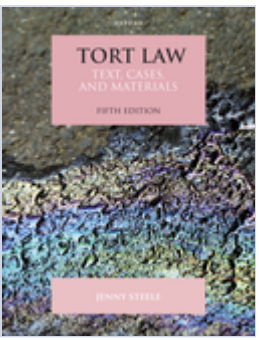

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

p. 160

4. The Duty of Care: Introduction and Development

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https://doi.org/10.1093/he/9780198853916.003.0004
Published in print: 29 September 2022
Published online: September 2022

Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This Chapter introduces the notion of the 'duty of care' in negligence, and tracks its emergence and development through a series of important cases, including analysis of the Supreme Court's most recent analysis of the duty of care. It explores the issues relating to liability, principle and policy, incremental development and the Caparo test, and incrementalism and established principle. The chapter concludes with consideration of the special case of omissions and positive duties to act.

Keywords: duty of care, universal duty, Caparo test, incremental development, omissions

Central Issues

i) In this Chapter, we track the emergence and development of the duty of care. While the negligence standard may be said to provide the content of the tort, the duty of care delineates its extent and limits. The courts' developing approach to the duty of care continues to dictate the way in which the tort develops and expands.

ii) In *Donoghue v Stevenson* [1932] AC 562, Lord Atkin argued that the existing examples of duties to take care could be seen as aspects of a single tort. Through the 'neighbour principle', he sought to state what these 'duty situations' had in common. In *Anns v Merton* [1978] AC 728,

Lord Wilberforce went further and stated a single, universal test for the duty of care in negligence. A duty would arise on the basis of 'neighbourhood', unless there was some distinct reason to deny a duty. This generalizing trend—with its very open-ended emphasis on 'any consideration that may negate a duty'—has since been reversed.

iii) In *Caparo v Dickman* [1990] 2 AC 605, the House of Lords set out a more complex approach. The House suggested that there is no single 'touchstone' of liability; and that relevant factors may be conveniently labelled in terms of foreseeability; proximity; and the fairness, justice, and reasonableness of imposing a duty. Development would be pragmatic, and incremental, with attention to these factors.

iv) More recently, the Supreme Court has clarified the significance of *Caparo v Dickman* and in some ways, has confined it. While the House in *Caparo* suggested that there was no universal test for a duty of care in negligence, later courts often interpreted the decision as setting out a 'three-part test' for whether there is a duty, or not. This 'test' began to be applied alongside other approaches, such as whether or not responsibility had been 'assumed' by the defendant, as if they were alternatives. In *Robinson v Chief Constable of West Yorkshire* and *Poole BC v GN*,
p. 161 the Supreme Court has now declared that there is no *Caparo* 'test'. Further, the three considerations referred to in *Caparo* should be considered only where a 'novel duty situation' arises. In cases which fall within 'established duty situations', there is no need to consider the issues discussed in *Caparo* at all. Further, the essence of *Caparo* is to be found not in its three sets of considerations (previously sometimes referred to as a three-part test), but in its emphasis on 'incremental development'.

v) At the same time, the Supreme Court has argued that there is a wider role to be played by recognized legal principles in relation to the evolution of the duty of care. Some questions about this are raised in the discussion in Section 2.4 of this Chapter. In seeking 'principled' solutions, the Supreme Court has attached considerable importance to the notion of 'assumption of responsibility', which had its origins before *Caparo*, but has taken on a broader role. The content of this idea is, however, hard to pin down, and may be highly variable.

vi) **Negligent omissions** have long been thought to raise distinct issues in respect of duty, but also potentially of breach, causation, and remoteness, which are the subject of later chapters. Given the importance of omissions to the reasoning of the courts in relation to duty of care, we begin to introduce such issues at the end of this Chapter. Through its recent decisions, including *Robinson* and *Poole*, the Supreme Court has placed considerable emphasis on a principled distinction between causing harm and failing to benefit. The status of the act-omission distinction has therefore been much enlarged, and in some important areas of the tort of negligence, it has been treated by the Supreme Court as the core notion at work.

1 Duty of Care: An Introduction

This chapter provides a general introduction to the 'duty of care', and particularly to the way in which this concept has evolved. There will be detailed consideration of some of its more complex areas of application in Chapter 5.

As outlined in Chapter 3, for a claim in negligence to succeed, it must be established that the defendant owed to the claimant a duty to take care, so that the defendant's negligence amounts to a breach of that duty. Furthermore, the breach of duty must be shown to have caused recoverable damage, which is within the scope of the duty and/or not too remote a consequence of the lack of care (Chapter 6).

In this chapter, we will:

1. consider the origins of the general duty of care in *Donoghue v Stevenson*, and its subsequent evolution through the defining cases of *Anns v Merton*, *Caparo v Dickman*, and the cluster of recent decisions including *Robinson v Chief Constable of West Yorkshire* and *GN v Poole BC*; and
2. reflect briefly on the nature of the duty concept and the part it plays in the tort of negligence.

p. 162

2 The Evolution and Content of the Duty Concept: From *Donoghue* to *Robinson* and *Poole*

2.1 A General Tort of Negligence: *Donoghue v Stevenson*

M'Alister (or Donoghue) v Stevenson [1932] AC 562

The appellant claimed damages for personal injuries from the respondent, a manufacturer of soft drinks. She alleged that a bottle of ginger beer manufactured by the defendants was bought for her by a friend in a café in Paisley, the bottle being made of dark opaque glass so that she could not see its contents. She further alleged that the café proprietor had poured some of the ginger beer into a glass, and she had drunk some of it, before her friend proceeded to pour out the remainder. At this point a decomposing snail floated out of the bottle. As a result of the nauseating sight of the snail, and in consequence of the impurities in the ginger beer that she had drunk, she claimed to have suffered shock and gastro-enteritis. The respondents argued that these alleged facts disclosed no valid action, and the House of Lords dealt with this purely legal question on the basis of assumed facts.[1] The best-known passage in UK tort law[2] appears in the judgment of Lord Atkin, and is highlighted in bold below. But a real flavour of the importance of this case will only be gained by comparing Lord Atkin's approach with the dissent of Lord Buckmaster. Whilst Lord Buckmaster was relying on existing legal principle, it will be evident that his objections to recognising a duty in this situation are supported by a concern with 'consequences': manufacturers could not possibly be expected to shoulder the prospective liabilities, should their duties be extended beyond purchasers of goods, to those who use or consume those goods. Plainly, Lord Atkin—whose judgment is extracted at more length here—did not harbour the same

fears. He needed both to *expand* the range of the tort, whilst at the same time finding some way of *restricting* that expansion. That is the nature of the duty of care: it links cases of negligence together into a whole, but also offers means by which to restrict its expansion.

