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Robinson v. Chief Constable of West Yorkshire Police: Taking Duty Back to Basics

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Abstract: In the United Kingdom, as in some other parts of the Commonwealth, the courts have long embarked on a search for a general formula which can be applied to determine whether a duty of care arises in any given negligence case. In 2018, the United Kingdom Supreme Court delivered its judgment in *Robinson v. Chief Constable of West Yorkshire Police*, in which a plurality strikingly rejected as misconceived attempts to identify such a general test. Duty cases, the Supreme Court held, are to be decided by reference to precedent where applicable, or (where no such precedent applies) by analogy with the existing authorities. This approach curtails the role of policy in the duty of care enquiry. In this article, the decision in *Robinson* is put in context and its significance explained. It is argued that the approach to the duty question adopted in *Robinson* should be welcomed. Not only is that approach the best of the alternatives available, but it is the only one that is consistent with the methodology of the common law and the rule of law.

Keywords: duty of care; negligence; *Robinson v. Chief Constable of West Yorkshire Police*

1 Introduction

Few legal issues have excited as much attention, academic and judicial, as the duty of care element of the tort of negligence. Leading duty cases have long formed the foundation of torts textbooks, and a steady stream of judgments regarding the duty concept has flowed from ultimate appellate courts in the United Kingdom and elsewhere in the Commonwealth. It is unsurprising that the duty element has garnered so much attention. In earlier times, before the demise of the civil jury in most of the common law world, it played a vital role in maintaining judicial control over negligence claims. In the modern era, the duty concept enables courts to lay

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down categorical rules regarding the reach of negligence liability as a matter of law.¹ Because the existence or otherwise of a duty of care is a question of law, the duty element is often used as vehicle for disposing of claims without a trial via the summary judgment procedure or facility to strike out the claim on the ground that it discloses no cause of action.

It is probably fair to say that the duty concept is a barometer for judges' sentiments regarding tort law. Duty cases often provide an indication as to whether particular judges would prefer tort law to play an enlarged or reduced role in society. They also offer a window into the function that judges discharge, and perceive themselves as discharging, in the tort process. They sometimes reveal the courts to be politically active institutions. On other occasions, they show judges remaining (or appearing to remain) aloof from the types of policy debates that typify the legislative process. The recent decision of the United Kingdom Supreme Court in *Robinson v. Chief Constable of West Yorkshire Police*,² on which this article focuses, bears all of these points out. As we will see, it involves a dramatic return to the conventional methodology of the common law.

Before turning to *Robinson* itself, it is important to provide some context regarding the English law concerning the duty of care concept. In 1932, the House of Lords delivered judgment in the famous case of *Donoghue v. Stevenson*.³ In his speech, Lord Atkin articulated the idea that one owes a duty of care to one's "neighbours".⁴ This led him to hold that a manufacturer of ginger beer owed a duty of care to a consumer who was allegedly injured by ingesting the remains of a snail which had been sealed within one of its bottles. The fact that the consumer and manufacturer were not in privity of contract, because the bottle had been sold via a retailer and to a friend of the consumer, did not preclude this conclusion.⁵

Gradually, this "neighbour principle" fuelled the belief that it was possible and, indeed, desirable to formulate a general test for the existence of a duty of care, that is

1 See Donal Nolan, *Deconstructing the Duty of Care*, 129 Law Q. Rev 559, 567–573 (2013).

2 [2018] UKSC 4, [2018] AC 736.

3 [1932] AC 562 (HL).

4 *Id.*, 580 ("acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. 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").

5 The sister case in the United States is, of course, *MacPherson v. Buick Motor Co.*, 111 NE 1050 (NY 1916).

to say, an equation that could be applied in all types of negligence cases to produce an answer to the duty issue. Thus, in 1970 Lord Reid said that the time had come “when we can and should say that [the ‘neighbour principle’] ought to apply unless there is some justification or valid explanation for its exclusion”.⁶ In 1978, in *Anns v. Merton London Borough Council*, Lord Wilberforce drew upon Lord Reid’s *dictum* in laying down a general two-stage test for the determination of the duty issue.⁷ This marked the high point of what has sometimes been dubbed the “modern approach” to the duty enquiry. The first step of the *Anns* test involved asking whether injury to a person such as the claimant was a reasonably foreseeable result of a failure by the defendant to exercise reasonable care. If that stage was satisfied, a duty would ordinarily arise unless the defendant was able to show by reference to policy factors that a duty should not be imposed.

Eventually, concerns that the *Anns* test involved an overly expansive approach to the duty concept and had led to unpredictable outcomes resulted in its being replaced. For the better part of three decades, the UK courts frequently applied an alternative, more conservative, general duty test. This was the so-called “*Caparo* test” (or “three-stage test”), which was derived from the speech of Lord Bridge in *Caparo Industries plc v. Dickman*,⁸ a case decided in 1990. Pursuant to that test a duty of care would arise where (1) injury to a person such as the claimant was reasonably foreseeable, (2) the parties were in a relationship of “proximity” and (3) imposing a duty would be “fair, just and reasonable”. The *Caparo* test, like its predecessor, was a policy-sensitive test, owing in large part to its third and final stage. Like the *Anns* test, it too was treated (by those who employed it) as a universal solution to the duty issue.

