stages of the negligence enquiry. In a narrower sense, however, the answer appears to be yes, as, based on both Nolan’s analysis *and* a comparison with a number of other legal systems, if recovery for purely economic loss and failures to provide a benefit are to be permitted at all, it must be done outside of singular concepts of fault, causation, and damage;²⁵¹ some *other* set of rules is therefore required, whether in the form of an additional element, or qualifications of the existing elements. However, whilst deconstructing notional duty enquiry would, like removing the factual duty enquiry, make the enquiry simpler and encourage like issues to be treated alike,²⁵² until courts better develop the doctrinal underpinnings of the defences, damage, and legal causation stages, a deconstruction of duty seems unlikely to occur.

²⁵¹ Again, whilst the French *do* limit recovery for pure economic loss partially through the idea of ‘fault,’ it is only by assigning it a different meaning to that used for other kinds of damage.

²⁵² For more on why notional duty *should* be deconstructed, see Nolan (n 8) 575-83.

VI. Conclusion

Notional duty performs an important normative function within the negligence enquiry; it determines which situations should be the subject of the laws of negligence, and which situations should not. Absent a notional duty, the defendant may carelessly cause harm to the claimant with impunity. A central feature of notional determinations is that they are categorical, and apply to broad situations. As we have seen, these 'situations' can be inclusionary and exclusionary, and ought to include references to the kind of harm incurred, the manner in which it occurred, as well as some reference to the parties' relationship to each other. Notional duty situations explained in terms of the relationship or kind of harm suffered only, are best avoided. Notional duty situations ought also not be formulated in overly narrow terms, nor in terms of a 'duty to do X.' Indeed, given that, as we saw in Chapter Four, the duty of care does not refer to a 'real' duty at all, arguably the 'duty' language is awkward and unnecessary: compare, for example, 'does the driver of a motor vehicle owe a duty to a passenger in relation to any physical damage that occurs to the passenger as a result of the driver's careless driving?' to 'can liability for negligence exist where a driver causes physical injury to a passenger as a direct result of their careless driving?' The 'scope' of the duty language is also potentially productive of confusion, given the multiple senses in which it is used, some of which are not only superfluous, but actively misleading.

Where a particular situation is deemed to not give rise to a notional duty, and so forms an exclusionary situation, the court may still find that a notional duty exists where the defendant has assumed a responsibility towards the claimant. This provides an entirely independent justification for why the defendant ought to have an obligation to compensate the claimant for any carelessly caused harm; it is not because everybody should have such an obligation in the particular situation, but because of the defendant's undertaking. Whilst assumptions of responsibility need not have been explicit, they nevertheless need to be

sufficiently clear such that, as in contract law, the defendant can be said to have objectively consented to a legal obligation being imposed. Where the focus moves from whether the defendant can safely be said to have consented, to whether, given the circumstances, the particular defendant *should* have consented, the assumption of responsibility test becomes indistinguishable from general duty tests and loses all value as a test for whether the defendant consented to the added obligation.

In determining whether a particular situation *ought* to be subject to the law of negligence, considerations of policy can often be highly relevant. Reliance on such considerations, however, is highly controversial, as, according to some, judges are not qualified to rely on them, their use requires the balancing of incommensurables, their use violates the rule of law, and their use produces a body of law that is less coherent than the body of law that would exist if they were prohibited. Such arguments, however, are far from watertight, and are often subject to the same problems they are trying to overcome. Whilst they nevertheless seem to *lessen* a number of problems, the extent to which they do this is debatable, as is the issue of whether the cost of doing so is worth it.

Finally, there is the issue of whether the notional duty enquiry is necessary. Whilst the argument that duty is a 'fifth wheel on the coach' has been thrown around for decades, until recently no-one has properly explained why. Nolan, however, has convincingly argued that many of the issues dealt with under the notional duty label can be 'redistributed' to other elements of the negligence enquiry. By doing so, Nolan argues that the negligence enquiry will be more structured, will treat like issues alike, will avoid the conflation of law with fact, and prevent confusion and incoherence; indeed, it was for similar reasons that it was argued in Chapter Four that factual duty was best left for the breach and remoteness enquiries. Yet even after deconstructing duty, there still remained the problem of explaining the circumstances in which carelessly caused purely economic loss and damage that had resulted from omissions was

actionable. A comparison with other legal systems revealed that, despite them often approaching liability for negligence in entirely different ways, they, too, have had to invent special rules, outside of *singular* concepts of fault, causation, and damage, to allow recovery for purely economic loss and omissions, but in a way that was subject to some constraint. *Some* independent 'notional duty' question, albeit an almost unrecognisable one, therefore seems inevitable. Though, until the courts develop more flexible and prescriptive rules on when, and in what circumstances, the other elements of the law of negligence can expand, including when new defences and forms and damage may be recognised, a narrower version of notional duty seems unlikely.

Having now examined the various methods by which the courts determine the existence of a duty (Chapter Three), and how the duty enquiry actually functions (Chapters Four and Five), in the next chapter we will explore how and to what extent this theory is applied in practice.

6. Comparing the duty methodologies of Australia, Canada, and the UK

Social scientists and historians have long brought data to bear on the study of law and legal institutions. In ever-increasing numbers, legal academics throughout the world are following suit.

- Lee Epstein and Andrew Martin, *An Introduction to Empirical Legal Research* (OUP 2014) vii.

I. Introduction

The previous four chapters have provided a detailed overview of the duty of care enquiry. In particular, we have explored, *inter alia*, the development of the duty concept, the development and value of general duty tests, the dual nature of the duty enquiry, the need for factual duty, the categorical nature of notional duty, and the controversy surrounding the use of policy considerations in determining the existence of a duty. For the most part, the principal focus of this thesis has therefore been on relatively high-level doctrinal matters. In Chapter Six, however, we will shift our focus from the doctrinal to the empirical, and undertake a study, involving both quantitative and qualitative aspects, that examines the extent to which the courts' *actual* approach to duty problems is consistent with the picture that has been painted in the previous four chapters.

The study will involve a content analysis¹ of recent duty decisions in the ultimate appellate courts of Australia, Canada and the UK, and will examine the extent to which particular methods and techniques have been employed in the determination of duty of care questions. Ideally, the study would explore whether different duty tests resulted in different outcomes, whether judges found the tests helpful or just paid lip service to them, the extent to which undisclosed policy considerations influenced the outcome of cases, and whether any other undisclosed considerations were influential in the minds of the different judges.

¹ For more on content analysis, see Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 Cal L Rev 63.

Unfortunately, however, empirical legal research has limits, and we can only peek behind the curtain so far. We cannot, for example, know what judges are thinking, nor can any study of a large number of cases possibly take into account the intricacies and analytical richness of individual judgments. Any attempt to provide a reliable insight into such issues, based on the cases alone, would therefore be doomed to fail. At the same time, however, we do not want to be too unambitious, and we want to learn as much from the cases as possible. We therefore face what Hall and Wright call the 'Goldilocks dilemma - one where the best use of content analysis is not to aim for too much, or too little, but just enough insight.'² With this in mind, the study will be limited to exploring the following matters only: (1) how frequently the various general duty tests are actually used; (2) how the courts determine the existence of a duty when they do *not* rely on general tests; (3) whether courts approach the notional duty enquiry in a categorical or fact-specific manner; (4) the frequency with which policy-based reasons are used in duty determinations; and (5) the extent to which academic commentary appears to have any influence on the courts.

If the data produced in the study, and the inferences drawn from it, are to be both replicable³ and reliable, a transparent and well-designed research methodology is important. Section II therefore outlines how the cases included in the study were selected and what conditions had to be met for the judicial opinions within those cases to be included in the data. Section III then explains how the cases and opinions were coded in accordance with the various methods and techniques being explored, before providing an overview and analysis of the quantitative and qualitative data obtained.

² *ibid* 90

³ Though, as Epstein and Martin note, empirical legal research does not require that the data produced be *perfectly* replicable, only that the inferences drawn from the data are able to be replicated *in principle*: Lee Epstein and Andrew Martin, *An Introduction to Empirical Legal Research* (OUP 2014) 59.

II. The study

The study included duty cases decided in the High Court of Australia, Supreme Court of Canada, and House of Lords and Supreme Court of the United Kingdom.⁴ The cases included in the study were identified as ‘duty’ cases via searches on the various Westlaw databases: cases in the High Court of Australia were identified via WestlawAU by searching for cases where ‘negligence’ and ‘duty of care’ appear as ‘catchwords’;⁵ cases in the Supreme Court of Canada were identified via Westlaw International⁶ by searching for at least *one* occurrence of the term ‘negligence’ and at least *three* occurrences of the term ‘duty of care’ *anywhere* in the text;⁷ and cases in the House of Lords / UKSC were identified via *two* WestlawUK searches; first, for ‘duty of care to whom,’ a common catchword in UK duty cases, anywhere in the text, and, second, for at least one occurrence of the terms ‘duty of care’ and ‘negligence’ anywhere in the text.⁸ Despite the searches identifying hundreds of cases in total, most of the cases were ultimately excluded from the final sample for various reasons. For example, in some cases a duty of care was conceded,⁹

⁴ For the remainder of the Chapter, ‘the House of Lords and Supreme Court of the United Kingdom’ will be referred to singularly as ‘the House of Lords / UKSC.’

⁵ This produced 68 results, 40 of which were included in the final sample.

⁶ Westlaw International was used because the Bodleian Law Library does not have a Westlaw Canada subscription.

⁷ The exact search term was ‘ADV: NEGLIGENCE & ATLEAST3(“DUTY OF CARE”) & CO(SUPREME COURT OF CANADA) & DA(aft 1/1/1985). This produced 72 results, 39 of which were included in the final sample. The search was conducted ‘anywhere in the text’ as Westlaw International does not have a ‘catchword’ or ‘Subject/Keyword’ search function. At least three instances of the term ‘duty of care’ was required in order to keep the number of cases required to be read within reason; in particular, a search requiring only one instance of the term produced over 300 results.

⁸ The first search (‘duty of care to whom,’ anywhere in the text) produced only 31 results, 27 of which were included in the final sample. As many well-known duty cases were absent from the list produced by the first search, and so as to avoid any significant imbalance in the sample of cases from the UK and the sample of cases from Australia and Canada, a second search was undertaken (‘duty of care’ and ‘negligence,’ anywhere in the text), which identified over 200 results, 12 of which were included in the final sample. The ‘Subject/Keyword’ search function in WestlawUK was not used because the results were extremely unreliable; in particular, the results included many cases that are not duty cases at all, and did not include many cases that are well-known duty cases. Similarly, no search was undertaken for at least three occurrences of the term ‘duty of care’ as WestlawUK does not have the capability to undertake such a search. For the avoidance of doubt, the study did not include cases heard in the Judicial Committee of the Privy Council.

⁹ For example, *Czatyрко v Edith Cowan University* (2005) 214 ALR 349, *New South Wales v Bujdosó* (2005) 227 CLR 1.

whilst other cases concerned different matters entirely, including matters of fault,¹⁰ causation,¹¹ vicarious liability,¹² non-delegable duties of care,¹³ and limitation periods.¹⁴ Ultimately, the study included 118 cases in total: 40 from the High Court of Australia, 39 from the Supreme Court of Canada, and 39 from the House of Lords / UKSC. A full list of the cases included in the sample appears in Appendix One. Given the relatively strictly defined methodology, it is possible that a number of cases commonly thought of as ‘duty cases’ were not included in the sample;¹⁵ however, it was felt that a clear and replicable methodology that potentially overlooked a small number of ‘duty’ cases was preferable to an overly discretionary methodology that did not.

The study was restricted to cases decided in the ultimate courts of appeal for a number of reasons; first, the cases were more likely to involve novel fact scenarios, and so less likely to be determined on the simple basis that they fell into an existing notional duty category; second, with the constraints of precedent being lessened, even if not absent entirely, courts were more likely to engage in a variety of different methodologies; third, the methodologies adopted by the ultimate appellate courts have the most precedential value; and, finally, excluding intermediate appeal and trial level decisions kept the number of cases required to be read within reason.¹⁶ The sample was also restricted to cases decided between 1 January 1985 and 30 April 2015. The year 1985 was chosen as a start date because, as was shown in Chapter Three, it was only then that significant differences in the different jurisdictions’ duty methodologies appeared to

¹⁰ *Imbree v McNeilly* (2008) 236 CLR 510, *New South Wales v Fahy* (2007) 236 ALR 406, *Perez v Galambos Michael* (2009) 312 DLR (4th) 220.

¹¹ *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506, *Walker Estate v York-Finch General Hospital* (2001) 198 DLR (4th) 193, *Resurfice Corp v Hanke* (2007) 278 DLR (4th) 643, *Clements (Litigation Guardian of) v Clements* (2012) 346 DLR (4th) 577.

¹² *B (KL) v British Columbia* (2003) 230 DLR (4th) 513.

¹³ *New South Wales v Lepore* (2003) 212 CLR 511, *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22.

¹⁴ *Clark v Canadian National Railway* (1988) 54 DLR (4th) 679.

¹⁵ For example, *Macfarlane v Tayside Health Board* [2000] 2 AC 59, despite being considered by some to be a ‘duty case,’ was not included in the study as it was not present in any of the relevant WestlawUK searches.

¹⁶ For example, in the period examined there were almost 2000 cases in the Court of Appeal of England and Wales alone that contained the terms ‘duty of care’ and ‘negligence.’ A similar number of cases could be expected in each of the State and Provincial courts of appeal of both Australia and Canada.

emerge. In particular, it was in July 1984 that the Supreme Court of Canada adopted the two-stage test in *City of Kamloops v Nielsen*,¹⁷ August 1984 that the High Court of Australia adopted Deane J's concept of proximity as a 'touchstone' for determining the existence of a duty of care,¹⁸ and October 1984 that *Anns v Merton LBC*¹⁹ began its fall from grace in the House of Lords.²⁰ The date 30 April 2015 coincided with the writing up of the results.

Where a case contained multiple opinions,²¹ each opinion, whether joint or individual, was counted separately for quantitative purposes. This did not, however, include opinions that were concurring opinions, or that failed to make a determination as to the existence of a duty of care or whether the case could be struck out on that basis. Where cases contained multiple parties, as many cases did, only where the individual claims raised substantially separate issue of *law*, and the existence of a duty was explicitly considered and determined in relation to each claim, were separate claimant/defendant combinations counted independently. This ensured that cases like *Sutradhar v Natural Environment Research Council*,²² which involved over 700 claimants with essentially identical causes of action, did not distort, or 'water down,' the data obtained from other cases.²³ Whilst this approach meant that cases with multiple opinions and multiple parties contributed more data than cases with joint opinions and only two parties, thereby having the *potential* to misrepresent the frequency of the different methods across cases, it nevertheless avoided the inevitable complexities involved with somehow 'weighing' the opinions in accordance with the number of opinions and parties per case. In particular, whilst most opinions gave rise to no difficulties, it was not clear how to weigh opinions in cases where

¹⁷ (1984) 10 DLR (4th) 641.

¹⁸ *Jaensch v Coffey* (1984) 155 CLR 549.

¹⁹ [1978] AC 728 (HL).

²⁰ *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson* [1985] AC 210 (HL). See especially Lord Keith at 240-41.

²¹ The neutral term 'opinion' will be used to refer to individual and joint judgments of the High Court of Australia, Supreme Court of Canada, and Supreme Court of the United Kingdom, as well as the individual speeches of the House of Lords.

²² [2006] PNLR 36 (HL).