Lord Buckmaster (dissenting)

i. At 568

The case of *Winterbottom v. Wright* (10 M & W 109) is … an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action either in tort or arising out of contract. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category. It
p. 163 may be noted, also, that in this case ↵ Alderson B. said (10 M & W 115): 'The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.'…

ii. At 578

In *Mullen v. Barr & Co.* [1929 S.C. 461, 479], a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this: 'In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer.'

In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.

iii. Lord Atkin, at 578–83

My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises. The case has to be determined in accordance with Scots law; but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the laws of Scotland and of England are the same. … The law of both

> countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. … We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.
>
> It is 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. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty,
>
> p. 164 but only where the case can ↵ be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. 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. The attempt was made by Brett M.R. in *Heaven v. Pender* (11 QBD 503, 509), in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.
>
> At present I content myself with pointing out 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. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But 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. This appears to me to be the doctrine of *Heaven v. Pender* (11 QBD 503, 509), as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould* ([1893] 1 QB 491, 497, 504). Lord Esher says: 'That case established that, under certain circumstances, one man may owe a duty to another, even 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 a personal injury to that other, or may injure his property.' So A. L. Smith L.J. [said]: 'The decision of *Heaven v. Pender* (11 QBD 503) 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.' I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, 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. That this is the sense in which nearness of 'proximity' was intended by Lord Esher is obvious from his own illustration in *Heaven v. Pender* of the application of his doctrine to the sale of goods. 'This' (i.e., the rule he has just formulated) 'includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would
p. 165 be used before there would ↵ probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property.' I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be 'used immediately' and 'used at once before a reasonable opportunity of inspection.' This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship as explained in *Le Lievre v. Gould*, I think the judgment of Lord Esher expresses the law of England; without the qualification, I think the majority of the Court in *Heaven v. Pender* were justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise.

iv. Lord Macmillan, at 609–11

... in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue

the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. …

Where, as in cases like the present, so much depends upon the avenue of approach to the question, it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer; and thus the plaintiff, if he is to succeed, is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found on a breach of that contract has been mitigated in the public interest, as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous condition. If, on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer, and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer, and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to the incidental contract of sale becomes irrelevant, and his title to sue the manufacturer is unaffected by that circumstance. The appellant in
p. 166 the present instance asks that her case be approached as a case of delict, not ↵ as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held to be entitled to complain of some defect in the subject-matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort.

v. At 618–19

The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence

> of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken.

There are three dimensions to the significance of this case:

1. It secured the independence of tort from contract. The judgment of Lord Macmillan was particularly important in this regard.
2. Through the judgment of Lord Atkin in particular, it recognized a *general* tort of negligence, not confined to specific duty situations.
3. It enabled negligence to emerge, albeit gradually, as the most flexible of torts, adapting to fill an ever-increasing range of claims. As Lord Macmillan put it, 'the categories of negligence are never closed'. Claimants have certainly turned to negligence in search of remedies. As he also put it, the conception of legal responsibility must adapt to changing social conditions and standards. The dynamism—and to some extent the uncertainty—of the tort of negligence is well anticipated in his judgment.

Tort and Contract in *Donoghue*

Donoghue recognized that a remedy may be available through the tort of negligence, where 'privity of contract' would prevent the consumer from having any contractual claim. The doctrine of 'privity' restricts contractual remedies to those who are parties to the contract.

Since the consumer in this case had not entered into a contract with the defendant manufacturer of the goods
p. 167 (nor, indeed, with the retailer who sold the ginger beer to her friend), ↵ she had no contractual remedy. Even today under the Contracts (Rights of Third Parties) Act 1999, a non-contracting consumer in the position of Mrs Donoghue would not have a contractual remedy, as no rights of action are conferred upon her by the contracting parties. *Donoghue* is the key case establishing that the cause of action in tort for negligence is independent of contract, and is not bound by the rules of privity which restrict contractual remedies. Duties to take care are imposed quite independently of contractual duties, so that they may be owed to parties who are strangers to the contract.

The relationship between tort and contract dominated Lord Macmillan's judgment. He analysed tort and contract as providing two ways of looking at the same set of facts, so that tort duties may coexist with contractual duties without the need to have identical content.

The same step had already been taken in the United States in *MacPherson v Buick Motor Co* 217 NY 382 (1916) (a decision of the New York Court of Appeals which was adopted by most state jurisdictions). *MacPherson v Buick* is referred to in the majority judgments of both Lord Atkin and Lord Macmillan, although it appears that its authority was not pressed by counsel for Mrs Donoghue (see further A. Rodger, 'Lord Macmillan's Speech in *Donoghue v Stevenson*' (1992) 108 LQR 236). The extracts from Lord Buckmaster's dissenting judgment above, and especially the strength of his criticism, indicate how significant this aspect of *Donoghue v Stevenson* was felt to be, at the time of the judgment. Lord Buckmaster was primarily concerned to prevent the traditional

rules of contract law, particularly privity, from being undermined by a developing law of negligence. The complex relationship between tort and contract has evolved further in recent years, and it is important to the discussion in Chapter 5, in relation to economic losses.

The Duty of Care in *Donoghue*

Progressively over the succeeding years, attention began to focus on Lord Atkin's analysis of the duty concept. It is clear that the terminology of 'duty' existed in the case law prior to *Donoghue v Stevenson*. Then, as now, there could only be liability on the basis of negligence if the defendant owed a legal duty to the injured party to take care for his or her safety. The distinction marked by the duty concept was and is the distinction between carelessly inflicted damage which involves the breach of a duty of care, and carelessly inflicted damage in respect of which there is no duty and therefore no liability. But the law prior to *Donoghue v Stevenson* consisted of a series of instances where a 'duty to take care' was recognized, and these were not united by any general theory. Many of the situations were contractual or perceived to be similar to contract (for example, the position of carriers in respect of their passengers).