These matters stood until the litigation in *Robinson*. As we shall see, the Supreme Court characterised duty cases that had been decided over the course of the preceding decades as having been largely misunderstood and rejected the suggestion that the duty enquiry could be dealt with by way of a general test. Relatedly, the Supreme Court left a far smaller role for the deployment of policy by judges in duty cases and placed heavy emphasis on the importance of principle and precedent. On any measure, therefore, *Robinson* is a canonical case, and one of the most significant that the Supreme Court has decided in its relatively brief history (having replaced the House of Lords as the apex court in the United Kingdom in 2009) in any branch of the law.

In addition to outlining the way in which the UK courts had, pre-*Robinson*, searched for a general test for the existence of a duty of care, it is important that we explain a few other matters by way of background. One vital point is that in cases

6 *Home Office v. Dorset Yacht Co* [1970] AC 1004 (HL) 1027. See also at 1054 (Lord Pearson).

7 [1978] AC 728 (HL) 751–752.

8 [1990] 2 AC 605 (HL) 617–618.

involving foreseeable physical damage caused by a positive act, the defendant will be hard pressed to sustain any argument that no duty was owed.⁹ It is only in rare circumstances, frequently where a judge has gone (or been led) astray, that any duty issue arises in such cases.¹⁰ In this regard, it appears that the relevant English law corresponds with that in jurisdictions in the United States.¹¹

Conversely, there are well-established no-duty categories, all of which are subject to one or more exceptions. The main such categories are as follows. First, the UK courts have established a bright-line rule to the effect that defendants do not generally owe a duty of care to guard against the risk of causing the claimant to suffer pure economic loss. The primary exception to this rule is where the defendant has assumed responsibility to take reasonable care to protect the claimant from suffering such loss.¹² Second, there is usually no duty of care owed by defendants who have merely failed to act (or, as the UK courts now tend to put it, “failed to confer a benefit” on the claimant). This no-duty rule is subject to a series of exceptions,¹³ including where the defendant has assumed a positive duty to look out for the claimant’s interests. Third, a defendant who negligently kills, injures or imperils another frequently owes no duty of care to a third party who suffers mental harm as a result.¹⁴

⁹ See JAMES GOUDKAMP & DONAL NOLAN, WINFIELD & JOLOWICZ ON TORT §5.014 (20th ed. 2020).

¹⁰ Examples include *Sam v. Atkins* [2005] EWCA Civ 1452; *Darnley v. Croydon Health Services NHS Trust* [2017] EWCA Civ 151, [2018] QB 783 (reversed on appeal: [2018] UKSC 50, [2019] AC 831).

¹¹ See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 78 (2010) (“Speaking generally, negligence suits arising out of acts by a defendant that have caused physical injuries and property damage to a plaintiff—or at least have done so without the intervention of other actors’ wrongful acts—tend not to raise difficult duty questions. This is because courts have fashioned the relevant duty rules quite broadly. For example, it is common for courts to say that any person who engages in a course of conduct—whether walking, driving, operating a machine, or providing a service—owes a duty to exercise due care against *physically harming* anyone whom he might *reasonably foresee* physically harming were he to perform that conduct carelessly”). See also §7 of the *Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm* (2010), which provides “(a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification”.

¹² See *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC (HL). Regarding the assumption of responsibility concept, see Donal Nolan, *Assumption of Responsibility: Four Questions*, 72 C.L.P. 123 (2019).

¹³ For prominent treatments, see *Smith v. Littlewoods Organisation Ltd* [1987] AC 241 (HL) 272–274 (dealing with exceptions to the closely allied principle that there is ordinarily no duty to take steps to control third parties); *Stovin v. Wise* [1996] AC 923 (HL) 944.

¹⁴ See *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL).

2 The Facts of *Robinson* and Decisions Below

One afternoon in 2008, a police officer witnessed an apparent drug deal in a park in Huddersfield, a town in the north of England. He thereafter shadowed the suspect, who entered a bookmakers. The officer decided not to make an arrest at this stage partly due to a concern that doing so would endanger the other customers. By the time that the suspect had left the bookmakers, more police officers had arrived on the scene and the decision was made to arrest him in the street. However, the suspect resisted and in the ensuing scuffle a “relatively frail” 76-year-old pedestrian was knocked over and injured. She sued the police for negligence.