²³ Other examples of cases with multiple parties pursuing similar claims in law, albeit often based on slightly different facts, were *Alcock v Chief Constable of South Yorkshire* [1992] AC 310 (HL) and *Perre v Apand* (1999) 198 CLR 180.

the rest of the court determined the outcome on a non-duty basis,²⁴ or opinions that concurred with the *outcome* of multiple opinions, despite subtle differences in those opinions' methodologies.²⁵ In other words, even if the opinions *were* weighed, no matter how this was done the problem of potentially misrepresenting the frequency of different methodologies across cases remained;²⁶ it was therefore decided that a simple, albeit imperfect, methodology, was superior to a complex, and similarly imperfect, methodology. Finally, where a number of independent bases were advanced to justify the existence of a duty, the individual bases were not counted separately, because, first, it was often not clear at which point an argument in support of the existence of a duty should count as an independent 'basis,' and, second, in the rare cases in which different bases *were* explicitly considered, the methodology adopted for the consideration of each basis tended to be the same in any event.

III. The competing methodologies

A. A brief overview of the data

Having identified the sources of the data, we can now explore how the opinions were coded in accordance with the exact methodological approaches being investigated and the data produced. However, before we do so, it is worthwhile first providing a brief overview of the data obtained from the different jurisdictions.

i. Kinds of damage

The cases included in the sample concerned a variety of different types of damage, and there appeared to be considerable variance in the different jurisdictions' interest in those different types of harm. In particular, whilst the HCA seemed principally concerned with the existence of a

²⁴ For example: *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (HL), where a number of their Lordships decided the case on the grounds of 'actionable damage'; and *Neindorf v Junkovic* (2005) 222 ALR 631, where the majority decided the case on the basis of the local occupiers' liability legislation.

²⁵ See, for example, Lord Lowry in *Alcock v Chief Constable of South Yorkshire* [1992] AC 310, 424 (HL).

²⁶ For example, where one judge found for the defendant on the basis of an absence of a duty, and the other four on the basis that there was a legislative immunity, ought the single judge's opinion, as the *only* duty determination, count as 100% or 20% of the case?

duty of care in personal injury cases, both the Supreme Court of Canada and House of Lords / UKSC were considerably more interested in harm that was purely economic in nature. A full breakdown of the different kinds of damage in the cases is presented below:²⁷

Table 1: Kinds of damage

Kind of damage	HCA	SCC	HoL/SCUK
Physical injury	22	11	10
Property damage	2	3	2
Pure economic loss	10	20	18
Psychiatric injury	4	3	8
Other	2	2	5

ii. Nature of the decision being appealed

The nature of the decision being appealed varied considerably between the jurisdictions.²⁸ The High Court of Australia heard 42 appeals over 40 cases (two cases involved multiple appeals), 33 involving appeals from trial determinations, and only 9 appeals from strike outs, summary dismissals or some other pre-trial ruling. The Supreme Court of Canada had a similar split, hearing 40 appeals over 39 cases (one case involved multiple appeals), 29 of those being appeals from trial determinations, and the remaining 10 from strike outs, etc. The UK, on the other hand, presented a very different split. Of the 39 cases, the House of Lords / UKSC heard 52 appeals (six cases involved multiple appeals), 23 coming from trial decisions, and 29, representing a majority of the total appeals heard, coming from appeals of strike out applications, etc. Not only, then, was the House of Lords / UKSC more likely to hear appeals of strike out applications, they also demonstrated a much greater tendency to hear multiple appeals together. A summary of the data is presented in the following table:

²⁷ Cases were only counted more than once where they involved more than one kind of damage. Cases involving multiple parties pursuing claims for the *same* kind of harm were therefore counted only once. 'Other' included cases involving false imprisonment, wrongful birth/life, and a failure to provide an education.

²⁸ Where the case involved multiple appeals being heard together, each appeal was necessarily counted separately.

Table 2: Nature of the decision being appealed

Type of decision appealed	HCA	SCC	HoL/SCUK
Strike outs, etc	9	10	29
Trial	33	29	23

It seems likely that a comparison of the respective procedural rules governing permission to appeal would reveal why the House of Lords / UKSC heard so many more joint appeals than both the High Court of Australia and Supreme Court of Canada; however, such a comparison is beyond the scope of this thesis and so left for another day.

iii. The number of substantive opinions per case

As was stated above, each non-concurring opinion that reached a determination as to the existence of a duty of care (that is, a 'substantive opinion') was considered independently for quantitative purposes. Despite each jurisdiction hearing a similar number of duty cases in the period examined, the number of substantive opinions varied considerably among the jurisdictions, as the following table shows:

Table 3: The total number of substantive opinions

Type of opinion	HCA	SCC	HoL/UKSC
Substantive	120	47	103
Concurring	17	12	77
Did not concern duty	21	6	5
Total	158	62	187

By way of comparison, then, when the total number of substantive opinions per jurisdiction is divided by the number of cases included in the sample, whilst the High Court of Australia and the House of Lords / UKSC gave an average of 3 and 2.6 substantive opinions per case respectively, the Supreme Court of Canada, where joint opinions were almost universal, gave an average of only 1.2 substantive opinions per case.²⁹ This contrast is further brought out by a comparison of the number of cases involving joint decisions of the entire court or single

²⁹ The reason for the large number of concurring opinions in the UK is that, prior to the formation of the Supreme Court, joint opinions were not given at all, and so *all* Law Lords sitting on a case were required to give *a* speech, whether 50 pages or one sentence.

substantive opinions (i.e. one substantive opinion per case). Whereas in the High Court of Australia, only 6 of the 40 cases (5 of which occurred since 2009), involved joint or single substantive opinions, and 10 of 39 cases in the House of Lords / UKSC involved joint or single substantive opinions, 25 of the 39 cases in the Supreme Court of Canada were joint or single substantive opinions (and of the 14 non-unanimous decisions, 11 occurred in the 15 cases heard prior to 1995, or alternatively, 21 of the 24 opinions since 1995 have been joint or single substantive opinions).

iv. Success rates of claimants and defendants

Finally, there was a noticeable difference in the success rates of claimants and defendants in the different jurisdictions.³⁰ Of the 40 cases in the High Court of Australia, when multiple parties were taken into account, there were 132 determinations as to the existence of a duty of care. Of those, a decision was made in favour of the claimant on 57 occasions (55 of which were appeals from trial decisions, whilst only 2 were appeals from strike out decisions), and a duty was denied in the remaining 75 (52 from trial decisions, and 23 from strike out decisions). This is not particularly encouraging data for claimants in general, and particularly for claimants hoping to appeal a decision to strike out their claim at first instance. In the Supreme Court of Canada, the split was slightly more encouraging for claimants. Of the 54 duty determinations, 28 were made in favour of the claimant (25 following trial and 3 following an appeal of a strike out decision), whilst 26 denied the existence of a duty (16 being appeals from trial decisions, and 10 upholding decisions to strike out the claim). Again, however, this is not particularly encouraging data for claimants hoping to successfully appeal a decision to strike out their claim at first instance. Of the 39 cases determined in the House of Lords and Supreme Court of the UK, there were 133

³⁰ Cases involving multiple parties where the court considered the existence of a duty independently in relation to each party were necessarily counted independently. If multiple parties were not taken into account, a case that, say, found a duty in relation to one claimant and no duty in relation to another could not have been meaningfully categorised. This essentially followed the methodology that was outlined in Section II, only claims that involved separate issues of fact, and so were considered by the court separately, were counted independently.

determinations as to the existence of the duty of care, and the news for claimants was more encouraging still: 75 of those decisions went in favour of the claimant (26 following trial decisions, and 49 following a decision to strike out the claim), whilst 58 of those decisions denied the existence of a duty (42 following an appeal of a trial decision, and 16 upholding decisions to strike out the claim). The above data is summarised in the following table:

Table 4: Success rates of claimants and defendants

Decision	HCA	SCC	HoL/UKSC
Decision in favour of claimant (After trial / After strike out)	57 (43%) (55/2)	28 (52%) (25/3)	71 (52%) (26/45)
Duty Denied (After trial / After strike out)	75 (57%) (52/23)	26 (48%) (16/10)	66 (48%) (43/23)
Total	132	54	136

At first blush, the data would appear to suggest a number of things; for example, that the High Court of Australia is, unequivocally, the most pro-defendant (or anti-claimant) of the jurisdictions examined,³¹ deciding the duty issue in favour of defendants 57% of the time, whilst the Supreme Court of Canada and the House of Lords / UKSC did so only 48% of the time. However, before drawing any such inference from the data, a number of caveats must be added.

First, the imposition of a duty cannot be equated with the imposition of liability, as whilst the denial of a duty was terminal to a claimant's claim, the imposition of a duty was no guarantee of success. Indeed, there were a number of cases where a duty was imposed but the claimant nevertheless failed on other grounds, usually by failing to show that the defendant acted carelessly.³² Similarly, overturning a strike out of a claim on the basis that the defendant owed no duty, was not necessarily the same as a determination that a relevant duty existed;

³¹ Indeed, this observation has been made before. See, for example, Pam Stewart and Anita Stuhmcke, 'High Court Negligence Cases 2000-2010' (2014) 36 SydLR 585, 585; and H Luntz, 'A View from Abroad' [2008] NZLRev 97, 99.

³² See, for example, McHugh J in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, McHugh in *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431, *Stewart v Pettie* (1995) 121 DLR (4th) 222, *Mustapha v Culligan of Canada Ltd* (2008) 293 DLR (4th) 29, and *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620.

rather, it merely held that the existence of a duty was not ‘unarguable,’ and so the claim ought not be struck out on that basis prior to a full hearing.³³ So even where the duty determination was made in favour of the claimant, a duty might nevertheless have been denied at a later stage of the proceedings.

Second, a finding that no duty existed was not necessarily consistent with an anti-‘claimant’ mentality, at least insofar as ‘claimant’ is usually understood, in the sense of an injured individual. This is most clearly demonstrated in contribution proceedings, where the claim is being contested by multiple wrongdoers. In *British Columbia v Imperial Tobacco Canada Ltd*,³⁴ for example, one of the various claims before the court involved a large tobacco company (who was being sued by consumers) seeking a contribution from the Canadian government for misrepresenting and failing to communicate to them the health risks of cigarettes. Ultimately, the court held that no relevant duty existed, which, despite being a decision in favour of the defendant, would not normally be described as an anti-claimant type decision.

Finally, whilst counting individual opinions separately was not thought to be overly problematic when examining the frequency of *methodologies*, given the problems associated with the alternative of somehow weighing the opinions, counting individual opinions separately has the potential to be very misleading when examining *outcomes*. For example, in a five member court, two individual opinions denying a duty would outweigh a three-member joint opinion imposing a duty, despite the court, overall, finding in favour of a duty. Again, this is not a limitation that can be overcome with weighing; how, for example, to weigh a dissenting opinion imposing a duty (and liability) when the other, say, four members of the court denied liability on other grounds; counting the majority as 0% would misrepresent the frequency of decisions imposing a duty, whilst counting it as 80% would misrepresent the frequency of decisions denying a duty, as that was not actually the decision reached.

³³ See, for example, Lord Slynn in *Barrett v Enfield* [2001] 2 AC 550 (HL).

³⁴ (2011) 335 DLR (4th) 513.

For what it is worth, however, the overall success rates of claimants and defendants in the cases included in the study, regardless of the grounds relied upon, were as follows:

Table 5: The successful party

Successful party	HCA	SCC	HoL/UKSC
Claimant overall	16 (37%)	19 (44%)	23 (44%)
Claimant on duty question	43%	52%	52%
Defendant overall	27 (63%)	24 (56%)	29 (56%)
Defendant on duty question	57%	48%	48%

Unsurprisingly, the success rates of claimants *overall* was lower than the success rates of claimants when confined to the duty issue.

v. The number of duty determinations

The above overview of the data has relied on a number of different methodologies, depending on the exact aspect of the data being discussed. For example: the types of damage were measured according to the injury suffered by the claimant, regardless of the number of opinions or defendants per case; the type of decision being appealed was measured according to number of decisions being appealed, regardless of the number of opinions or parties; the nature of the defendants was measured according to the number of defendants, regardless of how many claimants were involved; and the success rates were measured according to the number of determinations explicitly made, regardless of whether different claims involved identical questions of law. For the remaining sections, however, the methodology discussed in Section II will be used; that is, quantitative data will only consider individual or joint opinions that made a determination as to the existence of a duty of care or whether a case could be struck out on that basis, and will include multiple claimant/defendant combinations only where they were considered and determined independently and raised substantially separate issues of law. Overall, there were 289 such duty determinations included in the study, 131 in the High Court of Australia, 54 in the Supreme Court of Canada, and 104 in the House of Lords / UKSC.

B. The use of general duty tests

As we saw in Chapter Three, the struggle to articulate a precise formula for determining the existence of a duty of care has dominated duty jurisprudence for much of the last century. However, despite this struggle, and the courts' explicit acknowledgement of the limits of general duty tests, the courts continue to endorse their use, such that, today, Australia, Canada, and the UK all have relatively well-established tests for establishing the existence of a duty of care. In this section we will explore how frequently these general duty tests are used in practice; that is, in reaching conclusions about the existence of a duty of care.

i. Methodology

Whilst we have seen in Chapter Three that many of the duty tests are not 'tests' in any meaningful sense at all, for the purposes of this section, which is to investigate the courts' use of the so-called 'tests' rather than the merits of the tests, general duty 'tests' will be understood to include the following: Deane J's proximity test, the *Anns*³⁵ / two-stage test, the *Caparo*³⁶ / three-stage test, the assumption of responsibility test, incrementalism, and the salient features test. Opinions were only counted as having relied on a test where it was made explicitly clear that the existence or denial of a duty depended on having satisfied or failed a test or a stage of a test. Reasoning that was consistent with, but not explicitly identified as, the application of a general test was therefore not counted as having relied on a general test. This relatively strict approach was adopted so as to minimise the use of discretion when coding the opinions, something that was especially important in the High Court of Australia, where almost *any* weighing of pro- and anti-duty arguments could legitimately be labelled as an application of the salient features test, but was also important in the UK and Canada when terms such as 'fair,' 'just,' and 'reasonable' were used outside the context of *Caparo* or *Anns*.

³⁵ *Anns v Merton London Borough Council* [1978] AC 728 (HL) ('*Anns*').

³⁶ *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) ('*Caparo*').

ii. The results

A summary of the use of general duty tests in the three jurisdictions is provided in the following table:

Table 6: The use of different duty tests

Test	HCA	SCC	HoL/UKSC
Proximity	15 (11%)	0	0
<i>Anns</i> /the two-stage test	1 (<1%)	43(80%)	0
<i>Caparo</i> /the three stage test	6 (5%)	0	27 (26%)
Assumption of Responsibility	4 (3%)	3 (6%)	10 (10%)
Incrementalism	1 (<1%)	1 (2%)	1 (1%)
Salient features	11 (8%)	0	0
(Total tests)	(38) (29%)	(47) (88%)	(38) (37%)
No test	93 (71%)	7 (12%)	66 (63%)

iii. Analysis

The three jurisdictions paint an entirely different picture of the use of general duty tests. At one end of the spectrum was the High Court of Australia, which relied on a general duty tests in only 29% of duty determinations. The House of Lords / UKSC, though not quite to the same extent as the High Court of Australia, also assigned little role to general duty tests, using them only 37% of the time, despite being responsible for having invented not only the concept of general tests, but the majority of the tests themselves.³⁷ At the other end of the spectrum was the Supreme Court of Canada, whose reliance on general tests in determining the existence of a duty was almost universal, with almost 90% of all duty determinations analysed relying on some form of general test.