Lord Atkin was not the first judge to set out a general theory which sought to explain the particular instances of negligence liability. Brett MR (later Lord Esher) had propounded a broad test based on foreseeability in the case of *Heaven v Pender* ((1883) 11 QBD 503, 509):

> 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 of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

p. 168 ↵ He did not gain the agreement of his fellow judges in that case, and Lord Atkin agreed that the above statement is 'demonstrably too wide'. Lord Macmillan on the other hand thought that, with appropriate qualification, it could provide a useful practical guide, although not a formal definition. Later, Lord Esher and A. L. Smith LJ added the important qualification of 'closeness', 'directness', or 'proximity' (*Le Lievre v Gould* [1893] 1 QB 491, 497, 504).

Lord Atkin agreed that proximity was the necessary *additional* component which would restrict the circumstances in which a duty to take care could be said to arise. Equally importantly, he understood proximity to have a special meaning. This meaning would not be restricted to *physical* closeness, but could reflect a variety of aspects of the relationship between the parties in terms of closeness. In the particular case in hand, it was the fact that the goods were expected to reach the eventual consumer without intermediate tampering, and without inspection, that supplied the necessary closeness and 'directness'.

Foreseeability and **proximity** continue to be core elements in the test for the duty of care today.

Donoghue v Stevenson and the Unified Tort of Negligence

In 1957, looking back at the influence of *Donoghue v Stevenson*, R. V. F. Heuston argued that the neighbour principle had been over-emphasized. It was never intended by Lord Atkin to amount to a universal test for the existence of a duty of care in negligence, and had 'been called upon to bear a weight … manifestly greater than it could support': Heuston, '*Donoghue v Stevenson* in Retrospect' (1957) 20 MLR 1, 23. Heuston may well have been right in a narrow but important sense. Lord Atkin prefaced his broader remarks with a warning: to seek a 'complete logical definition is probably to go beyond the function of the judge'.[3]

However, to deny the validity of the neighbour principle as a *test* is perhaps to miss the historical contribution of *Donoghue v Stevenson*—though it is a point that Heuston would surely have wished to make more forcefully in the light of *Anns v Merton*, which is extracted and discussed in Section 2.2. Looking historically at the law of negligence, the issue of the day at the time of *Donoghue* was one of generalization. Could there be said to be a general tort of negligence, or was there just a 'wilderness of single instances' (Ibbetson, *A Historical Introduction to the Law of Obligations*, 179) where a duty could be said to arise? Lord Atkin's explanation of the duty of care was significant because it treated those isolated single instances as aspects of a broad and integrated tort of negligence. It may not have occurred to him to worry whether his explanation could be used as a precise test. The alternative was that the law only recognized a series of distinct and separate duty situations, in which the defendant would be liable for losses caused should he or she act negligently in breach of the duty.

Donoghue v Stevenson is generally recognized as beginning the process through which a general tort of negligence emerged. This process had been encouraged by many of the tort scholars of the day (among them Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 LQR 184; Pollock, *Torts* (13th edn, 1929)). In the next extract, Ibbetson traces this broader historical development up to about 1970, a few years before *Anns v Merton*. Subsequently, we will turn to the attempt to set out a universal 'test' for the duty of care in *Anns*.

p. 169 **David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 190–3; by permission of Oxford**

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> The turning point came with the well-known decision in *Donoghue v Stevenson* … In point of detail, this [decision] amounted to a reversal of the line of cases stemming from *Winterbottom v Wright*; it was never afterwards doubted that the person injured by a defectively manufactured product might in principle have an action against the negligent manufacturer.
>
> There were three possible routes to this conclusion. Most minimally, it could simply have been said that the cases following *Winterbottom v Wright* had been overruled, and that a duty of care was in fact owed by the manufacturer to the ultimate consumer. This would have been sufficient to explain the decision in the case. It would not, however, have involved any qualification of the traditional analysis in terms of a multiplicity of duties of care; nor would it have involved any qualification of the traditionally conservative 'incremental' approach to liability whereby the plaintiff was expected to demonstrate the existence of a duty of care by showing that the case fell within an already recognised duty situation or was very closely analogous to one. Such a minimalist approach was consistent with the speeches of Lord Thankerton and Lord Macmillan, and was the favoured interpretation of the case by contemporary commentators. …
>
> Secondly, *Donoghue v Stevenson* could have been treated as accepting an approach based upon a multiplicity of duty situations, but without any requirement that new duty situations could be recognized only by very close analogy to duty situations that had previously been recognised. This was implicit in Lord Macmillan's speech, and his central conclusion that 'the categories of negligence are never closed' … Such an approach inevitably involved some element of generalization, though Lord Macmillan himself was diffident about laying down any such principle … [[1932] AC 562, 619 …].
>
> Finally, and most generally, *Donoghue v Stevenson* might have involved the wholesale rejection of the analysis dependent upon a multiplicity of duties of care in favour of a single requirement of taking reasonable care. This was, famously, the approach of Lord Atkin. …
>
> In practice there was not a great deal of difference between the approaches of Lord Macmillan and Lord Atkin, for both of them allowed the law considerable flexibility to adapt to new situations. At a rhetorical level Lord Atkin's approach was particularly valuable, for it provided ready support for any conclusion that a judge wished to reach, and it provided a useful starting point for academic analysis. As a matter of reality, though, it was Lord Macmillan's more careful approach that was followed. … Text-book writers, while paying lip service to Lord Atkin's statement, still dealt with the law in terms of more or less discrete categories of duty situation, albeit that they were couched at a more general level … Judges, too, although less hide-bound by previous precedents, did not expand the law into a whole range of new situations simply on the grounds that the defendant had carelessly caused foreseeable harm to the plaintiff. Two types of case in particular stood in the way of the wholesale recognition of a general duty of care of the sort formulated by Lord Atkin: cases where a trespasser had been injured, and cases where financial loss had been suffered by reliance upon a negligent representation. …[4]