The trial judge found that the officers concerned had carried out the arrest carelessly. Nevertheless, he held that the police were not liable in view of the decision of the House of Lords in *Hill v. Chief Constable of West Yorkshire*.¹⁵ He said that case conferred on the police an immunity from suit in negligence. In *Hill*, the House had held that the police did not owe a duty of care to a woman who had been murdered by a notorious serial killer. Although Lord Keith had focused in his speech in *Hill* mainly on what he considered to be the lack of “proximity” between the police and the murder victim, he also relied on several policy considerations which he considered militated against recognition of a duty of care. These included a concern that imposing liability might result in police work being carried out “with a detrimentally defensive frame of mind”.¹⁶

The Court of Appeal dismissed an appeal by the claimant in *Robinson*. Hallett LJ, delivering a judgment with which the other members of the Court of Appeal agreed, applied the three-stage test derived from *Caparo*. The third stage of the test meant, Hallett LJ said, that a court would “only impose a duty where it considers it right to do so on the facts”.¹⁷ It would rarely be right to do so, she remarked, where the police were sued for negligence in respect of their conduct “in the course of investigating and suppressing crime and apprehending offenders”, since the interests of the public would not be best served by imposing a duty of care in such cases.¹⁸ Hallett LJ also argued that “provided the police act within reason, the public would prefer to see them doing their job and taking drug dealers off the street”. Any risk thereby posed to passers-by such as the claimant was “trumped by the risk to society as a whole”.¹⁹ Hallett LJ additionally considered that the claimant had been injured by the suspect

¹⁵ [1989] AC 53 (HL).

¹⁶ *Id.*, 63 (Lord Keith).

¹⁷ *Robinson v. Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15, [2014] P.I.Q.R. P14 [40].

¹⁸ *Id.*, [46].

¹⁹ *Id.*, [47].

and that the police had simply failed to protect her from him.²⁰ Finally, Hallett LJ held that the police officers had not acted negligently.

This short summary of Hallett LJ's judgment does not, of course, do full justice to her analysis. Nevertheless, it is instructive to draw attention to three features of her reasoning. The first is that Hallett LJ invoked the *Caparo* test, and particularly the third stage thereof, to justify what appears to be an untrammelled discretion whereby a court (seemingly at any level of the hierarchy) can refuse to recognise a duty of care on the ground that it considers it "right to do so" on the facts of the individual case. That approach seems to leave minimal or no room for the doctrine of precedent. A judge can simply hold that no duty of care is owed even if another court in a similar case has reached the contrary conclusion. The second is that Hallett LJ appealed to public sentiment. She referred to what the public would prefer, which is an empirical claim for which there was apparently no empirical evidence (certainly, Hallett LJ cited none). And the third is that Hallett LJ characterised the conduct of the police – a decision to carry out an arrest on which they then acted – as a mere failure to protect the claimant from being injured by the suspect. She reached that conclusion despite the fact that, independently of the attempt to arrest him, the suspect posed no danger to the claimant.

Pausing here, it is obvious that something went seriously wrong with the Court of Appeal's decision. A law-abiding senior citizen who had been negligently injured by positive conduct on the part of the police was told that no liability could arise because, in the Court of Appeal's view, imposing such liability would have detrimental consequences. She was also told that the court of public opinion would (if asked, though it had not been) take the same view. None of this is consistent with the general principle, to which we have referred above, that a duty of care ordinarily arises in cases in which foreseeable physical damage is caused by a positive act. Here, not only was the very risk that materialised foreseeable but it was actually foreseen. These are far from the only difficulties with the Court of Appeal's decision. But it is clear, even at this stage and for these brief reasons, that it was deeply flawed.

3 An Intervening Development

The claimant appealed to the Supreme Court. While her appeal was pending, the Supreme Court decided another police negligence case of great significance, namely *Michael v. Chief Constable of South Wales Police*.²¹ The decision in *Robinson* cannot be

²⁰ *Id.*, [53].

²¹ [2015] UKSC 2, [2015] AC 1732. See further James Goudkamp, *A Revolution in Duty of Care?*, 131 *LAW Q. REV.* 519 (2015); Sandy Steel, *State Liability for Failure to Save a Person from Being Killed*, *J. TORT LAW* (forthcoming).

properly understood without our saying a few words about that case. In *Michael*, it was held by a majority of the Supreme Court that the police did not owe a duty of care to a woman who made an emergency call reporting a threat to kill her, and who was then murdered before the police arrived at her house. Although the facts of the two cases were very different, the reasoning in *Michael* cast significant doubt on the Court of Appeal's decision in *Robinson*, for three main reasons.

First, *Michael* poured cold water on the idea that duty of care questions could be resolved by the application of a general test. In his majority judgment, Lord Toulson said:

From time to time the courts have looked for some universal formula or yardstick [for determining duty of care issues], but the quest has been elusive. And from time to time a court has used an expression in explaining its reasons for reaching a particular decision which has then been squashed and squeezed in other cases where it does not fit so aptly.²²

Lord Toulson then contended that there was no such thing as a *Caparo* test. He said that “[p]aradoxically, [the relevant] passage in Lord Bridge’s speech [in *Caparo*] has sometimes come to be treated as a blueprint for deciding cases, despite the pains which the author took to make clear that it was not intended to be any such thing”.²³ By explicitly repudiating the use of the *Caparo* test, Lord Toulson had undermined the main basis for the Court of Appeal’s decision in *Robinson*.