One might be tempted to explain away the comparatively infrequent use of tests in the High Court of Australia on the basis of the long period of uncertainty between the downfall of proximity and adoption of the salient features test; however, this explanation is not supported by the data, as, despite the salient features test ostensibly representing the law in Australia

³⁷ Indeed, even Deane J's proximity test was, at least according to Deane J himself, based on the dicta of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 (HL): *Jaensch v Coffey* (1984) 155 CLR 549, 579, 583-84; *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16, 51.

since *Sullivan v Moody*,³⁸ of the 60 duty determinations made in the 14 years since, only 9 have relied on the salient features approach,³⁹ the remaining 51, or 83% of all determinations, being determined via alternative methods. One may therefore be forgiven for asking whether the ‘disgraceful’⁴⁰ lack of guidance and ‘doctrinal chaos’⁴¹ that was thought to have existed prior to that time has actually been resolved at all.

The most popular tests

The most popular tests in each jurisdiction were not particularly surprising. In the High Court of Australia, on those relatively rare occasions when general tests were used, Deane J’s proximity test and the salient features test proved to be the most popular. Perhaps also unsurprisingly, of the 15 times that Deane’s proximity test was used, 7 came from judgments of Deane J or judgments to which Deane J was a party, whilst a further 3 came from judgments handed down during Deane’s time on the Court, and the remaining 5 from judgments delivered after Deane J’s retirement from the Court.⁴² This would certainly suggest that, even during the height of proximity’s reign, the use of the test was driven principally by Deane J rather than the Court itself. In the Supreme Court of Canada, *Anns* dominated the Courts’ approach to duty determinations, being used in 80% of all duty determinations made in the sample period; this included 26 of the 27 determinations made since 1995. In the House of Lords / UKSC, *Caparo* was clearly the most frequently used test, though perhaps not as often as one might expect. In particular, the three-stage test only accounted for 26% of all duty determinations made since

³⁸ (2001) 207 CLR 562 (*Sullivan*).

³⁹ Note that this figure excludes the decision of *Sullivan* itself, as well as the pre-*Sullivan* opinion of Gummow J in *Perre v Apand* (1999) 198 CLR 180, upon which the salient features test is based.

⁴⁰ *Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd* (1999) 9 NTLR 82 (FC) (Bailey J) [24]. See Chapter Three, fn 220.

⁴¹ Christian Witting, ‘The Three Stage Test Abandoned in Australia - Or Not?’ (2002) 118 LQR 214, 214. See Chapter Three, fn 221.

⁴² For the sake of completeness, it should be noted that the proximity test has been applied in a number of cases that did not fall within the sample, including *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 (‘duty of care’ not a catchword); *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 (‘duty of care’ not a catchword); and *Jaensch v Coffey* (1984) 155 CLR 549 (before 1985).

1985, and 30% (27/89) of determinations made since judgment was given in *Caparo* in 1990;⁴³ accordingly, despite being the most popular test, its use is far from universal, suggesting that the reputation of Lord Bridge's dicta as the 'classic exposition of the modern approach to establishing a duty of care'⁴⁴ may not be deserved.

The underrepresentation of assumption of responsibility and incrementalism

Although the data shows that neither the assumption of responsibility test nor incrementalism were used *in their own right* particularly often, both concepts were nevertheless used regularly as part of the overall duty enquiry, and so the data somewhat misrepresents their actual influence. In particular, in a number of cases, assumption of responsibility was used to demonstrate the requisite degree of proximity as part of *Caparo*,⁴⁵ *Anns*,⁴⁶ and Deane J's proximity test,⁴⁷ whilst incrementalism was occasionally used as part of the salient features test,⁴⁸ and to show that the imposition of a duty would, or would not be, fair just, and reasonable under both *Caparo*⁴⁹ and *Anns*.⁵⁰

⁴³ Indeed, Lord Bridge himself did not appear to rely on the three-stage test to deny a duty in *Caparo*, instead relying on an absence of an assumption of responsibility.

⁴⁴ M Lunney and K Oliphant, *Tort Law: Text and Materials* (5th edn, OUP 2013) 137.

⁴⁵ *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 (HL) (Lord Mance), *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL) (Lord Clyde), *Smith v Eric S Bush* [1990] 1 AC 831 (HL) (Lord Griffiths).

⁴⁶ *Childs v Desormeaux* (2006) 266 DLR (4th) 257 (McLachlin J), *BDC Ltd v Hofstrand Farms Ltd* (1986) 26 DLR (4th) 1 (Estey).

⁴⁷ *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 254-5 (Dawson J), *Hawkins v Clayton* (1988) 164 CLR 539 (Mason CJ and Wilson J, and Deane J).

⁴⁸ *Harriton v Stephens* (2006) 226 CLR 52 (Crennan J).

⁴⁹ *Smith v Ministry of Defence* [2014] 1 AC 52 (HL) (Lord Carnwath), *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 (HL) (Lords Bingham and Rodger), *Stovin v Wise* [1996] 1 AC 923 (HL) (Lord Nicholls).

⁵⁰ *Hall v Hebert* (1993) 101 DLR (4th) 129 (Sopinka J).

Failure rates of the different stages of Caparo and Anns

It is also worth noting that on the occasions on which *Caparo* and *Anns* were used, some ‘stages’ of the tests were more influential than others. A breakdown of the success rates of the various stages of the *Caparo* and *Anns* test is as follows:⁵¹

Table 7: Unsuccessful stages of *Caparo* and *Anns*

Stage(s) that failed	HCA	SCC	HoL/UKSC
Foreseeability	0	1 (2%)	0
Proximity	0	12 (28%)	5 (19%)
FJ&R	0	14 (33%)	10 (37%)
None (i.e. all passed)	6 (100%)	21 (49%)	13 (48%)

In both the House of Lords / UKSC and the Supreme Court of Canada, the success rates of claimants under *Caparo* and *Anns*, perhaps predictably, were similar to success rates overall. In the High Court of Australia, however, where Kirby J was responsible for all six uses of *Caparo*, due to the small sample size the data was not reflective of any overall trend.

‘Tests’ were often code for other things

Notwithstanding the considerable variance in the use of general tests among the jurisdictions, the data clearly show that general tests play a role in a not insignificant number of duty determinations. But was that role a useful one? As we saw in Chapter Three, a common criticism of duty tests is that they perform little analytical work themselves, and merely act as a label for the conclusion that a duty of care exists, a conclusion often reached via some other more specific reasoning. Unfortunately, quantitative data is limited in what it can tell us about the merits of duty tests, and such issues are best explored qualitatively, as was done in Chapter Three. Nevertheless, there are a number of features of the data worth highlighting.

In the High Court of Australia, of the 15 times that Deane J’s proximity test was relied upon to determine the existence of a duty of care, a more specific test or concept was *explicitly* used to

⁵¹ Note that the data adds up to more than 100% because some decisions failed *multiple* stages of the *Caparo* / *Anns* tests (e.g. proximity and FJ&R).

determine the presence of a sufficient degree of proximity on 11 of those occasions. In particular, the presence of proximity was determined by an assumption of responsibility in seven opinions, 'reliance' in two opinions, reasons of policy in one decision, and the presence of 'control' in one opinion. In only four of the 15 occasions that proximity was used as a general test did the existence of a duty *actually* depend on some abstract notion of proximity. Indeed, in *Hawkins v Clayton*,⁵² Deane J went so far as to *equate* proximity with assumption of responsibility in cases of pure economic loss, stating that, where:

[T]he plaintiff's claim is for pure economic loss ... the categories of case in which the requisite relationship of proximity is to be found are properly to be seen as special in that they will be characterized by some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two...⁵³

Mason CJ and Wilson J made similar comments, noting that '[regarding] the question of liability in tort, the relevant enquiry is whether the [relationship between the plaintiff and defendant] gave rise to a relationship of sufficient proximity *founded upon an assumption of responsibility...*'⁵⁴ This deference to more specific concepts, depending on the facts of the case, strongly supports the various criticisms of Deane J's proximity test, some of which we encountered in Chapter Three, and suggests that asking 'was there a sufficient degree of proximity?' is no more helpful than asking 'was there a duty of care?'

In the Supreme Court of Canada and the House of Lords / UKSC, similar criticisms could be made of the use of *Anns* and *Caparo*, where, despite the ostensibly structured approach required by the two tests, the existence of a duty was often determined via a simple balancing of pro- and anti-duty arguments. First, as Table 7 indicates, the foreseeability stage played almost no role whatsoever in any court, only failing once in the combined 76 times the tests

⁵² (1988) 164 CLR 539.

⁵³ *ibid* 576.

⁵⁴ *ibid* 545 (emphasis added).

were used.⁵⁵ Second, despite proximity playing a more significant role than the foreseeability stage, as was the case with Deane J's proximity test, its existence was often contingent on other, more specific tests, most notably an assumption of responsibility,⁵⁶ and, in the Supreme Court of Canada, on the basis of considerations of policy.⁵⁷ By far the most important element of the enquiry was whether the imposition of a duty would be fair, just, and reasonable. This open-ended stage, where almost any pro- and anti-duty argument could be considered, was relevant in 64 of the 76 times that *Caparo* and *Anns* were used, not including those times in the Supreme Court of Canada where a similar enquiry was undertaken under the 'proximity' label. Accordingly, given the comparatively undemanding foreseeability and proximity stages, *Caparo* and *Anns* frequently reduced to the question of whether it was fair, just, and reasonable to impose a duty, suggesting that the guidance offered by the stages is often, as has been claimed, of limited analytical assistance.

C. Determining the existence of a duty without general tests

The obvious question following the previous section, exploring how frequently general duty tests are used, is 'how do the courts determine the duty enquiry when they do not rely on general duty tests?' Indeed, as we have seen, in the *majority* of duty determinations in the High Court of Australia and House of Lords / UKSC, the courts determine the existence or absence of a duty via some other method. In this section, we will explore what those methods are.

⁵⁵ Though note *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193, where the Supreme Court, although declining to rule on the issue of foreseeability, suggested that it may not have been satisfied if they had ruled on it. Note also that questions of foreseeability played a greater, albeit still marginal, role in cases where duty tests were not used. See Section III.C below.

⁵⁶ See (n 45) and (n 46).

⁵⁷ *D(B) v Children's Aid Society* (2007) 284 DLR (4th) 682; *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620. See also the discussion in *Cooper v Hobart* (2001) 206 DLR (4th) 193, 202-203 [29] (McLachlin CJC and Major J), where 'questions of policy' were explicitly recognised as relevant to the proximity stage.

i. Methodology

The various ‘non-general test methodologies’ were classified into five broad categories. The categories were not identified prior to coding,⁵⁸ and only emerged after coding had been completed. In particular, during the coding of the cases, where an opinion did not rely on a test to determine the outcome of the duty enquiry, a brief description of the methodology that *was* used was made, and these were classified at the completion of the coding into, ultimately, the following five broad categories: the foreseeability of the harm, the common law method,⁵⁹ experimental general duty tests, policy considerations, and a balancing of pro- and anti-duty arguments. As the courts rarely explicitly identified the methodology they were applying, judgment was required in determining how to best describe and classify the opinions. The results should therefore be seen as only demonstrating that different types of methodologies were used, and an indication of how they could potentially be described.

ii. The results

An overview of the various methodologies relied on by the court when they did not rely on duty tests is as follows:

Table 8: Non-general test methodologies

Methodology	HCA	SCC	HoL/UKSC
No foreseeability	7 (8%)	0 (0%)	6 (9%)
Experimental duty tests	3 (3%)	0 (0%)	7 (11%)
Policy considerations	0 (0%)	0 (0%)	13 (20%)
Common law method	43 (46%)	7 (100%)	29 (43%)
Pro- and anti-duty arguments	40 (43%)	0 (0%)	11 (17%)
(Total)	(93)	(7)	(66)

⁵⁸ The only exception to this being the ‘pockets’ approach. The pockets approach *was* identified as a duty methodology prior to coding, but ultimately was classified as part of the ‘common law method’ category given the difficulty of distinguishing the pockets approach from general reliance on the common law.

⁵⁹ To some extent, of course, *all* judicial reasoning could be classified as following the ‘common law method.’ Here, however, by ‘common law method’ it is meant deference to existing principles and general analogical reasoning.

iii. Analysis

No foreseeability

As Table 8 illustrates, a small number of opinions in both the High Court of Australia and the House of Lords / UKSC were determined on the basis that the harm suffered by the claimant was not foreseeable; or, in other words, that the factual duty element had not been satisfied. No cases in the Supreme Court of Canada were determined solely on the grounds that the harm was not foreseeable. It will also be recalled that no cases in the Supreme Court of Canada were determined under the *Anns* test solely on the basis that the harm was not foreseeable. That factual duty played such a minor role in ultimate appellate courts should not be unexpected; ultimate appellate courts are generally reluctant to reconsider decisions of fact made in lower courts, as it is not in the public interest for those courts to spend their limited time making rulings that will often be of limited application beyond the particular facts of the case before the court. It is for this reason that when issues of factual duty are considered in ultimate appellate courts, it is usually to clarify the role played by foreseeability in certain types of cases, rather than merely to determine whether the foreseeability requirement was satisfied in that particular case.⁶⁰

Experimental duty tests

In both the High Court of Australia and the House of Lords there were also a small number of opinions that determined the outcome of the duty enquiry with what appeared to be experimental duty tests. In the High Court of Australia these alternative general duty determinants occurred during the period of uncertainty between the rejection of proximity as a general test and the rise of the salient features test, and included a concept of 'general reliance',⁶¹ a somewhat open-ended and circular 'precise legal rights'-based approach,⁶² and a

⁶⁰ For example, in *Page v Smith* [1996] 1 AC 155 (HL), the Court was not concerned with reconsidering the lower Court's factual findings, so much as clarifying *what* exactly was required to be foreseeable in cases involving primary victims of psychiatric injury.

⁶¹ *Pyrenees Shire Council v Day* (1998) 192 CLR 332, 369-71 (McHugh J).

‘control’-based test that examined the defendant’s degree of control over the risk.⁶³ In the House of Lords, also during a period of uncertainty, namely between the downfall of *Anns* and establishment of *Caparo* as the favoured replacement, a number of opinions, including several from Lord Jauncey, relied on what appeared to be a Deane J and Lord Atkin inspired concept of proximity as a general duty determinant.⁶⁴ In each case, the attempts were short lived and ultimately led to nothing, often following considerable criticism from other members of the court.⁶⁵

Policy considerations

In the House of Lords / UKSC, a number of opinions determined the outcome of the duty enquiry on the basis of considerations of policy. Whilst it is true that policy considerations play a role in many opinions, something that will be explored further later in this Chapter, in these opinions the role of policy was *explicitly* identified as the *principal* consideration. Significantly, all of the opinions that relied on this ‘policy approach’ occurred in ‘immunity’ cases,⁶⁶ where, according to Lord Dyson in *Jones v Kaney*,⁶⁷ ‘The only question is whether there are sufficiently compelling policy reasons for according the [defendant] immunity from suit.’⁶⁸ The immunity cases

⁶² *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 201-202 (Gaudron J).

⁶³ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 389 (Gummow J).

⁶⁴ Including: all four substantive opinions in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL), Lord Keith (at 396), Lord Ackner (at 402), Lord Oliver (at 406), and Lord Jauncey (at 420); Lord Jauncey in *Smith v Eric S Bush* [1990] 1 AC 831, 871-72; and Lords Jauncey and Oliver in *Caparo*, *passim*.

⁶⁵ For criticism of the general reliance test, see *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 389 (Brennan CJ). For criticism of the ‘precise legal rights’ test, see *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 213-25 (McHugh J).