p. 170 ↵ After a brief flirtation in the late nineteenth century, the Common law had turned its face against allowing actions for negligent statements (as opposed to negligent acts or omissions). … The wider view of *Donoghue v Stevenson*, though, contained no such limitation, and by the early 1950s it was being argued (unsuccessfully) that liability should be imposed [*Candler v Crane Christmas & Co* [1951] 2 KB 164. But see the dissenting judgment of Denning L.J. based on the nineteenth century cases in the Court of Chancery …]. As in the case of trespassers, this was at first rejected, but in 1963 the House of Lords laid down that there was no relevant difference between causing loss by negligent statement and causing loss in some other way [*Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465]. Thus an action was held to lie in principle (though not on the facts of the case) against a bank that had negligently represented to the plaintiff that its customer was a good credit risk, as a result of which the plaintiff had allowed the customer's order to continue in place and had hence suffered loss.

> *Hedley Byrne v Heller* and *Herrington v British Railways Board* [a case on trespassers] removed the two largest obstacles to the acceptance of Lord Atkin's broad approach. By around 1970 the law of negligence was beginning to be conceptualized in terms of an ocean of liability for carelessly caused foreseeable harm, dotted with islands of non-liability, … rather than as a crowded archipelago of individual duty situations. …

Ibbetson's account is valuable for its analysis of the trend toward general principle, particularly taken together with his account of the historical origins of negligence law in a series of isolated instances. However, he perhaps overstates, in this particular passage, the generality both of the neighbour principle *and* of the *Hedley Byrne* decision. We have already noted the important role of proximity or directness in the neighbour principle. Although *Hedley Byrne v Heller* contributed greatly to the emergence of a general 'tort of negligence' and the recognition of novel categories of duty, it did so with attention to the special requirements of a particular relationship. It is also significant as the origin of the 'assumption of responsibility' notion, which has been particularly emphasised by the Supreme Court in the decisions in *Robinson* and *Poole*, which lie far from its origin in relation to economic losses.

We will explore *Hedley Byrne* in Chapter 5, Section 2, and the later career of the 'assumption of responsibility' in Chapter 5, Section 3. For now, we will consider the 'ocean of liability' to which Ibbetson refers.

2.2 The 'Ocean of Liability': The *Anns* Test and the Prima Facie Duty of Care

The trend toward generalization in the tort of negligence reached its peak with the case of *Anns v Merton LBC* [1978] AC 728, and a number of cases decided under its influence.[5] Arguably, the most recent decisions of the Supreme Court (considered in section 2.4 of this Chapter) involve a very different kind of generalisation, of certain principles that help to determine the content of different categories of case (chiefly, an acts/omissions
p. 171 distinction) and/or can apply across categories (particularly, assumption of responsibility). *Anns*, by ↵ contrast, did not seem to recognize the notion of categories at all: the duty question was asked afresh in each case, by reference to general principles. Here, we are not chiefly concerned with the facts of *Anns*, though they are briefly set out later in this section. The decision was overruled by the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 (Chapter 5, Section 2), though courts had departed from its approach

to duty before this (decisively so in *Caparo v Dickman*, explored in the next section). For now, we are interested in the attempt made by Lord Wilberforce to express a universal test which would determine whether a duty of care is owed.

Lord Wilberforce's 'two-stage test' elevated the neighbour principle in *Donoghue v Stevenson* into a universal test. Many features of the two-stage test proved to be controversial, and this has prompted the emergence of a more complex approach (*Caparo v Dickman* Section 2.4; *Robinson v Chief Constable of West Yorkshire* and *GN v Poole*, section 2.5). The truth is that the current approach to the duty of care exhibits a real tension between the recognition that negligence is a single tort, and the need to determine criteria which will guide decisions in different classes of case, given the wide range of relationships to which negligence applies. A truly universal tort of negligence would have almost boundless potential to throw up new duty situations, and foreseeability is not a sufficient criterion to control this potential. Understanding the problems with *Anns v Merton* will be a useful step in helping us to appreciate the subtleties and the frustrations of the current law. In particular, we need to understand the discussion of 'principle' and 'policy' that has featured in the law at least since the decision in *Anns*.

Anns v Merton LBC [1978] AC 728

The plaintiffs were lessees of flats in a two-storey block. The block began to suffer cracked walls and sloping floors, and the plaintiffs alleged that this was because the foundations of the block were too shallow. Statutory powers under the Public Health Act 1936 allowed the defendant local authority to approve plans, and to inspect foundations before they were covered up. Plans had duly been approved, specifying foundations to a depth of 3 feet or more. The eventual foundations were of a depth of only 2 feet 6 inches.

For the purposes of the House of Lords' decision, it was not determined whether any inspection of the foundations had been made. Thus the case proceeded on the basis of the two alternative claims that either (a) the local authority had negligently failed to inspect the foundations, or (b) the local authority had been responsible for negligently inspecting the foundations. Lord Wilberforce made the following general remarks about the duty of care in negligence.

> **Lord Wilberforce, at 751–2**
>
> Through the trilogy of cases in this House—*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465, and *Dorset Yacht Co. Ltd v. Home Office* [1970] A.C. 1004, 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
> p. 172 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: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid at p. 1027. Examples of this are *Hedley Byrne's* case [1964] A.C. 465 where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of statements made, and *Weller & Co. v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; and (I cite these merely as illustrations, without discussion) cases about 'economic loss' where, a duty having been held to exist, the nature of the recoverable damages was limited: see *S.C.M. (United Kingdom) Ltd v. W. J. Whittall & Son Ltd* [1971] 1 Q.B. 337 and *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd* [1973] Q.B. 27.