The second reason has to do with the fact that the decision in *Michael* was premised on the logic that public defendants and private defendants were essentially subject to the same rules as far as the law of negligence was concerned.²⁴ In *Michael*, this “equality principle” had favoured the defendants. That was because, as the Supreme Court emphasised, just as a private individual would not have been legally obliged to answer the woman’s cry for help, nor did any liability attach to the police for not doing so expeditiously. However, on the facts of *Robinson* this equality principle favoured the claimant, since a private individual who carelessly collided with a passer-by in the street would ordinarily be subject to negligence liability for any injury that resulted.

Thirdly, while both the trial judge and Court of Appeal in *Robinson* had considered that the police enjoyed a broad immunity from negligence liability pursuant to *Hill*, in *Michael* Lord Toulson had expressly denied that *Hill* supported any such idea. On the contrary, he said that *Hill* had “recognised that the general law

²² [2015] UKSC 2, [2015] AC 1732, [102]–[103].

²³ *Id.*, [106].

²⁴ *Id.*, [101] (remarking that the general principles regarding omissions “have been worked out for the most part in cases involving private litigants, but they are equally applicable where D is a public body”).

of tort applies as much to the police as to anyone else”,²⁵ and that although the House of Lords had admittedly used the language of “immunity”, this turn of phrase had been “not only unnecessary but unfortunate”.²⁶ This was said to be because the courts’ refusal to impose a duty on the police to rescue victims of crime flowed not from any immunity but from the familiar rule that there is ordinarily no liability for omissions.²⁷

4 The Supreme Court’s Decision

Unsurprisingly given the decision in *Michael*, the Supreme Court unanimously allowed the claimant’s appeal in *Robinson* and held that the police had owed her a duty of care. Delivering the main judgment, Lord Reed (who had been one of the judges who heard the appeal in *Michael*, and who had concurred with Lord Toulson’s reasons) said that the case involved positive action by the police rather than, as the Court of Appeal had thought, an omission. He observed that the claimant’s argument was “not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured”.²⁸ This is clearly correct. A good litmus test for determining whether a case involves an omission is to ask whether, if the defendant were removed from the situation altogether, the claimant would still have been injured. Plainly, that test was not satisfied in *Robinson*: had the officers not sought to arrest the suspect, the tussle would not have happened and the claimant would not have been hurt. Since *Robinson* was a case of positive action causing foreseeable physical injury, that was sufficient, applying orthodox negligence principles, to establish that the officers had owed the claimant a duty to take reasonable care to guard against the risk of causing her to suffer physical injury. As for the breach of duty requirement, Lord Reed, agreeing with the trial judge and disagreeing with the Court of Appeal, concluded that it was satisfied on the basis that the officers should have noticed the claimant and delayed the arrest until she was out of harm’s way.²⁹

In addition to correcting the Court of Appeal’s error in holding that the omissions doctrine was engaged when it was not, Lord Reed seized the opportunity that the appeal presented to restate the proper approach to the determination of whether a duty of care was owed. He distinguished between those categories of relationship in which the courts had already decided a duty of care did or did not arise and those in which no such determination had been made. With regard to the former, he said that “there are many situations in which it has been clearly established that a duty of care

²⁵ *Id.*, [37].

²⁶ *Id.*, [44].

²⁷ *Id.*, [115]–[116].

²⁸ *Id.*, [73]. See also at [82] (Lord Mance) and [122] (Lord Hughes).

²⁹ *Id.*, [75]–[78].

is or is not owed”, giving as examples the duties of care owed by “motorists to other road users, by manufacturers to consumers, by employers to their employees, and by doctors to their patients”.³⁰ In such cases, once the decision has been made that a duty of care is owed, then that decision, Lord Reed made clear, will apply to all future cases of the same kind. Furthermore, since in cases of this type “a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles” it is “unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable”, unless, that is, the court has been invited to depart from an established precedent.³¹

As for cases falling within the latter category (“novel type[s] of case”), Lord Reed said:

[T]he characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case.³²

In view of the foregoing, Lord Reed described the overall approach that the courts should take in deciding whether or not a duty of care was owed as follows:

In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.³³

Consistently with the foregoing, Lord Reed was clear that the supposed *Caparo* test did not exist. He said:

The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in [*Michael*], that understanding of the case mistakes the whole point of *Caparo*, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.³⁴

³⁰ *Id.*, [26].

³¹ *Id.*

³² *Id.*, [27].

³³ *Id.*, [29].

³⁴ *Id.*, [21].