⁶⁶ McBride and Bagshaw, for example, describe immunities as situations in which a claimant ‘would normally be entitled to sue the defendant in negligence but in fact she is prevented from doing so by some special legal rule’: Nicholas J McBride and Roderick Bagshaw, *Tort Law* (4th edn, Pearson 2012) 89. Though note that a more complex definition is given at *ibid* 527-29, to explain the effect of Article 6(1) of the European Convention on Human Rights. See also James Goudkamp, *Tort Law Defences* (Hart 2013) 137 (fn 10).

⁶⁷ [2011] 2 AC 398.

⁶⁸ *ibid* 435.

concerned police immunity,⁶⁹ expert witness immunity,⁷⁰ combat immunity,⁷¹ and advocate's immunity.⁷²

Common law method

The most popular non-general test methodology in all three jurisdictions, however, accounting for almost half of the non-general test duty determinations in the High Court of Australia and House of Lords / UKSC, and *all* non-general test duty determinations in the Supreme Court of Canada, was what can most conveniently be described as the common law method; that is, where the existence of the duty was determined by reference to existing principles of law and general analogical reasoning. That the common law method was used in so many duty determinations should not be surprising, as, according to conventional duty analysis, general tests are only to be used where the existing law offers no (or at least limited) guidance.⁷³ Cases that relied on the common law method did so in a variety of ways. At one end of the spectrum were cases that were determined on the basis that the facts of the case fell within an existing notional duty category.⁷⁴ Other opinions relied less on the explicit *outcome* of existing cases, or the duty situation recognised, and more on the *reasoning* from existing cases, usually in the form of guidance or tests. For example, in the House of Lords a number of opinions relied on the test in *Alcock v Chief Constable of South Yorkshire Police*⁷⁵ to determine whether a duty was

⁶⁹ *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL) (Lord Templeman). Though note that, following *Michael v The Chief Constable of South Wales Police* [2015] 2 WLR 343 (HL), it is arguably no longer appropriate to describe the no-liability rule, as it applies to the police, as an 'immunity,' given that the absence of a duty is now justified on the basis of there not having been an assumption of responsibility rather than on the basis of there being a special rule that applies to the police: see *ibid* [44]-[47], [116] (Lord Toulson).

⁷⁰ *Jones v Kaney* [2011] 2 AC 398 (HL) (Lords Phillips, Collins and Dyson).

⁷¹ *Smith v Ministry of Defence* [2014] 1 AC 52 (HL).

⁷² *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 (HL).

⁷³ See, for example, the comments to this effect in: *Caparo* 618 (Lord Bridge), 628 (Lord Roskill); *Perre v Apand* (1999) 198 CLR 180, 217 (McHugh J); *Cooper v Hobart* (2001) 206 DLR (4th) 193 [41] (McLachlin J); *Childs v Desormeaux* (2006) 266 DLR (4th) 257 [15] (McLachlin CJ).

⁷⁴ See, for example, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 (Gummow, Hayne and Heydon JJ); *Waller v James* (2006) 226 CLR 136 (Crennan J); *Van Colle v Chief Constable of the Hertfordshire Police*; *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225 (HL) (Lords Brown and Phillips); and *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (HL) (Lords Bingham and Phillips).

⁷⁵ [1992] 1 AC 310 (HL).

owed in respect of secondary psychiatric injury,⁷⁶ whilst others relied on the guidance offered in *Hill v Chief Constable of West Yorkshire Police*⁷⁷ to determine the extent of the duty owed by the police in the course of investigating an alleged crime;⁷⁸ in the High Court of Australia, opinions relied on prior guidance offered by the court in relation to the liability of public authorities⁷⁹ and liability for pure economic loss;⁸⁰ and in the Supreme Court of Canada, opinions drew on other cases to determine the circumstances in which an occupier owes a duty to an intoxicated patron⁸¹ and in which a highway authority owes a duty to highway users.⁸² At the other end of the spectrum, where no explicit guidance had been given in prior cases, were those opinions that relied on far more general guidance, or on high level general principles of law. For example, in the High Court of Australia, opinions denied the existence of a duty on the basis that imposing a duty would conflict with general principles of the law of negligence, including those expounded in *Donoghue v Stevenson*,⁸³ or on the grounds that it would conflict with the

⁷⁶ See, for example the various opinions in *White v Chief Constable of South Yorkshire Police* [1999] 1 AC 455 (HL).

⁷⁷ [1989] AC 53 (HL).

⁷⁸ See, for example: Lord Steyn in *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 (HL), with whom the majority of the court agreed. See also the various opinions in *White v Chief Constable of South Yorkshire Police* [1998] 2 AC 455 (HL).

⁷⁹ See, for example *Graham Barclay Oysters v Ryan*, (2002) 211 CLR 540, at 577, where McHugh J relied on his own opinion in *Crimmins v Stevedoring Industry Financing Committee* (2001) 206 CLR 512, 559, to determine the circumstances in which a plaintiff will be owed a duty by a public authority. Similarly, in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, at 239, French CJ relied on the judgment of Gummow J in *Pyrenees Shire Council v Day* (1998) 192 CLR 332 to determine the circumstances in which a plaintiff will be owed a duty by a public authority.

⁸⁰ For example, in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 88 ALJR 911, at 925, Hayne and Kiefel JJ relied on the guidance offered by the majority judgment in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 to determine the existence of a duty of care in relation to purely economic loss, as did the entire court, albeit in three separate judgments, in *Barclay v Penberthy* (2012) 246 CLR 25: French CJ, Gummow, Hayne, Crennan and Bell JJ (at 284), Heydon J (at 294-94), and Kiefel J (at 320-21).

⁸¹ See, for example, Wilson J in *Crocker v Sundance Northwest Resorts Ltd* (1988) 51 DLR (4th) 321, relying on *Jordan House Ltd v Menow* (1974) 38 DLR (3rd) 105.

⁸² See, for example, Cory J in both *Brown v British Columbia (Minister of Transportation and Highways)* (1994) 112 DLR (4th) 1, and *Swinamer v Nova Scotia* (1994) 112 DLR (4th) 18, where he determined the outcome of the duty enquiry on the basis of the guidance offered in *Just v British Columbia* (1989) 64 DLR (4th) 689.

⁸³ [1932] AC 562. This occurred in *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317, where Gaudron J (at 340) and Gummow and Kirby JJ (at 379-81) refused to impose 'arbitrary' control mechanisms on recovery for psychiatric injury on that basis.

‘underlying value of the common law which gives primacy to personal autonomy;’⁸⁴ in the Supreme Court of Canada, opinions relied on general principles of law drawn from a ‘lengthy survey of judicial opinion,’⁸⁵ and ‘well established principles of tort law,’⁸⁶ again including *Donoghue v Stevenson*;⁸⁷ and in the House of Lords / UKSC, opinions denied a duty on the basis that to impose a duty would be inconsistent with ‘any basis of established principle...[in] the law of negligence,’⁸⁸ or would conflict with the general reluctance of the common law to impose liability for failing to confer a benefit.⁸⁹ Despite the common law method being applied at varying levels of generality, ranging from explicit guidance to the very general, the cases were not sub-classified any further due to the frequent difficulty in distinguishing between the different, but often very similar, sub-categories; further, the varying levels of guidance offered by the law appeared to be more a symptom of the specificity of the existing law than a consciously different approach to the duty enquiry by the judges.

Ad-hoc balancing

The fifth and final non-general test methodology was essentially an *ad hoc* balancing of pro- and anti-duty arguments (‘the balancing approach’). This open-ended method was particularly popular in the High Court of Australia, accounting for 43% of duty determinations overall, but was also used in a small number of duty determinations in the House of Lords.⁹⁰ The essence of the open-ended balancing approach was, perhaps, best described in *Kuhl v Zurich Financial*

⁸⁴ In *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 248, Gummow, Hayne and Heydon JJ relied on this to deny the existence of a duty to rescue.

⁸⁵ *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 [56] (Le Dain J, writing for the court). Le Dain J’s opinion later proved influential to Iacobucci J in *BG Checo International Ltd v British Columbia Hydro and Power Authority* (1993) 99 DLR (4th) 577, another opinion that did not rely on general duty tests.

⁸⁶ *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261 [182]-[183] (Iacobucci J).
⁸⁷ [1932] AC 562.

⁸⁸ *Murphy v Brentwood* [1991] 1 AC 398 (HL), 471 (Lord Keith), overruling *Anns* in the process.

⁸⁹ *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (HL), esp 1067 (Lord Hoffmann). See also *D&F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 (HL), 206, where Lord Bridge relied on the common law’s general approach to liability for defective quality goods, as drawn from a variety of cases, to determine whether a duty was owed to those who purchased a defective quality building by the original owners and builders.

⁹⁰ No opinions in the Supreme Court of the UK were classified as having relied on this method.

Services,⁹¹ where Heydon, Crennan, and Bell JJ stated that ‘The existence of a duty of care depends on the circumstances of the case.’⁹² The balancing approach shares much in common with the salient features test, which, ultimately, is little more than a formalised version of the balancing approach; indeed, many of the opinions classified as relying on the balancing approach appeared to simply be undisclosed applications of the salient features test, in that the existence of a duty was determined on the basis of the presence or absence of well-established salient features, despite the test itself not being directly named.⁹³ Where opinions relied on the balancing approach, a wide range of pro- and anti-duty reasons were used. Mostly these reasons were orthodox and unsurprising; for example, whether the defendant exercised any control over the claimant,⁹⁴ whether there was the potential for indeterminate liability,⁹⁵ whether the claimant was vulnerable to the defendant,⁹⁶ whether the imposition of a duty would create a conflict with other laws⁹⁷ or competing duties,⁹⁸ and, in the case of public authorities, issues of justiciability⁹⁹ and whether the allegedly negligent decision was policy-based rather than operational.¹⁰⁰ In almost all opinions, the existing law was also considered as part of the

⁹¹ (2011) 243 CLR 361.

⁹² *ibid* 390.

⁹³ It will be recalled that for opinions to be classified as applications of a general test the opinion had to be *explicit* that a general test was being applied. For example, in *CAL No 14 Pty Ltd v Motor Accidents Board* (2009) 239 CLR 390, at 404-411, Gummow, Heydon, and Crennan JJ, although not explicitly identifying the salient features test, denied the existence of a duty on the grounds that the claimant was not vulnerable, the imposition of a duty would interfere with the autonomy of the defendant, and the imposition of a duty would create incoherence in the law; in other words, on the presence or absence of well-established salient features. Similarly, in *Hunter and New England Local Health District v McKenna* (2014) 89 AJLR 39, at [17]-[23], the majority, also without identifying the salient features test, denied the existence of a duty on the basis of the limited scope of the statutory power, potential problems of indeterminacy, and potential problems of incoherence in the law; again, on the basis of the absence of well-established salient features.

⁹⁴ See, for example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 (Hayne J), and *Perre v Apand* (1999) 198 CLR 180 (Gaudron J and Callinan J).

⁹⁵ *Perre v Apand* (1999) 198 CLR 180 (Hayne J), and *Agar v Hyde* (2000) 201 CLR 552 (Gleeson CJ, and Gaudron, McHugh, Gummow and Hayne JJ).

⁹⁶ *Perre v Apand* (1999) 198 CLR 180 (Hayne J).

⁹⁷ *Miller v Miller* (2011) 242 CLR 446 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1 (French CJ, Gummow, Hayne, Heydon and Bell JJ); *Gala v Preston* (1991) 172 CLR 243 (Brennan J and Dawson J).

⁹⁸ *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373 (HL) (Lords Brown and Nicholls).

⁹⁹ *Stovin v Wise* [1996] 1 AC 923 (HL) (Lord Hoffmann).

¹⁰⁰ *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (Hayne J), and *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (Gleeson CJ).

balancing process.¹⁰¹ Other opinions, however, particularly in the High Court of Australia, relied on extremely fact-specific considerations that were less orthodox and, arguably, inappropriate for the ostensibly categorical duty analysis, including concerns that the risk that materialised was ‘readily apparent,’¹⁰² a consideration conventionally dealt with under the fault stage or as evidence of contributory negligence, and concerns that the existence of a duty would impose an unreasonable burden on the defendant,¹⁰³ a consideration surely also more appropriate for the fault analysis. Despite the variance in the different types of reasons relied upon in the duty analysis, ultimately no quantitative data was collected in relation to those different reasons given the difficulty of classifying them objectively.¹⁰⁴

iv. Some additional commentary

Having now seen an overview of the data, it is worth saying a few words about the various non-general test methodologies. For the most part, the methodologies were orthodox and uncontroversial. Few would suggest for example, that liability ought be imposed where the harm suffered was not foreseeable; and whilst it was argued in Chapter Four that this is more appropriately dealt with in the fault or remoteness stages, for now it remains an orthodox part of the duty enquiry. The experimental duty tests, too, are not particularly controversial, as all duty tests must start somewhere, and the fact that they were ultimately abandoned as general duty determinants says more about the tests themselves, than the propriety of relying on experimental tests in general, given that general tests are widely accepted under the present law. Reliance on the common law method, or general analogical reasoning, is, certainly, the most orthodox method of determining the duty enquiry of all, and an axiomatic aspect of common law legal systems generally. More controversial were those opinions that relied on

¹⁰¹ How much weight was placed on the existing law depended, of course, on its perceived merits as well as the extent to which it applied to the facts of the case. For what is perhaps the only exception, being an opinion that appeared to place almost *no* value on the existing law at all, see the judgment of Hayne J in *Perre v Apand* (1999) 198 CLR 180.

¹⁰² In *Mulligan v Coffs Harbour CC* (2005) 223 CLR 486, 499 (Gummow J).

¹⁰³ *Cole v South Tweed Heads Rugby League* (2004) 217 CLR 469, Gleeson CJ (at 476) and Callinan J (at 506).

¹⁰⁴ The exception, of course, being the use of policy reasons, discussed further below.

policy considerations and the balancing approach. The propriety of policy considerations was discussed in detail in Chapter Five and so need not be repeated here. As for the balancing approach, whilst its open-endedness gives rise to many of the same criticisms directed at the policy-based approach, perhaps the major objection is that, without any structure to the analysis, it is difficult to know which arguments will be relied upon by the court and so predict the outcome of cases with any degree of certainty. Indeed, McHugh's criticisms of the salient features approach, which we saw in Chapter Three, would appear to be equally applicable to the balancing approach:

Left unchecked, this approach becomes nothing more than the exercise of a discretion - like the process of sentencing, where the final result is determined by the individual "judge's instinctive synthesis of all the various aspects". Different judges will apply different factors with different weightings. There will be no predictability or certainty in decision-making because each novel case will be decided by a selection of factors particular to itself. Because each factor is only one among many, few will be subject to rigorous scrutiny to determine whether they are in truth relevant or applicable.¹⁰⁵

It could be argued that, on this basis, the *ad hoc* nature of the balancing approach therefore provides an inferior method for determining duty cases to general tests, as despite their defects, *some* guidance is better than *no* guidance. This certainly appears to be the essence of Kirby J's comments in support of general tests in *Pyrenees Shire Council v Day*.¹⁰⁶

[W]hatever the defects of the notions of "foreseeability", "proximity" and the imprecision of the policy evaluation inherent in measurement of "fairness", "justice" and "reasonableness", some guidance must be given by the Court as to how the duty question is to be answered when it is contested in a particular case. Otherwise, confronted with a suggested new category, lawyers in their offices and courts in Australia would have no instruction for their task of reasoning by analogy from past categories ... the individual affected, the lawyer advising and the court deciding have a right to know at least the general approach which they should adopt in order to resolve the controversy.