Problems with the '*Anns* Test'

i. Problem 1: The Disappearance of 'Proximity' as an Independent Factor

Clearly, Lord Wilberforce considered himself to be encapsulating Lord Atkin's 'neighbour principle' as the first stage of his two-stage test. Yet there is a problem with the way in which he expressed the neighbour principle. He gave the impression that 'proximity or neighbourhood' is a *function of* foreseeability: '*a sufficient relationship of neighbourhood or proximity such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter …*'. In *Donoghue v Stevenson* as we have explained, proximity of relationship was deliberately added as a way of qualifying the foreseeability test, and was clearly intended to add extra *limits* to a test based on foreseeability. It was not simply another way of establishing foreseeability, which seems to have become its role in *Anns*.

This aspect of the *Anns* test was particularly criticized by Richard Kidner. Writing before the decision in *Caparo v Dickman* (Section 2.4), but in an article which largely anticipated that decision and specifically its rejection of *Anns*, Kidner suggested that to neglect proximity in this way was a significant error. It might lead courts to overlook some very significant policy (and other) reasons which had been decisive in the pre-*Anns* case law, including *Donoghue* itself, since such reasoning was often conducted under the heading of 'proximity'. Proximity had acquired a 'coded meaning' in these pre-*Anns* cases, and varied as between different categories of case.

R. Kidner, 'Resiling from the *Anns* Principle' (1987) 7 LS 319, at 323–4

> … as a yardstick for the extension of old duties or the establishment of new duties the *Anns* principle does not advance the law very far, for outside the area of foreseeable physical damage the degree of proximity necessary to bring about a duty of care will and always has been an issue. *Anns* tends to obscure that fact by giving the impression that foresight is the dominant criterion …, obscuring the need to apply historical and policy considerations to the question of other levels of proximity.

It is not clear whether the disappearance of proximity as an independent factor was deliberate. In *Anns* itself, Lord Wilberforce mentioned proximity, but it seems he thought the proximity question was adequately resolved by the following passage:

p. 173 **Lord Wilberforce, *Anns v Merton*, 753–4**

> … One of the particular matters within the area of local authority supervision is the foundations of buildings—clearly a matter of vital importance, particularly because this part of the building comes to be covered up as building proceeds. Thus any weakness or inadequacy will create a hidden defect which whoever acquires the building has no means of discovering: in legal parlance there is no opportunity for intermediate inspection. So, by the byelaws, a definite standard is set for foundation work (see byelaw 18 (1) (*b*) referred to above): the builder is under a statutory (sc. byelaw) duty to notify the local authority before covering up the foundations: the local authority has at this stage the right to inspect and to insist on any correction necessary to bring the work into conformity with the byelaws. It must be in the reasonable contemplation not only of the builder but also of the local authority that failure to comply with the byelaws' requirement as to foundations may give rise to a hidden defect which in the future may cause damage to the building affecting the safety and health of owners and occupiers. And as the building is intended to last, the class of owners and occupiers likely to be affected cannot be limited to those who go in immediately after construction.
>
> … as I have suggested, a situation of 'proximity' existed between the council and owners and occupiers of the houses … [Lord Wilberforce went on to consider the nature of the statutory context and its influence on common law duties of care].

This passage draws upon Lord Atkin's discussion in *Donoghue v Stevenson* of proximity in the sense of absence of opportunity for intermediate inspection of goods. Lord Wilberforce makes the comparison directly: in *Donoghue*, the bottle was opaque and not likely to be opened before it reached the consumer; in *Anns* the foundations were bound to be covered and so were likely to lead to a hidden defect. But Lord Wilberforce has here run together the notions of proximity and foreseeability: it must be in the reasonable contemplation of the builder and of the local authority that failure to comply with the bye-laws would affect the health and safety of occupiers in the future, and thus the requirement that there should be 'proximity or neighbourhood' is satisfied. Lord Wilberforce did not consider, under the heading of 'proximity', issues concerning the nature of the relationship between local authority and subsequent purchasers. A more extensive range of issues, independent of foreseeability, would today be considered under this heading.

The impact of *Anns*, in some of the cases that followed, was indeed that 'proximity' was run together with foreseeability. In *Ross v Caunters* [1980] Ch 297, an intended beneficiary brought an action in negligence against solicitors for their role in an invalid will. Sir Robert Megarry V-C approached the question of proximity as if it was determined through foreseeability.

It was the fact that the beneficiaries were known, hence more than foreseeable, that made them proximate. Indeed, Sir Robert Megarry V-C felt able to justify a prima facie duty of care on the basis of 'obviousness' (a very strong version of 'foreseeability'), thanks to the decision in *Anns*:

> **Sir Robert Megarry V-C, at 310**
>
> If one approaches the present case in the manner indicated by Lord Wilberforce, I can see only one answer to the question that has to be asked at the first stage. Prima facie a duty of care was owed by the defendants to the plaintiff [the intended beneficiary] because it was obvious that carelessness on their part would be likely to cause damage to her.

p. 174 ↵ The complex case law on recovery for economic losses was regarded as relevant only at the second stage, where it had to be considered whether there were any factors to negative the duty. In the later case of *White v Jones* [1995] 2 AC 207, it was observed by the House of Lords that the simple approach in *Ross v Caunters* could not withstand the change marked by *Caparo v Dickman* (Section 2.4). In particular, the absence of a direct relationship between the defendant solicitor, and the intended beneficiary, was perceived to give rise to problems of proximity, which is once again understood as a criterion independent of foreseeability. The decision in *White v Jones*, and the current approach to cases of negligence in respect of wills, are further considered in Chapter 5. *Ross v Caunters*, like *Anns v Merton* in this jurisdiction,[6] is now a part of legal history.

ii. Problem 2: The Universal Test and Prima Facie Duty of Care

So far, we have been chiefly concerned with the content of the test. But the structure and scope of the test caused further problems.

It is clear that Lord Wilberforce expected his approach to apply to all cases where the court had to decide whether to recognize a duty of care in negligence. For a period of time, courts were ready to accept that this represented the correct way forward for negligence law. However, problems began to be noted in two directions. First, negligence law was likely to expand into unpredictable areas. The range of situations in which one's negligence is foreseeably likely to cause harm is very broad indeed. The 'ocean of liability' referred to by Ibbetson was a real possibility. Second, courts were tempted to reconsider established areas under the influence of *Anns*, questioning existing restrictions. Reasoning which had been applied to restrict liability in previously decided cases was prone to be swept aside or addressed only at the second stage.