It is important to emphasise that Lord Reed did not merely deny the existence of any role for the *Caparo* test but disapproved of the very idea that the House of Lords in *Caparo* had intended to lay down a “test” at all. Like Lord Toulson in *Michael*, Lord Reed stressed that in *Caparo* Lord Bridge had expressly denied that a single general principle could provide a practical test to determine whether a duty of care was owed, and considered it “ironic that ... Lord Bridge’s speech has been treated as laying down such a test”.³⁵ On the contrary, Lord Bridge had adopted “an incremental approach, based on the use of established authorities to provide guidance as to how novel questions should be decided”, and “it was that approach, and not a supposed tripartite test” which Lord Bridge had then used to decide the case.³⁶ Incremental reasoning, by analogy from existing authority, was the *true Caparo* approach, and “the existence of a duty of care did not depend on the application of a ‘*Caparo* test’ to the facts of a particular case”.³⁷

5 Policy

In this section and those that follow, we explore several issues of general importance that *Robinson* raises. The first, which we address under this heading, concerns the place of policy in the duty analysis. *Hill* had widely been interpreted as laying down a policy-based immunity for the police in negligence cases concerned with the prevention and investigation of crime (and had been so interpreted by the trial judge and Court of Appeal in *Robinson*). However, Lord Reed instead explained that case (as had Lord Toulson in *Michael*) by reference to the omissions doctrine. He summed up his discussion in this regard as follows:

[T]here is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise.³⁸

Lord Reed also made some more general observations about the role of policy in the negligence context and the duty element in particular. He said:

[I]t is important to understand that [discussions of policy considerations] are not a routine aspect of deciding cases in the law of negligence, and are unnecessary when existing principles provide a clear basis for the decision, as in the present appeal ... The absence of a duty towards

³⁵ *Id.*, [24].

³⁶ *Id.*, [25].

³⁷ *Id.*, [30].

³⁸ *Id.*, [70].

victims of crime, for example, does not depend merely on a policy devised by a recent generation of judges in relation to policing: it is based on the application of a general and long-established principle that the common law imposes no liability to protect persons against harm caused by third parties, in the absence of a recognised exception such as a voluntary assumption of responsibility.³⁹

At the same time, Lord Reed made it clear that he was not saying that policy concerns had no place in the duty of care enquiry: on the contrary, while the courts were not “policy-making bodies in the sense in which that can be said of” law reform bodies or government departments, he accepted that “the exercise of judgement about the potential consequences of a decision” had a part to play when a court was asked to decide whether a novel duty of care existed,⁴⁰ at least where “established principles” did not provide a clear answer to the duty question.⁴¹ It follows from this discussion that although policy considerations do have a role to play in the duty enquiry, this is limited to novel cases. Further, the role of policy arguments in novel cases is secondary to the role of “established principles”.

It was this aspect of Lord Reed’s analysis that provoked the strongest reaction from some of the other judges who heard the appeal, albeit that they all agreed on the outcome. According to Lord Mance, it would be “unrealistic to suggest that, when recognising and developing an established category [of negligence liability], the courts are not influenced by policy considerations”, and the reality was that “in recognising the existence of any generalised duty in particular circumstances they are making policy choices”.⁴² Similarly, Lord Hughes said that earlier judicial reliance on policy considerations was “simply too considered, too powerful and too authoritative in law to be consigned to history”, and that it was not possible to treat such considerations as “no more than supporting arguments”.⁴³

When considering the tensions between the Justices’ approaches to the role of policy, it is important to distinguish between the “is” question of the extent to which the courts have in fact relied on policy considerations to decide duty cases and the “ought” question of the extent to which it is appropriate for them to base duty decisions on such considerations. In relation to the “is” question, empirical research by Plunkett regarding the use of policy-based reasoning in the UK shows that only in a small minority of duty cases at the ultimate appellate level in which reliance was placed upon policy considerations were they determinative of the outcome of the duty enquiry.⁴⁴ Perhaps the best example of merely incidental reliance on policy is

39 *Id.*, [69].

40 *Id.*

41 *Id.*, [42].

42 *Id.*, [84].

43 *Id.*, [113].

44 See JAMES PLUNKETT, *THE DUTY OF CARE IN NEGLIGENCE* 203 (Table 13) (2018).

Hill itself, which is easily explicable (and was explained in *Robinson*) by reference to the omissions doctrine.

However, Plunkett's research also accords with Lord Mance's observation in *Robinson* that there are undoubtedly *some* earlier cases decided at the highest level where it was accepted that a duty of care could be denied on policy grounds. A good example of such a decision is *Smith v. Ministry of Defence*,⁴⁵ in which the House of Lords upheld the existence of a "combat immunity" applicable to anything done in the course of military operations against an enemy, an immunity justified on the ground that the existence of a duty of care might hamper the conduct of the military in wartime. This immunity means that even in cases in which a defendant combatant causes foreseeable physical injury or physical damage to property by their positive conduct (and where one would therefore expect there to be a duty of care in accordance with the general principles upheld in *Robinson*), no liability in negligence can arise.