Whilst it is no doubt true that some guidance is better than no guidance, this can only be an argument in favour of general tests to the extent that general tests *do* provide more guidance

¹⁰⁵ *Crimmins v Stevedoring Committee* (1999) 200 CLR 1 [77].

¹⁰⁶ (1998) 192 CLR 330, 415-16 (footnotes omitted).

than the alternatives, and, as we have seen, the entire basis of the criticism of general tests is that they do not; to argue in defence of general tests on this basis simply begs the question. Indeed, as we have seen, Deane J's proximity test was typically little more than a label for whatever consideration(s) seemed important on the facts, whilst under *Caparo* and *Anns*, not only does the proximity stage consider a similarly wide range of considerations, but much of the analysis tends to be done under the open-ended fair, just, and reasonable stage, which often descends into a balancing of pro- and anti-duty arguments in any event. Then there is the salient features test which is essentially little more than a formal label for the balancing approach so as to give the method a semblance of jurisprudential legitimacy. So whilst the balancing approach is, *prima facie*, the antithesis of the structured and predictable approach to determining the duty enquiry sought to be achieved by general tests, in practice, the difference often appears to be little more than an illusion.

D. Do the courts approach the notional duty enquiry in a categorical or fact specific manner?

In Chapter Five we saw we saw that the notional duty enquiry is best understood as involving a determination as to whether a liability *should* exist in a particular 'situation,' or 'category of case,' and that it is the identification of this category of case that gives notional duty determinations their precedential value as well as making them questions of law rather than of fact. In this section, we will investigate whether this understanding of notional duty is shared by the courts. In particular, we will explore whether the focus of the courts is on whether a duty exists in a particular *category of case*, or whether a duty exists on the *particular facts of the case*.

i. Methodology

For the purposes of this section, a 'categorical' duty determination was one that identified a particular situation, which both covered and applied beyond the facts of the case, in which a

duty of care was held to either exist or not exist. Whilst this included determinations that identified the duty situation *via* tests, it did not include determinations that specified that a duty would exist in a specific situation *provided some additional test was satisfied*, as whilst such determinations apply beyond the facts of the case, the justification for the imposition of the duty in such cases is the satisfaction of the test and not because the facts came within a previously recognised duty situation; after all, no-one would argue that the three stage test in *Caparo* set out a ‘category of case’ consisting of situations that satisfied the three-stage test. Determining whether a duty determination was fact-based or categorical was informed by considerations including, how the court worded its task (i.e. ‘to determine whether *the* defendant owe a duty to *the* claimant,’ or whether ‘*a* defendant owed a duty to *a* claimant in this type of situation’), and the types of reasons relied upon by the court (i.e. were they reasons that applied to the situation generally, or reasons that only applied to the particular fact-situation before the court?).¹⁰⁷ A considerable degree of judgment was, however, also required. As only notional duty determinations are categorical in nature, factual duty determinations, being those that were based on an absence of foreseeability, were excluded from the data; though, as we saw above, this represented only a minority of opinions included in the sample.¹⁰⁸

Initially there was also a plan to code the determinations according to how broad or narrow the duty categories were; that is, according to whether the category had a wide or narrow ‘scope.’ As we saw in Chapter Five, the level of generality of the duty situations can vary considerably. However, this plan was abandoned shortly after beginning the coding as it soon became clear that, despite a clear variance in the level of generality of the categories, they were

¹⁰⁷ The former consideration was necessarily not conclusive. If, for example, an opinion specified its task as to determine when *a* defendant owes *a* duty for pure economic loss caused by negligent misstatement (i.e. in a categorical manner), but concluded that this will only be where the defendant assumes a responsibility towards the claimant, despite the task being framed in categorical terms, the fact that the existence of a duty depends on the exact facts of the case (i.e. whether the defendant assumed responsibility) meant the determination was not categorical.

¹⁰⁸ In particular, seven opinions in the High Court of Australia, no opinions in the Supreme Court of Canada, and six opinions in the House of Lords / UKSC.

simply too difficult to categorise discretely in any meaningful manner; in particular, the levels of generality tended to lie somewhere on a continuous spectrum rather than falling into any discrete categories.

ii. Results

The respective frequencies of categorical and fact-based duty determinations in the various courts is outlined in the following table.

Table 9: Whether notional duty determinations were categorical or fact-based

Type of notional duty determination	HCA	SCC	HoL/UKSC
Categorical	73 (59%)	48 (89%)	80 (82%)
Fact-based	51 (41%)	6 (11%)	18 (18%)

iii. Analysis

The data are clear that, at least for the most part, in all three jurisdictions notional duty is indeed understood as a categorical issue; *predominantly* so in the Supreme Court of Canada and House of Lords / UKSC, and *mostly* so in the High Court of Australia. The next question, of course, is why there are there still such a considerable number of fact-based determinations. As we saw in Chapter Five, fact-based notional duty determinations based on assumptions of responsibility are orthodox and unproblematic, and are used to justify the existence of a notional duty in broad exclusionary situations. Reliance on assumptions of responsibility is particularly common in cases involving pure economic loss and failures to confer a benefit (including liability for third parties). As we also saw in Chapter Five, other than where the fact-specific determinations are based on assumptions of responsibility, they seem unnecessary, as, without any need to overcome a broad exclusionary rule, it is not clear why they need to be confined to the facts of the case. In order to gain a better understanding of the fact-based

determinations, they were therefore classified further, into, first, those concerning pure economic and omissions, and, second, those based on an assumption of responsibility.¹⁰⁹

Fact-based notional duty determinations

The breakdown of the fact-based notional duty determinations was as follows:

Table 10: Classification of fact-based notional duty determinations

Type of fact-based determination	HCA	SCC	HoL/UKSC
Concerned purely economic loss or omissions	36(70%)	4 (67%)	17 (94%)
Did not concern purely economic loss or omissions	15(30%)	2 (33%)	1 (6%)
Based on an assumption of responsibility	15(30%)	4 (67%)	17 (94%)
Not based on an assumption of responsibility	36(70%)	2 (33%)	1 (6%)

Analysis of new data

Table 10 reveals a number of interesting findings. In relation to the House of Lords / UKSC, it clearly demonstrates that the Law Lords approach the notional duty enquiry in much the same way that was presented in Chapter Five. In particular, notional duty determinations tend to be confined to their facts only where the case concerns purely economic loss or omissions, *and* the existence of the notional duty is based on the presence or absence of an assumption of responsibility. In relation to the Supreme Court of Canada, the data show that fact-based determinations are relatively rare, but where they have occurred it has not always been in cases involving purely economic loss or omissions, nor has it always been based on an assumption of responsibility. Given, however, that only 6 determinations fell into the fact-based classification, we should be careful before concluding the data is illustrative of any wider patterns.

In relation to the High Court of Australia, the data was particularly revealing. First, it demonstrated that the High Court frequently resolves purely economic loss and omission cases

¹⁰⁹ This included notional duty determinations based explicitly on the *Hedley Byrne* / assumption of responsibility test, those where the presence of ‘proximity,’ as part of another general test (i.e. *Anns* , *Caparo* or Deane J’s proximity test), was based on an assumption of responsibility, and those where an assumption of responsibility played a role in a more general analysis (which turned out to only be relevant in the High Court of Australia).

without any reference to whether the defendant assumed a responsibility to the claimant. Indeed, this would appear to occur in the *majority* of pure economic loss and omission cases.¹¹⁰ Instead, the High Court relied on other concepts, such as whether the claimant was vulnerable,¹¹¹ or whether the claimant was in a position to protect themselves.¹¹² This stood in stark contrast to the approach adopted by the House of Lords / UKSC which, when faced with a case involving purely economic loss or an omission that they wished to confine to the particular facts of the case,¹¹³ appear to resolve the existence of a notional duty almost *exclusively* on the basis of whether the defendant assumed a responsibility towards the claimant. In another sense, however, the approaches of the High Court of Australia and the House of Lords / UKSC were quite similar; they both recognise that liability for purely economic loss and omissions are subject to general exclusionary rules, and that if they are to be overcome there must be some special justification for doing so based on the particular facts of the case; and whereas the House of Lords / UKSC takes a strict approach, only permitting exceptions where there was an assumption of responsibility, the High Court takes a broader approach, permitting exceptions where there was an assumption of responsibility *or* where the claimant was especially vulnerable or unable to protect themselves.¹¹⁴ The second feature the data revealed about the High Court of Australia is the significant number of fact-based duty determinations that did *not* concern claimants trying to overcome the general exclusionary rule for omissions and purely economic losses. Again, outside of cases involving purely economic loss and omissions, it is not clear why duty determinations need to be confined to the facts of the case. Whilst a number of

¹¹⁰ In particular, whereas 36 opinions related to cases involving purely economic loss, only 15 were resolved on the basis of an assumption of responsibility. Further, the 36 opinions did not include pure economic loss or omissions cases where the exception was categorical (for example, *Hill v Van Erp* (1997) 188 CLR 159).

¹¹¹ See, for example, *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 88 ALJR 911 (Hayne and Kiefel JJ).

¹¹² *Barclay v Penberthy* (2012) 246 CLR 258.

¹¹³ Not all decisions involving purely economic loss were confined to the particular facts of the case. Compare for example: *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL), and *White v Jones* [1995] 2 AC 207 (HL).

¹¹⁴ Whether or not these are convincing justifications is, of course, an entirely different matter.

these cases could be explained on the basis that the High Court simply confused issues of notional duty and fault,¹¹⁵ there can nevertheless be little doubt that the High Court of Australia simply *do* approach the notional duty issue with much greater emphasis on the facts of the case than the other two jurisdictions. Whilst this may not be overwhelmingly supported by the quantitative data, that it is nevertheless the case is suggested by a number of factors.

First, there have been a number of pronouncements in the High Court of Australia to the effect that the existence of a duty depends heavily on the precise facts of the case rather than the situation generally. In *Cole v South Tweed Heads Rugby League Football Club Limited*,¹¹⁶ for example, Gleeson CJ made it clear that the duty enquiry is not to be considered at 'a high level of abstraction, divorced from the concrete facts [of the case]';¹¹⁷ whilst in *Kenny & Good Pty Ltd v MGICA*,¹¹⁸ Gummow J seemingly rejected the categorical nature of notional duty altogether, when he said:

[I]n England, the duty has been formulated at some level of abstraction from any particular facts. In Australia, in accordance with authority in this Court, the determination ... of the existence and scope of a duty of care requires scrutiny of the precise relationship between the relevant parties.¹¹⁹

Second, the types of considerations relied on by the High Court of Australia are noticeably different to those relied on by the other jurisdictions. Whilst this is, again, difficult to prove quantitatively without undertaking an entirely new survey focussing on the different types of reasons relied on by the different courts, we have nevertheless seen that, whereas the High Court of Australia places a heavy emphasis on fact-specific considerations such as the degree of control exercised by the defendant, the degree of vulnerability of the claimant (both of which

¹¹⁵ For example, *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 (Gaudron J), and *Vairy v Wyong Shire Council* (2005) 223 CLR 422 (Gummow J). See also Section II.E of Chapter Five. Note that, despite the claim that the opinions, in fact, concerned matters of fault, they were classified as notional duty determinations because *that is how they were identified by the court*, and this chapter is, after all, exploring how the courts *actually* approach the duty issue rather than how (it is argued) they *should* approach the duty issue.

¹¹⁶ (2004) 217 CLR 469.

¹¹⁷ *ibid* 472.

¹¹⁸ (1999) 199 CLR 413.

¹¹⁹ *ibid* 445.

are explicitly incorporated into the salient features test, and do *not* appear to be confined to pure economic loss or omission cases), both the House of Lords / UKSC and the Supreme Court of Canada tend to instead focus more on considerations that applied to the situation generally, as is consistent with their predominantly categorical approach to the notional duty enquiry.

Third, as we saw in Chapter Five, the High Court of Australia is far more likely than the other jurisdictions to formulate the notional duty in terms of a 'duty to do x.' Such formulations are necessarily heavily influenced by the particular facts of the case, rather than the type of situation generally.

Fourth, even where other jurisdictions have created categorical exceptions to the general exclusionary rule for purely economic losses and those that concern a failure to confer a benefit, the High Court of Australia has instead tended to approach such problems in a fact-based manner. This is clearly illustrated in the competing approaches taken to defective building cases. Whilst both the House of Lords / UKSC¹²⁰ and Supreme Court of Canada¹²¹ have dealt with such situations categorically, ruling that either *all* subsequent purchasers are or are not owed a duty, the High Court of Australia has not. In particular, the most recent pronouncement on the issue, *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*,¹²² denied the existence of a duty on the grounds that the particular plaintiff lacked any vulnerability and the particular wording of the contract between the plaintiff and the original owner.¹²³ Again, as was made clear in Chapter Five, the obvious problem with such reasoning is that the next defective building case that comes along, which will probably involve a slightly differently worded contract and slightly different degree of vulnerability, etc, will need to undergo a fresh duty evaluation. Perhaps, however, the majority opinion in *CAL No 14 Pty Ltd v Motor Accidents Insurance*

¹²⁰ *D&F Estates Ltd v Church Commissioners for England and Wales* [1989] 1 AC 177 (HL).

¹²¹ *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193.

¹²² (2014) 88 ALJR 911.

¹²³ See especially, *ibid* [29] (French CJ), [56] (Hayne and Kiefel JJ).

*Board*¹²⁴ provides the clearest illustration of the High Court of Australia's fact-based approach to the notional duty enquiry. The plaintiff's husband, Mr Scott, was killed as he rode his motorcycle home from the defendant's hotel, following a lengthy drinking session at the hotel's bar. The accident was held to be a result of Mr Scott's intoxication. The plaintiff sued the defendant hotel on the grounds that they should not have let Mr Scott leave the hotel in his intoxicated state. Gummow, Heydon and Crennan JJ, with whom French CJ and Hayne J agreed, held that the defendant had not owed the plaintiff a 'duty to take reasonable care to prevent [the plaintiff] from riding the motorcycle while so affected by alcohol as to have a reduced capacity to ride it safely.'¹²⁵ Reasons for rejecting such a duty included a lack of vulnerability, and the exact nature of the arrangement between Mr Scott and the publican (i.e that the publican would keep Mr Scott's motorcycle keys until the following morning). Other more general considerations were also relied upon. However, it was only *after* the court determined that the particular defendant did not owe a duty to the particular claimant, on the exact facts of the case, that the court though it desirable to offer some guidance on whether a duty was owed 'by publicans to customers: generally.'¹²⁶ Why the court did not deal with the issues the other way around is not at all clear.

Importantly, the above four points merely seek to explain *why* the High Court is more likely to approach the notional duty issue on the basis of the facts of the case, rather than categorically, rather than to justify it. As was made clear in Chapter Five, approaching notional duty issues on the facts of the case, other than where it is based on an assumption of responsibility, is unnecessary and confusing.

¹²⁴ (2009) 239 CLR 390.

¹²⁵ *ibid* 404.

¹²⁶ *ibid* 411.