By the time this second stage was reached, a prima facie duty was already said to have arisen. Thus considerations at this stage appeared (literally) secondary when compared to the idea of 'neighbourhood' in the first stage. 'Prima facie duty' would be a simple matter of foreseeability, checked by the weak concept of proximity or directness referred to earlier in this section, rather than requiring detailed justification in each case. 'No duty' or 'no liability' cases would begin to require exceptional justification. In a number of cases,

courts even used the language of 'immunity' to describe the denial of a duty of care at the second stage: *Hill v Chief Constable of West Yorkshire Police* [1989] 1 AC 53. This has led to difficulties of compatibility with the European Convention on Human Rights (ECHR), and particularly Article 6 (right of access to a court or tribunal), but it also became suspect in domestic law, as courts became reluctant to declare the existence of an 'immunity' (Chapter 5.4).

All of this raises the difficult question of the relationship between the two stages of the two-stage test.

2.3 Principle and Policy

A general issue which has created disagreement since the decision in *Anns v Merton* is the roles to be played by what are often termed 'principles' and 'policy considerations' in the law of negligence. The general or universal test in the first stage of *Anns* can be interpreted as being based on legal principle. Many judicial
p. 175 statements in recent tort cases make reference ↵ to the need to be 'principled' in developing the law. 'Principled' distinctions are contrasted with 'arbitrary' distinctions. An example can be found in Lord Nicholls' judgment in *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32:

> To be acceptable our law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification.

This is a relatively expansive interpretation of what 'principle' is. Factors which are sometimes labelled 'policy' are also capable of being both transparent, and consistent. There has also been some judicial comment which directly contrasts 'principle' with 'policy'. Certain judges have sought to explain that the type of 'policy' that is relevant to the determination of whether the defendant owes a duty of care is primarily 'legal' policy. The aim is perhaps to indicate that this type of 'policy' lies within the competence of judges, and other lawyers. In this section, we briefly outline the characteristics of principle and policy, and identify their relative roles in the cases of *Anns v Merton* and *Caparo v Dickman*. This is necessary background to considering the reduced *direct* appeal to 'policy' in the most recent direction taken by the Supreme Court—and the particular notion of 'principle' being applied (Section 2.5).

According to Ronald Dworkin,[7] 'principles' have two characteristic features. First, principles can be generalized. Principles which have been employed in answering one question can be used to generate solutions to a different question, provided that the second question is similar in a relevant way. Decisions which are based on principled statements might be thought to exert 'gravitational force'—as Dworkin puts it—beyond the area in which they are formally binding, because they are capable of being generalized. *Donoghue v Stevenson* and *Anns v Merton* appear to be excellent examples of this. However, we will see that *Caparo* displays a retreat back to analysis of specific facts. It puts less faith in 'principle' in this generalisable sense. Its recognition of 'categories' has been continued by *Robinson* and *Poole*; but at the same time, these decisions have seemed to identify a few 'principles' which are considered truly generalisable. At the very least, 'principled' decisions should be reconcilable with one another when viewed with hindsight. In one or two areas of negligence, even the search for consistency (with hindsight) has been abandoned.[8] This, however,

may have been a passing phase, as courts sought a new set of tools to deal with emerging concerns of over-extensive liability, while still attempting to 'right wrongs'. In the most recent period, these areas have not been those which cause the greatest difficulty.

'Foreseeability', as a criterion, is easily generalized through the idea of the reasonable person. In any given situation, what would a reasonable person in the position of the defendant have foreseen? To promote foreseeability appears to be to promote simplicity, coherence, and fairness. Indeed the emergence of foreseeability as the key criterion both in duty of care analysis, and in other elements of the tort of negligence, is linked to a trend towards universal tests. Proximity on the other hand has traditionally been more sensitive to factual variations. The existence of a proximity test of this sort would not prevent the law from being *consistent*. But it means consistency must be sought at a very detailed level.

p. 176 ↵ What is the other dimension of 'legal principle'? Dworkin argued that 'principles', as opposed to 'policies', have particular content. Their content must reflect the rights of the parties, and not broader societal goals. This is well summarized and explained in the following extract.

Stephen Guest, *Ronald Dworkin* (3rd edn, Stanford University Press, 2013), 90–1

Principles and Policies

Dworkin's well-known distinction between principles and policies serves several purposes. It is intended to characterize distinctions which lawyers actually use in describing what judges should do. I think he captures that discourse successfully.

... principle and policy are terms of art for [Dworkin] and formal definitions are to be found in chapters 2 and 4 of *Taking Rights Seriously* ... He does not change his mind in *Law's Empire,* nor in *Justice for Hedgehogs.* Roughly, principles describe rights, and policies describe goals:

> A 'principle' [is] a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.

... principles describe rights which aim at establishing an *individuated* state of affairs. So, he says:

> A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served.

Policies, on the other hand, describe goals which aim at establishing an *unindividuated* political state of affairs:

> A 'policy' [is] that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.

We speak of making something a 'matter of principle' and mean that we should act in some way rather than another. Whatever the consequences are because fairness, or justice, or some other matter of morality demands it. Lawyers have no difficulty at all in speaking in this way about legal rights nor, indeed, do most people. ...

> 'Policy' is more ambiguous and is at times used loosely, sometimes even just to mean that the judge has run out of good arguments and is striking out on his own ... More often, though, it is used in the way Dworkin says it is, that is, it is a reference to the consequences that would follow from deciding in favour of one of the parties. The usual example is where the judge decides one way because to decide otherwise would 'open the floodgates of litigation'. All law students are familiar with that sort of reasoning.

As Guest says, one of the hallmarks of 'principle' is supposed to be that it gives 'individuated' reasons for decisions. A principle does not aim at a state of affairs that will be of general benefit, but concentrates on the rights and responsibilities of the particular parties affected.

p. 177 ↵ We can see that foreseeability fits the 'content' requirement for principles, just as it fitted the form of principle by being easily generalizable. It is based on reasons that relate to the *individual defendant*, and not to broader social policy goals. Proximity, as it was developed after *Caparo*, is a very different matter.