As for the "ought" question, addressing it would take us deep into the theory of tort law as well as jurisprudential works concerning the function of judges. Space precludes our embarking on an analysis in this regard. It must suffice for present purposes to observe that Lord Reed's position that it is legitimate for judges in novel cases to weigh policy considerations but that such considerations are of secondary significance, accords with much academic thinking, especially in the Commonwealth.⁴⁶ At the same time, however, there are policy maximalists, who view with scepticism attempts to distinguish between policy and principle,⁴⁷ and policy minimalists who consider any recourse to policy to be either inconsistent with the nature of private law or the business of judging or both.⁴⁸

⁴⁵ [2013] UKSC 41, [2014] AC 52.

⁴⁶ See, e.g., Dilan A. Esper & Gregory C. Keating, "Putting Duty in Its Place": A Reply to Professors Goldberg and Zipursky, 41 *LOY. L.A. L. REV.* 1225, 1247–1249 (2008); Stephen Perry, *The Role of Duty of Care in a Rights-Based Theory of Negligence Law*, in *THE GOALS OF PRIVATE LAW* 79, 83–91 (Andrew Robertson and Tang Hang Wu eds., 2009); Andrew Robertson, *Justice, Community Welfare and the Duty of Care*, 127 *LAW Q. REV.* 370 (2011); Andrew Robertson, *Rights, Pluralism and the Duty of Care*, in *RIGHTS AND PRIVATE LAW* 435 (Donal Nolan and Andrew Robertson eds., 2012).

⁴⁷ See, e.g., Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menu*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* 59 (Peter Cane and Jane Stapleton eds., 1998); Jane Stapleton, *The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable*, 24 *AUST. BAR REV.* 135, 135 (2003) ("Oddly, some Australian lawyers still believe that there is a meaningful tension between principle and policy as bases for legal reasoning in tort cases. But I have yet to hear a compelling account of the difference between principle and policy"). See also Jenny Steele, *Scepticism and the Law of Negligence*, 52 *C.L.J.* 437, 441 (1993) (doubting the stability and defensibility of the principle/policy distinction).

⁴⁸ See, e.g., Robert Stevens, *TORTS AND RIGHTS* (2007) ch 14; Allan Beever, *REDISCOVERING THE LAW OF NEGLIGENCE* (2007).

6 Acts and Omissions

The relatively modest role that Lord Reed carved out for policy factors meant more space for principle to be deployed. In *Robinson*, it was the distinction between acts and omissions that was of paramount importance. As regards this issue, Lord Reed said:

The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property; it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies).⁴⁹

As with other parts of his judgment, this focus on the act/omission distinction was consistent with *Michael*, albeit that there the focus on the distinction had militated against liability, whereas in *Robinson* it worked in its favour. Lord Hughes reacted strongly against Lord Reed's analysis on this point. In particular, while Lord Hughes acknowledged the significance of the act/omission distinction, he considered that it could not explain the absence of a duty of care in all of the police liability cases for two reasons: first, because there were exceptions to the omissions doctrine; and, second, because "there is no firm line capable of determination between a case of omission and of commission".⁵⁰ With respect, however, these are not convincing objections. The existence of exceptions to a no-liability rule does not necessarily (or even presumptively) rob the rule of force in cases which do not fall within the exceptions. For example, the outcome of particular cases can plausibly be explained by reference to the general rule against recovery of pure economic loss in negligence even though the rule is not absolute. And the idea that there is not a workable distinction between positive conduct cases and omissions cases, and that "the great majority of cases can be analysed in terms of either",⁵¹ is implausible. On the contrary, once it is understood that the distinction in play here is between making things worse for the claimant and not making them better, the distinction works perfectly well in most cases. This is because, applying this distinction, it is usually enough for the court simply to ask itself whether removing the defendant from the picture entirely would have left the claimant in a *better* position (in which case the defendant

49 [2015] UKSC 2, [2015] AC 1732, [69].

50 *Id.*, [117].

51 *Id.*

made things worse) or in the *same* position (in which case the defendant did not make things worse, and hence is being sued for failing to confer a benefit).⁵²

7 General Duty Tests

In *Caparo*, Lord Bridge perceptively observed that “there has for long been a tension between two different approaches” to the duty concept.⁵³ Under what he called the traditional approach, “the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics”, whereas under “the more modern approach”, a single general principle is sought “which may be applied in all circumstances to determine the existence of a duty of care”.⁵⁴ Unsurprisingly Lord Bridge traced the “modern approach” to the speech of Lord Atkin in *Donoghue* to which we referred at the start of this article. Indeed, the enunciation of Lord Atkin’s famous “neighbour principle” can be (and has been) interpreted as a general test (although it is unlikely that Lord Atkin intended it to be so interpreted).