E. To what extent do courts rely on policy considerations?

As we saw in Chapter Five, the use of policy considerations to determine the outcome of the notional duty enquiry is highly controversial. Whilst some believe that policy considerations are an essential part of any duty analysis, others believe that any use of policy is highly inappropriate and that such considerations should play no part in the duty enquiry whatsoever. Notwithstanding the controversy, however, there can be little doubt that, save for the occasional protestation to the contrary,¹²⁷ the courts are generally more than happy for policy-based considerations to be taken into account as part of the notional duty analysis. Indeed, as we have seen, consideration of policy factors is explicitly *required* by the final stage both the *Anns* and *Caparo* tests (and in the case of the former, the proximity stage too,¹²⁸) has featured in Deane J's proximity test,¹²⁹ and would certainly appear to be permissible under the salient features test.¹³⁰

Given that courts *can* rely on policy considerations, how often do they *actually* rely on policy considerations? For critics of policy-based reasoning, the answer to this is potentially important. If, for example, the courts do not actually rely on policy, or at least only do so rarely, then the debate surrounding the propriety of policy-based reasoning would be of limited practical significance. On the other hand, if policy-based reasoning were universal, they might have greater cause for concern. The popular view, however, seems to be that, at least in the ultimate appellate courts, policy *does* indeed play a crucial role in many duty determinations. Luntz, for example, has argued that, despite the High Court of Australia's ostensible distaste for

¹²⁷ For example, in *Hall v Hebert* (1993) 101 DLR (4th) 129, at [4], McLachlin J calls the use of policy 'problematic' and says it can potentially lead to 'draconian' outcomes; in *Macfarlane v Tayside Health Board* [2000] 2 AC 59 (HL), Lord Steyn dismissed reliance on the 'quicksands' of public policy; whilst in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, at 593, Callinan J claimed that policy 'is a matter for parliament rather than the courts...'

¹²⁸ See (n 57) above.

¹²⁹ *Jaensch v Coffey* (1984) 155 CLR 549, 585 (Deane J), *Gala v Preston* (1991) 172 CLR 243, 260 (Brennan J), in *Bryan v Maloney* (1995) 182 CLR 609, 618 (Mason CJ, Dean and Gaudron JJ), and *Hill v Van Erp* (1997) 188 CLR 159, 176 (Dawson J).

¹³⁰ See the discussion in Chapter Three, Section VIII.

policy-based arguments, such considerations nevertheless ‘permeate many of their judgments;’¹³¹ Weinrib, too, has argued that policy is ‘much invoked’ in duty determinations;¹³² whilst Beever, in perhaps the boldest statement of all, has said that, under the *Caparo* and *Anns* general duty tests, ‘the duty of care is determined *entirely* by policy.’¹³³ In this section we will explore the accuracy of these claims further. In particular, we will investigate how frequently policy considerations were *actually* relied upon in the various courts.

i. Methodology

The first, and most obvious, difficulty in determining how frequently policy-based arguments are relied upon by the courts, is what we mean by ‘policy.’ ‘Policy’ is, as we saw in Chapter Three, a slippery term, and is often used to refer to a wide variety of considerations. The frequency with which courts rely on considerations of policy will therefore vary according to how we define ‘policy.’ If, for example, policy is understood broadly, as referring to broad considerations as to what is just between the parties, then ‘policy’ considerations would feature in almost every duty determination, a conclusion that, as Robertson notes, is accurate but ‘unremarkable.’¹³⁴ As we also saw in Chapter Three, however, in the duty context, policy does not tend to be understood so broadly; rather, ‘policy’ tends to be understood as referring to considerations of community welfare, as distinct from considerations of interpersonal justice.¹³⁵ Indeed, it is this understanding of policy that those who object to its use have in mind. Many common duty arguments can easily be classified in accordance with this definition. So, for example, arguments relating to the claimant’s vulnerability, the degree of the defendant’s control over the risk, the claimant’s reliance on the defendant, and whether the duty would be inconsistent with an existing contract between the claimant and defendant, clearly relate to issues of

¹³¹ H Luntz, ‘The Use of Policy in Negligence Cases in the High Court of Australia’ in M Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish 2007) 83.

¹³² EJ Weinrib, ‘The Disintegration of Duty’ in M Stuart Madden (ed), *Exploring Tort Law* (Cambridge University Press 2005) 149.

¹³³ A Beever, *Rediscovering the Law of Negligence* (Hart 2007) 187 (emphasis added).

¹³⁴ A Robertson, ‘Policy-Based Reasoning in Duty of Care Cases’ (2012) 33 LS 119, 121.

¹³⁵ See Chapter Three, Section V.A.

interpersonal justice,¹³⁶ whilst arguments relating to the effect of recognising a duty on the legal system, the effect of recognising the duty on existing allocations of risk, and the effect recognising a duty would have on a class of persons including the defendant, clearly relate to considerations of community welfare.

Other arguments, however, do not so clearly lie on one side of the line or the other, and could conceivably be classified as arguments based on considerations of interpersonal justice *and* arguments based on considerations of community welfare.¹³⁷ The clearest examples of such argument are those relating to fears of indeterminate liability and those relating to conflicting duties.¹³⁸ In the case of conflicting duties, Robertson, who has written extensively on the appropriate classification of duty-based arguments,¹³⁹ suggests focussing on whether the concern with conflicting duties is with the behavioural consequences of recognising the conflicting duty, in which case the argument relates to community welfare, or whether the concern is with how the defendant could be expected to reconcile and discharge the competing duties, in which case it relates to interpersonal justice. In relation to concerns with indeterminate liability, the solution is less obvious; on the one hand, the argument could be seen as based on fears that recognising liability will result in a flood of claims in the courts, causing delays in the legal system and requiring additional public resources, and so based on considerations of community welfare, whilst on the other hand, it could be understood as demonstrating a lack of any proximate relationship between the parties, or as creating an unduly onerous burden on the defendant (given the number of potential parties), and so based

¹³⁶ Robertson (n 134) 122-23, 127.

¹³⁷ As Robertson, for example, notes, 'Like all legal dichotomies, the distinction between interpersonal justice and community welfare is at times difficult to draw': *ibid* 121.

¹³⁸ *ibid* 122.

¹³⁹ See, for example: *ibid*; A Robertson, 'Constraints on Policy-Based Reasoning in Private Law' in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009); A Robertson, 'Justice, Community Welfare and the Duty of Care' (2011) 127 LQR 370; and A Robertson, 'Rights, Pluralism and the Duty of Care' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart 2012).

on considerations of interpersonal justice.¹⁴⁰ For the purposes of this section, however, arguments based on indeterminacy will be classified as a policy consideration. A final type of argument that gives rise to difficulty relates to concerns over justiciability. Whilst this is often understood as a consideration of policy, according to Robertson, it is more convincingly understood as a question of whether the decision is suitable for judicial review, and so relating to neither community welfare nor interpersonal justice.¹⁴¹ Nolan, too, argues issues of justiciability relate to neither community welfare nor interpersonal justice, and are better understood as relating to questions of fault.¹⁴² Accordingly, for the purposes of this section, arguments based on justiciability were not classified as policy-based arguments.

The second difficulty with determining how often policy considerations were relied upon by the courts is what we mean by 'relied upon.' After all, there is a clear distinction between relying *solely* upon policy considerations, relying on policy considerations to support a conclusion already reached via other grounds, and stating that policy considerations would have been relevant, or even conclusive, were the facts different; yet all could be said to 'rely upon' policy considerations in some sense. Accordingly, for the purposes of this section, duty determinations were classified into the following four categories: policy considerations were not considered; policy considerations were considered but were held to be unconvincing or irrelevant on the facts; policy considerations supported the outcome of the duty enquiry *in addition to* non-policy considerations; policy considerations were determinative.

For the sake of clarity, duty determinations that relied *solely* on case law that had, in some way or another, relied on policy considerations, were *not* classified as having relied on policy; rather, they were deemed to have simply relied on the common law method. However, where the policy-based reasoning behind the case being relied upon was re-examined, the case

¹⁴⁰ See, for example, the discussion in *Beever* (n 133) 233-39. See also Robertson, 'Policy-Based Reasoning in Duty of Care Cases' (n 134) 121.

¹⁴¹ Robertson, 'Policy-Based Reasoning in Duty of Care Cases' (n 134) 124.

¹⁴² D Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, 566, 577.

was classified as having relied on policy, given the outcome depended not only on the result of the prior case, but whether the reasons supporting it were justified. When coding the data, a distinction was also drawn between pro-duty and anti-duty policy based arguments in order to determine whether such arguments were used primarily to support the imposition of a duty or to deny it. Finally, as policy considerations are relevant to notional duty only, factual duty determinations were excluded from the analysis.

ii. Results

The number of duty determinations that relied upon considerations of policy is detailed in the following table:

Table 11: The use of policy

Did the opinion rely on policy?	HCA	SCC	HoL/UKSC
Yes	54 (43%)	30 (55%)	68 (69%)
No	70 (57%)	24 (45%)	30 (31%)

Of those determinations that did 'rely upon' policy, whether for or against the imposition of a duty, the manner in which they did so (i.e. whether the policy argument was relied upon to support the imposition of a duty, and so a 'pro-duty' argument, or to deny it, and so an 'anti-duty' argument) was as follows:

Table 12: The manner in which policy was relied upon

Manner 'policy' relied upon	HCA		SCC		HoL/UKSC	
	Pro-duty	Anti-duty	Pro-duty	Anti-duty	Pro-duty	Anti-duty
Considered, but unconvincing or irrelevant on facts	3(5%)	31(57%)	3(10%)	14(47%)	5(7%)	23(34%)
Supported the conclusion in addition to non-policy reasons	9(17%)	18(33%)	6(20%)	9(30%)	11(16%)	31(46%)
Was determinative	0	5(10%)	1(3%)	6(20%)	5(7%)	10(15%)
(Total)	(12)(22%)	(54)(100%)	(10)(33%)	(29)(97%)	(21)(30%)	(64)(95%)

iii. Analysis

The data clearly demonstrates that the use of policy considerations in notional duty determinations varies considerably across the different jurisdictions. Whereas in the High Court

of Australia, only 43% of determinations relied on policy considerations, and in the Supreme Court of Canada 55% of determinations relied on policy considerations, in the House of Lords / UKSC almost 70% of determinations relied on considerations of policy.

However, whilst the data clearly demonstrates that policy considerations were relied upon, in some sense, in a considerable number of duty determinations, it equally clearly demonstrates that the duty enquiry is far from determined 'entirely' by policy considerations. This is made even clearer still when we see *how* the policy considerations were relied upon. In particular, whilst a significant number of decisions 'relied upon' policy considerations in some sense, the majority of determinations that did so either dismissed such considerations as unconvincing or irrelevant on the facts, or only used them to support a determination that could be, or had already been, reached via other grounds that did not depend on policy. Only in a minority of determinations were considerations of policy *solely* determinative of the outcome of the duty enquiry.

When policy-based arguments were relied upon, the data are clear that it was predominantly in order to deny the existence of a duty rather than to support it. This was most clearly illustrated in the High Court of Australia where 100% of the opinions that relied on policy considered anti-duty policy arguments, whilst only 22% considered pro-duty policy arguments, none of which, incidentally, were determinative. The situation was similar in both the Supreme Court of Canada and House of Lords / UKSC, where policy-based arguments were also overwhelmingly anti-duty in nature; again, anti-duty policy argument being considered in close to 100% of opinions that relied on policy, whilst less than one-third of those opinions considered pro-duty policy arguments. It is noteworthy that the limited role of pro-duty policy considerations calls into question the final stage of the *Caparo* and *Anns* tests. In particular, it is completely inconsistent with the idea that the *imposition* of a duty must be 'fair, just, and reasonable' in the circumstances. The true position, it seems, is that the imposition of a duty

must *not* be *unfair*, *unjust* and *unreasonable*. A similar imbalance in pro- and anti-duty policy considerations in trial and intermediate appellate level courts in Canada and England has previously been noted by Robertson.¹⁴³

A further factor that became clear during coding was that there was a distinct lack of variety in policy-based arguments used in favour of a duty. In particular, almost *every* pro-duty policy consideration was one of two arguments: that to impose a duty would encourage a higher standard of care,¹⁴⁴ or, particularly in the House of Lords / UKSC, that wrongs should be remedied.¹⁴⁵ In the High Court of Australia, the lack of variety was the most obvious, where of the 12 determinations that relied on pro-duty policy considerations, 10 relied on the argument that the imposition of a duty would result in a higher standard of care *only*, whilst the other 2 relied on the higher standard of care argument *in addition to* another pro-duty policy-based argument. In the Supreme Court of Canada, of the 10 determinations that relied on pro-duty policy-based arguments, 6 relied on the higher standard of care argument, the other 4 on more general policy-based arguments. And in the House of Lords / UKSC, of the 21 determinations that relied on pro-duty policy-based arguments, 17 relied on either the higher standard of care argument or the wrongs should be remedied argument, or both, with the other 4 relying on other pro-duty policy-based arguments. This homogeneity in relation to pro-duty policy based

¹⁴³ Robertson, 'Policy-Based Reasoning in Duty of Care Cases' (n134) 131. Note also Robertson points out (at *ibid*) that this is inconsistent Booth and Squires' claim that '[p]ost *Caparo*, the starting presumption is that a new category of duty will be recognised only when policy factors militate in favour of its recognition' (citing Cherie Booth and Daniel Squires, *The Negligence Liability of Public Authorities* (OUP 2006) 3.06).

¹⁴⁴ This was classified as a policy argument because it aims to deter harm in *future* cases, and so is justified on the basis that it benefits the *community*, not the claimant before the court.

¹⁴⁵ This is commonly described as a consideration of 'public policy.' See, for example, *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (CA) 663 (Bingham MR); and *D v East Berkshire Community NHS Trust* [2005] 2 AC 373 (HL) [100] (Lord Rodger). It must be noted, however, that the 'wrongs must be remedied' argument is particularly poor, and an almost perfect example of question begging, as it fails to explain *why* the careless causation of harm amounts to a wrong in the first place. For further criticism of this argument, see the comments of Lord Rodger in *D v East Berkshire Community NHS Trust* [2005] 2 AC 373 (HL) [100], and McBride and Bagshaw (n 66) 118-9. cf Andrew Robertson, 'On the Function of the Law of Negligence' (2012) 33 OJLS 31, 37-38.

arguments stood in stark contrast to the wide variety of anti-duty policy-based arguments relied upon by the courts.

Finally, despite there being a much greater variety of policy-based arguments being used against the imposition of a duty, some arguments were nevertheless used much more frequently than others. The most commonly used anti-duty policy argument appeared to be that the imposition of a duty would potentially lead to indeterminate liability. As was noted above, for the purposes of this section, this was classified as a policy-based argument; however, as we also saw, many argue that it is, in fact, better understood as an argument based on interpersonal justice.¹⁴⁶ Accordingly, if we were to re-classify the argument as one of interpersonal justice, the influence of ‘policy’ considerations reduces considerably, as the following amended table demonstrates:¹⁴⁷

Table 13: The use of policy considerations excluding those based on indeterminate liability?

Did the court rely on ‘policy’	HCA	SCC	HoL/UKSC
Yes (excl. indeterminate liability)	31 (25%)	22 (41%)	64 (65%)
Yes (incl. indeterminate liability)	54 (43%)	30 (55%)	68 (69%)
No (excl. indeterminate liability)	93 (75%)	32 (59%)	34 (35%)
No (incl. indeterminate liability)	70 (57%)	24 (45%)	30 (31%)

The change is most noticeable in the High Court of Australia, where the reclassification reduced the number of determinations that relied on considerations of policy by 23, from 54 to 31, meaning almost *half* ($31/54 = 42\%$) of the occasions on which the court relied on policy, it was relying *solely* on the indeterminate liability argument. Similarly, in the Supreme Court of Canada, reclassifying concerns of indeterminacy reduced the number of determinations that relied on policy by 8, from 30 to 22, a 26% drop. In the House of Lords / UKSC, however, the reclassification was of only modest effect; reducing the number of cases that relied on policy by 4 from 68 to 64, a 6% drop, meaning that only very rarely was the only policy argument

¹⁴⁶ See (n 140)

¹⁴⁷ The data from Table 11, representing the use of ‘policy’ when considerations of indeterminate liability were classified as policy, are also included.

considered by the court the argument that a recognition of liability could lead to indeterminate liability. It is also worth noting that whilst 12 of the 23 of times the indeterminacy argument was 'relied upon' in the High Court of Australia, and 2 of the 8 times it was relied upon in the Supreme Court of Canada, it was dismissed as irrelevant or unconvincing on the facts, the indeterminacy argument nevertheless clearly carries considerably more weight in the High Court of Australia and Supreme Court of Canada than in the House of Lords / UKSC. Although it is not immediately clear why, one possible explanation for the difference in the effect of arguments based on indeterminacy is the distinct approaches to pure economic loss taken by the courts. In particular, as we have seen, the House of Lords / UKSC generally approach pure economic loss cases (and omissions cases) on the basis that a general exclusionary rule exists, which can only be overcome where the claimant has assumed a responsibility towards the claimant. On this approach, there is little need for arguments based on indeterminacy; the exclusionary rule is *already* taken to be justified, and so arguments based on indeterminacy are simply not necessary. In the High Court of Australia, on the other hand, there is a much greater tendency for each case to be approached on its facts. Where this does occur, there *is* a need for any determination to not give rise to indeterminacy, and so argument based on indeterminacy must necessarily be considered.