In *Law's Empire* (Fontana, 1986), Dworkin theorizes that law 'works itself pure', gradually casting aside detailed issues based on particular facts and aiming at a more universal respect for principle and right. For much of its recent history, the development of negligence has suggested rather the reverse. In terms of both substance and form, negligence became less 'principled' in both of Dworkin's senses. As we will see in Chapter 5, developments tended to show greater attention to the impact on social goals such as economic welfare, and greater attention to the specific facts of individual situations. And yet, there was a continuing search for coherence in negligence law, albeit with greater tolerance of variation according to the specific context of a given case. That search for coherence has been brought to the foreground in *Robinson* and *Poole*. The role of policy in these cases needs some reflection.

Under *Caparo* at least, principle defined according to *content* was not dominant over policy. In Section 2.5, we will address the question of what is meant by 'principle' in the most recent direction taken by the Supreme Court, particularly in the cases of *Robinson* and *Poole*. We will see that here too, 'principle' does not seem to be defined in terms of its content, in the Dworkinian sense. Rather, it refers primarily to a settled area of legal doctrine, which can be applied by the courts without reference to wide-ranging reasons about the likely impact of the decision. The *basis* of that established area of law may, however, be based in many sorts of consideration, and failure to address this directly is a key issue with the Supreme Court's approach.

The contrast between two aspects of the 'duty of care' enquiry—factors relating to foreseeability, and factors relating to policy—are conveniently summarized in the following extract.[9] Here, Millner suggests that the entire duty of care concept is essentially policy based. Were it not for policy questions, the duty of care would be 'dispensable'. The emphasis on change at the end of the extract raises a particular challenge for the decisions in *Robinson* and *Poole*.

M. Millner, *Negligence in Modern Law* (Butterworths, 1967), 230

> The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms a part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and 'duty of care' in this sense is a convenient but dispensible concept.
>
> On the other hand, the policy-based or notional duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a concept entirely divorced from foreseeability and governed by the policy of the law. 'Duty' in this sense is logically antecedent to 'duty' in the fact-
> p. 178 determined sense. Until the law acknowledges that a particular ↵ interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature. The syntheses achieved in *Donoghue v Stevenson* and the *Hedley Byrne* case were concerned with duty of care in this sense and show the duty concept as an antenna with which to probe delicately the novel categories of relationship and classes of injury which come before the courts for recognition. The dynamics of the duty of care are largely outside the conceptual framework of negligence. The social forces which favour stability and those which promote change interact in a profoundly complex and subtle manner to yield normative solutions in law and morals. For this reason, there is no simple explanation of the subtle shifts in the scope and character of the duty of care or the precise timing of such movements. No analysis is worth its salt which is not based upon a concrete and detailed study of the society in which the changes are generated.

Summary

It is one thing to say that there is a single unified tort of negligence. Lord Atkin in *Donoghue v Stevenson* did this, and when he did so he answered an important question which was widely asked at the time: did negligence exist as an independent tort? To say that there is a single test for establishing a duty of care in negligence is quite a different matter. Lord Wilberforce in the *Anns* case thought the time had come to attempt the latter, but with hindsight he was wrong.

The single universal test based primarily on foreseeability was unsuccessful for a number of reasons. It paid insufficient attention to the detailed reasons for decided cases in specific areas; it paid insufficient attention to the analysis of the relationship between the parties in those cases; and it did not give priority to questions of practical impact. Furthermore, it appeared to provide a 'hierarchy' of reasons, in which a prima facie duty arose on the basis of principle alone. As we have seen, commentators such as Millner (before *Anns*) and Kidner (some years after *Anns*) have objected that policy is inherent to the recognition of a duty of care. It should not be relegated to a role where it merely 'negatives' such duties on specific occasions. Although there may be a general tort of negligence, that does not mean there is a general test for a duty of care, based on foreseeability of damage. On the other hand, at the most basic level, legal decision-making should be 'principled' in the sense that the distinction between cases is transparent, and based on sound reasoning, as we saw in the extract from Lord Nicholls at the start of this discussion. In the most recent decisions, it has been emphasized

that the distinction between cases should also follow established patterns. Arguably, both of these essential features—sound reasoning, and established patterns—apply just as strongly to 'policy' decisions as to any other.

2.4 An 'Irresistible Force'? *Caparo*, Three Factors, and Incremental Development

In the period of development surrounding *Donoghue v Stevenson* and the decades leading up to *Anns v Merton*, it might have seemed that generalization was the main force at work in the tort of negligence. But, as we discussed in Chapter 1, tort as a whole has proved resistant to generalization. In *Caparo v Dickman*, the 'irresistible force' described by Christian Witting later in this section is one that works *against* generalization and universality. Controversy now surrounds the question whether *Caparo v Dickman* was a decisive move
p. 179 which retains ↵ its significance, or whether it is 'discredited'. The answer depends very much on what it is that was significant about *Caparo* in the first place. If anything, it could be said that recent decisions go further in avoiding the generalization of liability seen in *Anns*: the three criteria in *Caparo* are not to be regarded as setting out a 'test' at all. But the judgments in *Caparo* never did aim to replace one test, with another. The incremental approach, which recommends the consideration of 'duty questions' through close scrutiny of 'established categories', is now considered to be the core of *Caparo*.[10]

Caparo Industries plc v Dickman and Others [1990] 2 AC 605 (HL)

Defendant auditors had prepared an annual report in respect of a company, F plc. This they were obliged to do by virtue of sections 236 and 237 of the Companies Act 1985. The claimants had purchased shares in F plc both before and after the publication to shareholders of the audited accounts. The claimants argued that they had relied on the published accounts in deciding to purchase sufficient shares to take over the company. They alleged that the auditors had been negligent in their preparation of the accounts, and that they owed a duty of care to the claimants. It was foreseeable both that F plc would be susceptible to a take-over bid; and that any investor seeking to make such a bid would rely upon the accuracy of the accounts. The Court of Appeal decided that a duty of care was owed by the auditors to the claimants, not in their role as investors, but in their capacity as existing shareholders in F plc.