The *Anns* test represented the apogee of the modern approach until it was abandoned in *Caparo*. However, even in *Caparo* the tension between the two approaches was evident. On the one hand, Lord Oliver stressed that the search for a general duty test was pointless and detrimental – a pursuit of a “will-o’-the-wisp”, which served “not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense”.⁵⁵ Similarly, Lord Bridge emphasised that the answer to the duty question lay in what he called “the more traditional categorisation of distinct and recognisable situations”.⁵⁶ And yet at the same time Lord Bridge could not resist the temptation to identify three “necessary ingredients” for a duty of care to arise, namely foreseeability, “proximity” and that it be “fair, just and reasonable” for a duty of care to be imposed.⁵⁷ Although Lord Bridge specifically denied that the latter two concepts were “susceptible of any such precise

52 See further John C.P. Goldberg & Benjamin C. Zipursky, *The Place of Duty in Negligence Law*, 64 VAND. L. REV. 657, 695–696 (2001); Donal Nolan, *The Liability of Public Authorities for Failing to Confer Benefits*, 127 LAW Q. REV. 260 (2011); Sandy Steel, *Rationalising Omissions Liability in Negligence*, 135 LAW Q. REV. 484 (2019). Note that in some positive conduct cases the defendant’s negligence will not leave the claimant worse off because the conduct was not a but-for cause of the claimant’s damage, but merely contributed to its occurrence. See further Jane Stapleton, *Unnecessary and Insufficient Factual Causes*, J. TORT LAW (forthcoming).

53 [1990] 2 AC 605 (HL) 616.

54 *Id.*

55 *Id.*, 633.

56 [1990] 2 AC 605 (HL) 618. See also at 628 (Lord Roskill).

57 *Id.*, 617–618.

definition as would be necessary to give them utility as practical tests”,⁵⁸ these three ingredients led in time to the resurrection of the modern approach, under the guise of the so-called “three-stage test” named (ironically) after the very case which had so forcefully sought to restore the traditional approach. *Robinson* and *Michael* represent a concerted effort by the court of final appeal to stamp out the general test approach once and for all. They involve, consequently, a dramatic revival of traditional duty methodology.

Which approach is preferable? The notion that it is possible to devise a universal formula that can simply be applied to any case to yield the correct result in relation to the duty issue certainly has at least superficial appeal, and this presumably explains why many judges have long sought to come up with one. Further, time-poor judges likely find general tests to be convenient. Instead of embarking on the potentially labour-intensive exercise required by the traditional approach (which, particularly as set out in *Robinson*, entails an open-ended search for and consideration of analogies), they can simply input the relevant variables into a formula and have the answer to the duty problem materialise.

Conversely, there are powerful reasons to resist the allure and “beguiling simplicity”⁵⁹ of general duty tests. One is that in order to encompass a sufficiently wide range of possible facts, the concepts that constitute a general duty test are generally so abstract (“neighbourhood”, “proximity” and so on) that in themselves they provide little or no guidance as to whether a duty of care ought to be recognised.⁶⁰ At worst, these concepts are not only empty of substantive content, but they also conceal the true path along which judges reason.

Another and more profound problem with general duty tests is that they necessarily encroach on the role of precedent. Indeed, taken literally, general tests seem to leave no room for the doctrine of precedent at all. The judge simply applies the test to the facts and the test itself produces the right answer. Earlier authority simply goes by the board, as in the worst excesses of the *Anns* era. In practice, of course, a more nuanced approach is taken, but the basic question of how any particular general test is to be reconciled with the doctrine of precedent never receives a satisfactory answer, because no such answer can be given. Hence the use of a general test in combination with traditional precedent-based reasoning necessarily generates irresolvable tensions and the law inevitably becomes unclear and incoherent.

⁵⁸ *Id.*, 618.

⁵⁹ MAURICE MILLNER, *NEGLIGENCE IN MODERN LAW* 236 (1967).

⁶⁰ For a well-known essay critiquing the concept of proximity and which played an important role in preventing the *Caparo* test from taking root in Australia, see MICHAEL MCHUGH, *Neighbourhood, Proximity and Reliance*, in *ESSAYS ON TORTS* (Paul D Finn ed., 1989).

Suppose, for example, that we take seriously the proposition put forward by the Court of Appeal in *Robinson* that the three-stage *Caparo* test be used in every duty case. Where would this leave the complex web of duty rules that the courts have developed to govern liability for, for example, psychiatric injury?⁶¹ Does the court simply ignore the relevant decisions, despite the fact that they appear to govern the claim in question, and apply the *Caparo* test instead? And if the answer is in the negative, meaning that in psychiatric injury cases precedents must be followed, what reason is there for a special approach in that particular enclave?