F. To what extent do courts rely on academic literature?

Having spent so much time in earlier chapters examining the voluminous academic literature devoted to the duty enquiry, and much of this chapter exploring whether judicial opinions are consistent with those academic accounts of the duty enquiry, it would be interesting to see how much *explicit* influence that literature has had on the courts. In particular, do the courts appear to take academic literature into account when reaching their decisions, or do they ignore it entirely?

i. Methodology

Methodologically speaking, measuring the influence of *anything* on judicial opinions, from those opinions alone, is a notoriously difficult task. Opinions do not always state the full basis for their conclusions, and so any inferences about *why* a particular decision has been reached must be treated with caution.¹⁴⁸ Where, for example, academic literature was *in fact* influential, it is not hard to imagine its influence nevertheless being downplayed, or failing to be mentioned in the judge's opinion at all. As Stanton notes, 'There is ... no convention, equivalent to those which operate in the academic world, requiring a judge to attribute views drawn from another person's work. As a result, attributing the source of an idea is a matter of judicial taste.'¹⁴⁹ Similarly, it is not inconceivable that an opinion reached independently of academic literature might nevertheless cite literature in support of the conclusion in the hope of giving the conclusion added authority, particularly when that literature is by authors of eminence. As Stanton also notes, 'A judgment which did not consider the leading theoretical writing on the topic would be open to criticism and conversely, one which adopts the views of leading authors gains authority.'¹⁵⁰ It is also important to realise that opinions do not only cite academic work that was ostensibly influential. Academic work is frequently cited for entirely different purposes; sometimes it is cited to support the argument being advanced, sometimes to illustrate an argument that the court is rejecting. Measuring the influence of literature on the basis of citations would need to take this into account; literature that is criticised is obviously going to be less influential than literature that is praised. Admittedly, some of these limitations could likely be overcome by interviewing judges about their individual opinions and asking about the

¹⁴⁸ Hall and Wright (n 1) 96, 99-100. For example, Patterson has hypothesised that the reason for Lord Brown's low rate of dissent in the House of Lords was his office's proximity to the coffee room, which had the effect of encouraging other Law Lords to visit his office (on their way to get a coffee), become better friends with Lord-Brown, and thereby be more likely to agree with him on the outcome of cases. Whilst such a hypothesis is possible, and consistent with the data, whether or not that is the *actual* explanation, and so causative, is impossible to prove. See Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013) 158, 167-8.

¹⁴⁹ Keith Stanton, 'Use of Scholarship by the House of Lords in Tort cases' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists, and the Process of Judging* (Hart 2011) 206.

¹⁵⁰ *ibid* 221.

influence of individual pieces of academic literature. Such an undertaking, however, is well beyond the scope of this chapter. Further, even interviews would not be an infallible method for determining the true influence of academic literature, as many judges would likely have forgotten many of the ‘undisclosed’ reasons for their opinions, other than those opinions given most recently, and even if they could remember, are unlikely to confess to presenting others’ ideas as their own. Notwithstanding the limitations of measuring the influence of academic literature by reference to the number of citations, provided those citations are distinguished on the basis of their purpose, it nevertheless appears to be the most objective proxy for ‘influence,’ and avoids the difficulties with somehow determining how influential the literature was via some other discretionary means. Further, it seems relatively safe to infer that, *on the whole*, more citations of ostensibly influential literature implies more influence, whilst fewer or no citations implies less influence.

To take into account the differing purposes of citations, opinions were classified into the following four categories: did not cite academic literature; cited academic literature incidentally or in a way that did not appear to influence the conclusion; cited academic literature in support of the actual state of the law or in support of the conclusion;¹⁵¹ and, cited literature that conflicted with the conclusion as to the existence of a duty. Each opinion only counted once, regardless of the number of parties in the case.¹⁵² Individual opinions were also able to cite academic literature in more than one way.¹⁵³ Given that, as we saw in Chapter Four, factual duty issues appear to attract just as much academic commentary as notional duty issues, opinions concerning solely factual duty determinations *were* included in the data. For the sake of clarity, academic literature included journal articles, textbooks, book chapters, and research papers, but

¹⁵¹ Whilst citations in support of the conclusion and citations in support of the existing state of the law are, arguably, distinguishable, the line between the two was frequently blurred (e.g. a conclusion that followed from a particular conclusion as to the state of the law) and so they were classified together.

¹⁵² This avoided the difficulty of identifying which claimant / defendant combination the citation applied to, something that was rarely clear. There were 120 such opinions in the High Court of Australia, 103 in the House of Lords / UKSC, and 47 in the Supreme Court of Canada. See Section III.A.iii above.

¹⁵³ For example, it could cite literature both for *and* against the conclusion reached.

did not include law reform commission reports (or the international equivalents) or unpublished extra-judicial speeches. Finally, the frequency of citations per opinion was not considered; this was because it was felt that, say, nine opinions with no citations and one opinion with 10 citations, should not be equated with 10 opinions with one citation each, as the latter says more about the influence of academic literature *overall*, than the former.

ii. Results

The manner in which the opinions of the various courts cited academic literature was as follows:¹⁵⁴

Table 14: The use of academic literature in opinions

Manner academic literature cited	HCA	SCC	HoL/UKSC
Opinion did not cite	68(57%)	19(40%)	67(65%)
Opinion cited incidentally	13(11%)	7(15%)	10(10%)
Opinion cited as background or in support	46(38%)	26(55%)	32(31%)
Opinion cited in conflict with conclusion	8(7%)	3(6%)	7(7%)

iii. Analysis

Much of the data is unsurprising, as well as being relatively consistent across the different jurisdictions. In all jurisdictions, academic literature was predominantly cited to support the opinions' description of the law or the conclusion ultimately reached, including in more than half (55%) of all opinions in the Supreme Court of Canada. Academic literature was also only occasionally cited incidentally,¹⁵⁵ and was only rarely cited when it did not support the conclusion reached.¹⁵⁶ It is also worth noting that on *no* occasion could it be said that academic literature was deferred to absolutely; this should be somewhat expected, given that a complete

¹⁵⁴ The reason there are more data points than opinions is because many opinions cited academic literature for multiple purposes; for example, both for and against the conclusion. It is for this reason that the sum of the percentages adds to more than 100%. Note that percentages are given as a percent of total opinions per court.

¹⁵⁵ This was almost exclusively for historical purposes; for example, explaining how a doctrine of law emerged and developed over time.

¹⁵⁶ Stanton suggests that the primary reason courts cite academic literature that conflicts with their conclusions is to address the objections of the counsel who cited it, rather than for the purposes of academic discourse on how the law should be developed: Stanton (n 149) 214.

deferral to academic literature would arguably amount to an abrogation of judicial responsibilities. Despite much of the data being consistent across the jurisdictions, there was some variance in the number of opinions that did *not* cite any academic literature, accounting for 67% of opinions in the House of Lords / UKSC, 57% of opinions in the High Court of Australia, and only 40% opinions in the Supreme Court of Canada.

Whilst we have already noted the limits of measuring the influence of academic literature via the number of citations, a number of observations made during the coding appeared to suggest that, if anything, the *true* influence of academic literature is *under-represented* by the data. For example, in *Arthur JS Hall and Co v Simons*,¹⁵⁷ Lord Hoffmann stated that ‘in considering these questions I have been greatly assisted by a wealth of writing on the subject by judges, practitioners, and academics, in the United Kingdom and overseas. I hope that I will not be thought ungrateful if I do not encumber this speech with citations.’¹⁵⁸ In other words, academic literature *was* influential, yet no literature was cited. Accordingly, if we are measuring influence by citations, and the courts have explicitly said that they often do not cite academic work that has been influential, it seems safe to infer that the *actual* influence is greater than the *apparent* influence, based on a simple measure of the number of citations.

Academic literature therefore clearly appears to have *an* influence on the courts. Quantifying that level influence, however, is extremely difficult and it is next to impossible to determine in any reliable way whether or not academic literature actually influences the *outcome* of cases, and if so, to what extent. Perhaps Stanton, despite writing about the House of Lords only, captures the true position best:

The overall picture which emerges ... is of a senior judiciary which is prepared to be open about the material it uses to feed into its decisions, including the fact that it is considering and, at times, placing reliance on juristic writing. For academic jurists this holds out the possibility that their work may, albeit on rare occasions, have an impact on the development

¹⁵⁷ [2002] 1 AC 615 (HL).

¹⁵⁸ *ibid* 688

of the law, even though a precise assessment of the level of that impact is likely to be impossible.¹⁵⁹

IV. Conclusion

Chapter Five involved a content analysis of 118 duty decisions in the ultimate appellate courts of Australia, Canada, and the UK, over the 30 year period between 1985 and 2015. The chapter has explored differences in the types of cases heard, the frequency with which the courts rely on general duty tests, what the courts rely on when they do not rely on general duty tests, whether the courts approach notional duty in a categorical manner, the extent to which the courts rely upon policy considerations, and the extent to which academic literature *appears to* influence the courts. The study has identified a number of differences in the methodological approaches of the different courts.

Of the 118 cases included in the study, 40 were from the High Court of Australia, 39 were from the Supreme Court of Canada, and 39 were from the House of Lords / UKSC. Perhaps the greatest difference in the nature of the cases heard concerned the number of appeals from trial determinations compared to the number of appeals from strike outs and other pre-trial rulings. Whilst appeals from strike outs, etc, made up approximately 25% of the cases heard in both the High Court of Australia and the Supreme Court of Canada, they made up 55% of cases heard in the House of Lords and Supreme Court of the UK. And of the cases that were appealed from strike outs, etc, whilst they were almost invariably unsuccessful in both the High Court of Australia and the Supreme Court of Canada, in the House of Lords / UKSC, more often than not they were successful. The success rates of claimants also appeared to vary considerably, yet, due to the data's focus on the existence of a duty rather than the existence of liability, and each opinion counting only once, this particular data had to be viewed with caution.

¹⁵⁹ Stanton (n 149) 224.

The various courts approach to general duty tests also varied considerably. Whilst the High Court of Australia and the House of Lords / UKSC only relied on tests in a clear minority of cases, the use of general tests in the Supreme Court of Canada was almost universal. Though, upon closer analysis, general tests often appeared to be being often used at little more than labels for whatever arguments the court felt were appropriate for that particular category of case.

When duty tests were not used, a variety of other methodologies took their place. Unsurprisingly, what was described as the 'common law method' proved to be particularly popular in this regard. In the High Court of Australia, however, an *ad hoc* balancing approach also emerged as a particularly influential method. Despite the balancing approach giving rise to a number of serious objections, there is nevertheless a strong argument that it does not result in an overly dissimilar method of determination than general tests; that is, the difference relates more to form than to substance. In any event, the data are clear that a considerable number of cases are resolved without reference to the more well-known duty methodologies; in particular, general duty tests and the common law method. Whilst the apparent ability of the courts to resolve so many cases without recourse to general duty tests might be seen to support the claims of those who criticise the value of duty tests, it also highlights a clear lacuna in the conventional understanding of the courts' approach to resolving duty problems.

The majority of all duty determinations in all jurisdictions were categorical in nature. Of those determinations that were based on the exact facts of the cases, in the House of Lords / UKSC, these were almost exclusively purely economic loss and omissions cases involving assumptions of responsibility. In the High Court of Australia, however, fact-based determinations were neither confined to purely economic loss / omissions cases, nor those involving assumptions of responsibility. This appeared to be explained on the basis that the High

Court of Australia simply *is* more focussed on the particular facts of the case when approaching the notional duty issue.

Reliance upon policy considerations was also not as significant as some commentators have suggested. Despite courts generally seeing the use of policy considerations as perfectly appropriate, in many cases, including the majority of cases in the High Court of Australia, policy considerations were not mentioned at all, whilst in those cases that did consider policy-based arguments, the majority of such cases either dismissed them as irrelevant or unconvincing on the facts, or only used them to support a conclusion reached via means that did not depend on policy. Only in a small minority of cases were policy-considerations determinative of the outcome. Also of note was that policy considerations played an almost exclusively negative role, pointing *against* the existence of a duty rather than in *favour* of it; and of the occasions that they did point in favour of a duty, it was almost invariably on the basis that it would encourage a higher standard of care, or because wrongs should be remedied, both of which are arguments that give rise to significant difficulties.

Finally, the influence of academic literature was examined. In both the High Court of Australia and House of Lords / UKSC, the majority of opinions cited no academic literature at all, and in the Supreme Court of Canada, it was not far from half of all opinions. Where academic literature was mentioned, it was predominantly for the purposes of supporting the opinion's overview of the law or conclusion reached. Only rarely was academic literature cited that conflicted with the conclusion reached by the opinion. Although inferring the *influence* of the literature on the basis of the number of citations is fraught with difficulties, there were nevertheless indications that, if anything, the influence of academic literature is greater than the number of citations would suggest. *How* much greater, or how best to describe this influence (significant, moderate, overwhelming, etc) is not something that can be sensibly concluded from the data alone.

As was made clear from the beginning, as with all social science research, empirical legal research has limits, and the conclusions offered above should not be equated with scientific fact. As has been emphasised throughout, much of the coding required considerable discretion and so it is unlikely that if the study were repeated the results would be perfectly replicable. Having said that, there is no expectation that *any* empirical legal research should be perfectly replicable, only that it be replicable *in principle*,¹⁶⁰ and it is hoped that the methodology has been described, and applied, well enough that if the study were repeated, substantially similar results would be obtained, and the same trends would be observed; in particular, that despite the three common law jurisdictions examined adopting similar high level approaches to duty (i.e. the use of general tests, both factual and notional elements, not prohibiting the use of policy), significant differences in their approach to duty problems nevertheless exist.

¹⁶⁰ See (n 3).

7. Conclusion

Perhaps this is the ultimate lesson for legal theory in the attempted conceptualisation of the law of negligence and the expression of a universal formula for the existence, or absence, of a legal duty of care on the part of one person to another. The search for such a simple formula may indeed be a “will-o’-the wisp”. It may send those who pursue it around in never-ending circles that ultimately bring the traveller back to the very point at which the journey began. Thus we seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so ... So after 70 years the judicial wheel has, it seems, come full circle.

- Kirby J in *Graham Barclay Oysters Pty Ltd v Ryan* 211 CLR 540, [244].