The disregard of precedent is inherently objectionable in a system that is founded on the doctrine of *stare decisis*. However, it is possible to distil two particular problems that it causes. The first is that it necessarily leads to *ad hoc* decisions and, in turn, uncertainty in the law. The outcome of cases becomes less predictable,⁶² which in turn generates more litigation. Indeed, it might be thought that the suggestion of one senior judge that a general duty test is required if the law is not to become a “morass of single instances”⁶³ gets things backwards and that, on the contrary, that is exactly what general tests are prone to produce. A second shortcoming of general tests is that a judge who is both freed from the constraints of precedent and asked to apply a test made up of concepts so abstract as to be meaningless (as the general duty tests formulated by the English courts have invariably been) is essentially given *carte blanche* to decide the case however he or she wishes. Although this does not necessarily result in bad outcomes in individual cases, such an approach is antithetical to the philosophy of the common law and weakens the authority of the decisions that are made.

It would be an unconvincing response to the critique that has been offered to say that a general test such as the *Caparo* test is only to be used in novel cases. One problem with this reply is that even in novel cases there will *always* be relevant authorities from which guidance can be gleaned by analogy, and as we have said such authorities cannot properly be accommodated within the rubric of the *Caparo* test. In an advanced system of precedent-based rules, there is simply no such thing as a jurisprudential vacuum, where a court (even at the ultimate appellate level) is completely unconstrained by earlier case law. Although they may be stronger or weaker in individual cases, analogies *always* exist. To this it can be added that there is, in reality, no bright line between categories of case in which the duty issue has already been resolved and novel cases because the use of analogical reasoning blurs the boundary. And since it is only after the authorities have been fully considered

61 See *supra* note 14.

62 See Jonathan Morgan, *The Rise and Fall of the General Duty of Care*, 22 P.N 206, 217–218 (2006).

63 *Customs and Excise Commissioners v. Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [8] (Lord Bingham).

that any assessment of the novelty of the claim before the court can be made, the idea that the *Caparo* test could be used *ab initio* in novel cases makes little sense.

By contrast, the traditional approach, revitalised by *Robinson*, simply involves standard common law reasoning.⁶⁴ That is to say, it entails working with the existing authorities to determine whether any particular case is covered by binding precedent, and, if not, reasoning by analogy and by reference to relevant considerations in order to decide whether or not a duty of care is owed.⁶⁵ By reducing and constraining the degree of individual judgment involved in deciding cases, it brings the law of negligence closer to the “rule of law ideal where the outcome of the case does not depend upon the individual views of the particular decision-maker, but upon the common understanding of what the law requires”.⁶⁶ While the exercise required by the traditional approach may be more or less straightforward in a particular case, and although there might be legitimate disagreement about the considerations a court should take into account, there is nothing mysterious about what it entails.

It might be said in response to the foregoing that the traditional approach is itself just another general test. However, although the courts have sometimes presented the incremental methodology endorsed in *Robinson* as though it exists on the same plane as the *Caparo* test,⁶⁷ this is a clear error. The whole point of the traditional approach is that there is, and can be, no such thing as a general duty test.⁶⁸ When the Supreme Court in *Robinson* rejected the existence of the *Caparo* test, it did not install the incremental approach to fill the void that it created. Rather, *no* test for the existence of a duty of care was adopted.

It is sometimes suggested that the traditional approach is stultifying and does not allow the tort of negligence to develop.⁶⁹ However, this is a caricature apparently borne of the failure to appreciate that the traditional approach is just standard common law reasoning. After all, no-one could seriously suppose that the common law itself is incapable of development just because it is a system of rules based on precedent and reasoning by analogy. Conversely, it is true that applying the traditional approach the courts are less likely to make radical changes to the

64 See KEITH STANTON, *Incremental Approaches to the Duty of Care*, in TORTS IN THE NINETIES 34, 39 (Nicholas J. Mullany ed., 1997) (“incrementalism may be regarded as restoring a traditional method of adjudication to the tort of negligence”).

65 See also Plunkett, *supra* note 44, 71.

66 Grant Lamond, *Analogical Reasoning in the Common Law*, 34 O.J.L.S. 567, 576 (2014).

67 See, e.g., *Customs and Excise Commissioners v. Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [7].

68 See *Crimmins v. Stevedoring Industry Finance Committee* [1999] HCA 59, (1999) 200 CLR 1, [73] (McHugh J stating that “[t]he 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”).

69 See, e.g., David Howarth, *Negligence after Murphy: Time to Re-think*, 50 C.L.J. 58, 71 (1991).

circumstances in which a duty of care is or is not owed, but this is simply an incident of the common law process itself.

8 Conclusion

The decision in *Robinson* has the potential to usher in a new era in the troubled history of the duty of care element of the tort of negligence, an era marked by greater predictability and consistency. The decision elevates the importance of precedent and principle in the determination of whether a duty of care is owed, and diminishes the significance of policy (while still according it a subsidiary role in cases which are not governed by established authority). Relatedly, it rejects as misconceived the idea that all duty cases can be resolved by the use of a general duty test. Instead, the methodology of the common law itself provides the answer to novel duty cases.