I. Introduction

The basic task of the duty of care enquiry is to determine the circumstances in which carelessly caused damage is recoverable; where a duty of care exists, carelessly caused harm is compensable; absent a duty of care, carelessly caused harm may be inflicted with impunity. Today, negligence is the most commonly litigated of all the torts, and so understanding duty is more important than ever. Yet, so many discrete problems are now dealt with in the duty enquiry, that making sense of it has almost become an exercise in futility. Even the courts appear to have given up offering any sort of general guidance, seemingly only able to reconcile the various decisions by recourse to highly abstract concepts, such as what is ‘fair, just, and reasonable.’ Academic commentary, too, whilst often highly insightful, is typically of limited help, given the (inevitable) focus of the commentary on only discrete aspects of the enquiry. The sheer volume of commentary and cases also has the ironic effect of making the task of understanding duty even harder, given in the increased difficulty in identifying areas of agreement and disagreement.

The broad aim of this thesis has been to provide a detailed overview and analysis of the duty of care enquiry, drawing on both academic analyses and judicial experience in leading common law systems. It has sought to do this by: providing a detailed overview and analysis of

the history and development of the duty concept; isolating and articulating the discrete problems dealt with under the (typically) singular duty rubric; providing original commentary on and analyses of some of the existing debates; providing overviews and analyses of a number of often overlooked and under-analysed aspects of the duty enquiry; and, finally, exploring whether there are any *practical* differences in how the courts in different jurisdictions approach the duty problem. It is hoped that in doing so, the various duty decisions, and academic commentary, can be better understood as a whole.

II. Overview of main conclusions and findings

Despite the common law never having permitted recovery for *all* carelessly caused loss, the duty of care is a relatively modern invention, emerging only in the early nineteenth century, approximately 100 years after negligence was first beginning to be recognised as a tort in its own right. Yet the original function of duty was not to limit the potentially unbounded scope of liability negligence; on the contrary, it was first used to *expand* the scope of the fledgling tort, by converting claims that were *not* actionable in contract into claims that *were* actionable in tort. As negligence gained popularity as a cause of action, however, duty soon transformed from a method of distinguishing actions based on contract from actions based on tort, to an element of the law of negligence; absent a pre-existing 'duty,' no claim in negligence could exist. Initially, duties were only recognised in a finite list of discrete situations, based principally on the historic forms of action. By the late nineteenth century, however, courts began seeking to explain *why* a duty existed in one situation but not another. The earliest attempt at this was provided by Brett MR, who explained the existence of a duty in terms of 'foreseeability.' Due to the potentially far-reaching effects of such a broad formulation, Brett MR's explanation was soon rejected. Fifty years later, however, and following considerable uncertainty surrounding the appropriate role for foreseeability in the negligence enquiry, Brett MR's foreseeability-based formula was seized upon by Lord Atkin, who used it as the basis of his 'neighbour principle.' It was at this point that

the existence of a duty of care began to be popularly seen as depending on the satisfaction of a general formula.

Despite a shaky start, Lord Atkin's idea that 'in English law there must be, and is, some general conception [i.e. a duty formula] of relations giving rise to a duty of care, of which the particular cases found in the books are but instances,'¹ eventually gained widespread acceptance by the mid-twentieth century, and since that time considerable effort has been devoted to finding and articulating that general conception. The product of those efforts has been a variety of general duty tests, each of which has been subject to considerable limitations, generally due to their highly abstract nature; indeed, the courts regularly concede as much. As Kirby J notes in the quote at the start of the chapter, the search for *any* general conception, except in the most abstract (an unhelpful) of terms, is surely a 'will-o'-the-wisp.'²

Yet whilst there may be little to be gained by seeking to understand duty by reference to general formulas, there is much to be gained by focussing on the *anatomy* of the duty enquiry, and the general properties of duty decisions. The first step lies in recognising that the duty enquiry performs a dual role; first, determining whether the broad situation to which the facts belong *ought* to be subject, in principle, to the laws of negligence ('notional duty'), and, second, in determining whether the particular defendant owed a duty to the particular claimant ('factual duty'). When we realise that factual duty is determined on the basis of whether harm to the particular claimant was foreseeable, it soon becomes clear that the issue is able to be dealt with via the fault and remoteness enquiries, and so factual duty is, in fact, functionally superfluous. Further, the arguments that it should nevertheless remain as part of the duty enquiry in order to prevent negligence becoming an abstract enquiry are unconvincing. Removing the foreseeability element from the duty enquiry would, in fact, lead to greater simplicity and prevent conflation of entirely separate issues.

¹ *Donoghue v Stevenson* [1932] AC 562 (HLL), 580 (Lord Atkin).

² Note that Kirby J was quoting Lord Oliver in *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL), 633.

This leaves the duty enquiry as a notional question only, which, too, is best understood as consisting of two discrete stages. The first step is to identify the broad 'situation' or 'category of case' under consideration. Such situations, in order to avoid confusion, must reference the kind of harm suffered, the way it occurred, and the relationship of the parties to each other. Situations should also not be formulated in overly narrow nor overly broad terms. Formulations of notional duty as a 'duty to do X,' which are becoming increasingly common in Australia, are both awkward and focus the attention of the court on the wrong things, and so should be avoided. Courts should also be mindful when speaking in terms of the 'scope' of the duty, given the confusion that can arise from the various, and completely inconsistent, meanings ascribed to the term. Policy considerations also appear to be helpful in identifying whether a particular situation *should* or *should not* be subjected to a notional duty; and, whilst such considerations nevertheless give rise to a number of objections, none seems to be convincing enough to warrant prohibiting the use of policy entirely.

If the court determines that the relevant situation does not give rise to a notional duty, the court should then move to the second step, and ascertain whether, despite reasons why the broad situation should not attract a notional duty, a notional duty should nevertheless exist on the facts because the defendant assumed a responsibility towards the claimant. Admittedly, this is not always the approach taken by the courts, but if it were, it would simplify the duty enquiry considerably. When determining whether the defendant assumed a responsibility to the claimant, courts must be careful here not to conflate the normative issue of whether the defendant *should* have assumed a responsibility, with the factual issue of whether the defendant *did* (albeit in an objective sense) assume a responsibility towards the claimant. If the defendant did assume a responsibility towards the claimant, the claimant will overcome the otherwise exclusionary nature of the category and a notional duty will exist. Courts should also be mindful that many of the problems dealt with under the notional duty enquiry can be dealt with at other stages of the negligence enquiry. Whilst doing this would simplify the duty enquiry

even further, it seems unlikely to occur until further guidance is given in relation to the scope of the other stages of the negligence enquiry.

When we move from what the courts *should* do, to what they *do* do, a number of stark contrasts emerge among the ultimate appellate courts of the three Commonwealth jurisdictions examined. General tests, for example, whilst used almost universally in the Supreme Court of Canada, were of only marginal importance in both the House of Lords / UKSC and High Court of Australia, the former preferring to rely primarily on existing case law, the latter on an *ad hoc* balancing approach largely resembling the currently in vogue salient features test. Where the existence of a notional duty was based on the facts of the case, in the House of Lords / UKSC this tended to only occur in cases involving omissions or purely economic loss where the defendant had assumed a responsibility to the claimant; in the High Court of Australia, however, fact-based duty determinations were not so confined, often occurring in circumstances where confining the determination to the facts of the case seemed unnecessary and confusing, reducing the precedential value of the decision, and seemingly often the result of conflating issues of fault with issues of duty. The use of policy also varied among the jurisdictions; being 'relied upon' 60% more frequently in the House of Lords / UKSC than the High Court of Australia. In all jurisdictions, however, policy was used predominantly to justify the denial of a duty rather than its imposition. Despite the different jurisdictions all sharing relatively similar high level approaches to duty, the way it is approached in practice varies considerably.

III. Conclusion

Understanding the duty enquiry is no easy task. It is hoped, however, that this thesis has provided some guidance on what is wrong with the courts' current approach to duty, as well as provided a general framework through which the various debates and cases can be understood. It is also hoped that the slightly amended duty framework advocated in this thesis, particularly

in chapters four and five, will help future courts to approach duty problems in a more structured way, so that they are no longer feeling their way through the enquiry without rudder or compass. This is not to say that determining when a duty does or does not exist is reduced to a simple algorithm; indeed, 'What is the relevant duty situation?', 'Should this broad situation be protected by the laws of negligence?', 'Is it appropriate to rely on policy considerations in this case?', and 'Can the defendant be said to have assumed a responsibility towards the claimant?' do not give rise to any easy answers. However, by isolating the discrete issues dealt with in the duty enquiry and dealing with them in a more logical fashion, it is hoped that determining when a duty of care does and does not exist should at least be *easier*.

Appendix

Duty cases from the High Court of Australia

1. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424
2. *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340
3. *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479
4. *Hawkins v Clayton* (1988) 164 CLR 539
5. *Bus v Sydney County Council* (1989) 167 CLR 78
6. *Gala v Preston* (1991) 172 CLR 243
7. *Nagle v Rottnest Island Authority* (1993) 177 CLR 423
8. *Bryan v Maloney* (1995) 182 CLR 609
9. *Hill v Van Erp* (1997) 188 CLR 159
10. *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241
11. *Pyrenees Shire Council v Day* (1998) 192 CLR 330
12. *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431
13. *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1
14. *Perre v Apand* (1999) 198 CLR 180
15. *Agar v Hyde* (2000) 201 CLR 552
16. *Jones v Bartlett* (2000) 205 CLR 166
17. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254
18. *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1
19. *Brodie v Singleton Shire Council* (2001) 206 CLR 512
20. *Sullivan v Moody* (2001) 207 CLR 562
21. *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317
22. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540
23. *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269
24. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515
25. *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 217 CLR 469
26. *Neindorf v Junkovic* (2005) 222 ALR 631
27. *Vairy v Wyong Shire Council* (2005) 223 CLR 422
28. *Mulligan v Coffys Harbour City Council* (2005) 223 CLR 486
29. *Harriton v Stephens* (2006) 226 CLR 52
30. *Waller v James* (2006) 226 CLR 136
31. *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215
32. *Sydney Water Corporation v Turano* (2009) 239 CLR 51
33. *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390
34. *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420
35. *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1
36. *Miller v Miller* (2011) 242 CLR 446
37. *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361
38. *Barclay v Penberthy* (2012) 246 CLR 258
39. *Hunter and New England Local Health District v McKenna* (2014) 314 ALR 505
40. *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 88 ALJR 911

Duty Cases from the Supreme Court of Canada

1. *BDC Ltd v Hofstrand Farms Ltd* (1986) 26 DLR (4th) 1
2. *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481
3. *Crocker v Sundance Northwest Resorts Ltd* (1988) 51 DLR (4th) 321
4. *Rothfield v Manolakos* (1989) 63 DLR (4th) 449
5. *Just v British Columbia* (1989) 64 DLR (4th) 689
6. *Fletcher v Manitoba Public Insurance Co* (1990) 74 DLR (4th) 636
7. *Canadian National Railway Co v Norsk Pacific Steamship Co* (1992) 91 DLR (4th) 289
8. *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261
9. *BG Checo International Ltd v British Columbia Hydro and Power Authority* (1993) 99 DLR (4th) 577
10. *Queen v Cognos Inc* (1993) 99 DLR (4th) 626
11. *Hall v Hebert* (1993) 101 DLR (4th) 129
12. *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1993) 107 DLR (4th) 169
13. *Brown v British Columbia (Minister of Transportation and Highways)* (1994) 112 DLR (4th) 1
14. *Swinamer v. Nova Scotia (Attorney-General)* (1994) 112 DLR (4th) 18
15. *Galaske v O'Donnell* (1994) 112 DLR (4th) 109
16. *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193
17. *Stewart v Pettie* (1995) 121 DLR (4th) 222
18. *D'Amato v Badger* (1996) 137 DLR (4th) 129
19. *Hercules Managements Ltd v Ernst & Young* (1997) 146 DLR (4th) 577
20. *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* (1997) 153 DLR (4th) 385
21. *Lewis (Guardian ad Litem of) v British Columbia* (1997) 153 DLR (4th) 594
22. *Ryan v Victoria (City)* (1999) 168 DLR (4th) 513
23. *Dobson (Litigation Guardian of) v Dobson* (1999) 174 DLR (4th) 1
24. *Ingles v Tutkaluk Construction Ltd* (2000) 183 DLR (4th) 193
25. *Martel Building Ltd v Canada* (2000) 193 DLR (4th) 1
26. *Cooper v Hobart* (2001) 206 DLR (4th) 193
27. *Edwards v Law Society of Upper Canada* (2001) 206 DLR (4th) 211
28. *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193
29. *Young v Bella* (2006) 261 DLR (4th) 516
30. *Childs v Desormeaux* (2006) 266 DLR (4th) 257
31. *D (B) v Halton Region Children's Aid Society* (2007) 284 DLR (4th) 682
32. *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620
33. *Mustapha v Culligan of Canada Ltd* (2008) 293 DLR (4th) 29
34. *Design Services Ltd v Canada* (2008) 293 DLR (4th) 437
35. *Holland v Saskatchewan (Minister of Agriculture, Food and Rural Revitalization)* (2008) 294 DLR (4th) 193
36. *Fallowka v Royal Oak Ventures Inc* (2010) 315 DLR (4th) 577
37. *Broome v Prince Edward Island* (2010) 317 DLR (4th) 218
38. *Elder Advocates of Alberta Society v Alberta* 331 DLR (2011) (4th) 257
39. *British Columbia v Imperial Tobacco Canada Ltd; Knight v Imperial Tobacco Canada Ltd* (2011) 335 DLR (4th) 513

Duty Cases from the House of Lords and UKSC

1. *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] 1 AC 785
2. *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241
3. *Curran v Northern Ireland Co-Ownership Housing Association* [1987] AC 718
4. *Ogwo v Taylor* [1988] 1 AC 431
5. *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53
6. *D&F Estates Ltd v Church Commissioners for England and Wales* [1989] 1 AC 177
7. *Calveley v Chief Constable of Merseyside Police* [1989] 1 AC 1228
8. *Smith v Eric S Bush* [1990] 1 AC 831
9. *Caparo Industries plc v Dickman* [1990] 2 AC 605
10. *Murphy v Brentwood District Council* [1991] 1 AC 398
11. *Department of the Environment v Thomas Bates & Son* [1991] 1 AC 499
12. *Alcock v Chief Constable of South Yorkshire* [1992] AC 310
13. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145
14. *White v Jones* [1995] 2 AC 207
15. *Spring v Guardian Assurance plc* [1995] 2 AC 296
16. *X (Minors) v Bedfordshire County Council and Others* [1995] 2 AC 633
17. *Page v Smith* [1996] 1 AC 155
18. *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] 1 AC 211
19. *Stovin v Wise* [1996] 1 AC 923
20. *White v Chief Constable of South Yorkshire Police* [1998] 2 AC 455
21. *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830
22. *Waters v Commissioner of Police For The Metropolis* [2000] 1 WLR 1607
23. *Barrett v Enfield* [2001] 2 AC 550
24. *W v Essex County Council* [2001] 2 AC 592
25. *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619
26. *Arthur JS Hall & Co v Simons* [2002] 1 AC 615
27. *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309
28. *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057
29. *Sutradhar v Natural Environment Research Council* [2004] PNLR 30
30. *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373
31. *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495
32. *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181
33. *Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of Sussex Police* [2009] 1 AC 225
34. *Jain v Trent Strategic Health Authority* [2009] 1 AC 853
35. *Mitchell v Glasgow City Council* [2009] 1 AC 874
36. *Jones v Kaney* [2011] 2 AC 398
37. *Smith v Ministry of Defence* [2014] 1 AC 52
38. *Cramaso LLP v Ogilvie-Grant* [2014] 1 AC 1093
39. *Michael v The Chief Constable of South Wales Police* [2015] 2 WLR 343

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