The House of Lords allowed the auditors' appeal. In preparing the annual accounts, no duty of care was owed to the claimants either as investors, or as shareholders. Foreseeability would not be sufficient to form the basis of such a duty. Since this was a case of economic loss caused by allegedly negligent statements, it would be essential to show that there was a 'special relationship' between the parties, as explained in the leading case of *Hedley Byrne v Heller and Partners Ltd* [1964] AC 465.

The extracts below concern the general approach to establishing whether a duty of care was owed.

Lord Bridge of Harwich, at 617–18

. … [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. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients 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. 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,

p. 180

↵ recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43–44, where he said:

> "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'."

One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss.

Lord Oliver of Aylmerton, at 632–3

… it is now clear from a series of decisions in this House that, at least so far as concerns the law of the United Kingdom, the duty of care in tort depends not solely upon the existence of the essential ingredient of the foreseeability of damage to the plaintiff but upon its coincidence with a further ingredient to which has been attached the label 'proximity' and which was described by Lord Atkin in the course of his speech in *Donoghue v. Stevenson* [1932] A.C. 562, 581 as:

> "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."

It must be remembered, however, that Lord Atkin was using these words in the context of loss caused by physical damage where the existence of the nexus between the careless defendant and the injured plaintiff can rarely give rise to any difficulty. To adopt the words of Bingham L.J. in the instant case [1989] Q.B. 653, 686:

> "It is enough that the plaintiff chances to be (out of the whole world) the person with whom the defendant collided or who purchased the offending ginger beer."

The extension of the concept of negligence since the decision of this House in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465 to cover cases of pure economic loss not resulting from physical damage has given rise to a considerable and as yet unsolved difficulty of definition. The opportunities for the infliction of pecuniary loss from the imperfect performance of everyday tasks upon the proper performance of which people rely for regulating their affairs are illimitable and the effects are far reaching. A defective bottle of ginger beer may injure a single consumer but the damage stops there. A single statement may be repeated endlessly with or without the permission of its author and may be relied upon in a different way by many different people. Thus the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of what has been called a 'relationship of proximity' between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be 'just and reasonable.' But although the cases in which the courts have imposed or withheld liability are capable
p. 181 of an approximate categorisation, one looks in vain for some common denominator ↵ by which the existence of the essential relationship can be tested. Indeed it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. 'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.

There are, of course, cases where, in any ordinary meaning of the words, a relationship of proximity (in the literal sense of 'closeness') exists but where the law, whilst recognising the fact of the relationship, nevertheless denies a remedy to the injured party on the ground of public policy. *Rondel v. Worsley* [1969] 1 A.C. 191 was such a case, as was *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, so far as concerns the alternative ground of that decision. But such cases do nothing to assist in the identification of those features from which the law will deduce the essential relationship on which liability depends and, for my part, 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. The fact is that once one discards, as it is now clear that one must, the concept of foreseeability of harm as the single exclusive test—even a prima facie test—of the existence of the duty of care, the attempt to state some

> general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense.

Lord Oliver quoted from Brennan J in *Sutherland Shire Council* and Lord Devlin in *Hedley Byrne* before continuing:

At 635

> Perhaps, therefore, the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy. Thus, for instance, cases can be classified according to whether what is complained of is the failure to prevent the infliction of damage by the act of the third party (such as *Dorset Yacht Co. Ltd v. Home Office* [1970] A.C. 1004, *P. Perl (Exporters) Ltd v. Camden London Borough Council* [1984] Q.B. 342, *Smith v. Littlewoods Organisation Ltd* [1987] A.C. 241 and, indeed, *Anns v. Merton London Borough Council* [1978] A.C. 728 itself), in failure to perform properly a statutory duty claimed to have been imposed for the protection of the plaintiff either as a member of a class or as a member of the public (such as the *Anns* case, *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223, *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175) or in the making by the defendant of some statement or advice which has been communicated, directly or indirectly, to the plaintiff and upon which he has relied. Such categories are not, of course, exhaustive. Sometimes they overlap as in the *Anns* case, and there are cases which do not readily fit into easily definable categories (such as *Ross v. Caunters* [1980] Ch. 297). Nevertheless, it is, I think, permissible to regard negligent statements or advice as a separate category displaying common features from which it is possible to find at least guidelines by which a test for the existence of the relationship which is essential to ground liability can be deduced.

p. 182

Commentary

The Necessary Ingredients of the Duty of Care

It is clear from each of the judgments extracted that foreseeability of harm will not suffice, even in order to establish a ‘prima facie’ duty of care. The approach in *Anns v Merton* is rejected. Equally, all of the extracts specify that the following ‘ingredients’ are necessary:

1. harm to the plaintiff/claimant must be foreseeable;
2. the situation must be one of proximity or neighbourhood;
3. the situation must be one in which it is ‘fair, just and reasonable’ to impose a duty of care.

Clearly, ‘proximity’ has re-emerged as a distinct element in the analysis of the situation, separate from foreseeability. Equally importantly, each of the factors above is given equal status in determining whether a duty of care is owed. Since it is acknowledged that these factors include considerations of ‘pragmatic’ reasons

(which we might broadly categorize as 'policy'), policy is no longer restricted to a merely subsidiary role.

Although it thus became common to refer to *Caparo* as establishing a 'three-stage test', the three factors were not intended to operate in terms of distinct stages in the same way that the *Anns* test did. Following *Caparo*, no factor takes priority. A duty of care will only arise if, in all the circumstances and taking into account the factors above, it seems appropriate that it should do so. Policy is part of the positive process of establishing a duty of care, rather than a merely limiting factor.

Ingredients Not Tests

The Supreme Court, as we will see, has now declared that there is no 'three stage' *Caparo* test. In stating the three 'ingredients' of the duty of care enquiry, Lords Bridge and Oliver both explained that these will not operate as 'tests' as such. Instead, words such as 'proximity' are only 'convenient labels', which summarize the reasons why the court has decided that the relationship is one that ought to give rise to a duty of care. The description of a particular relationship as 'proximate' is therefore a conclusion. It marks the court's judgment that the situation in question displays the hallmarks of 'proximity'. What this does not tell us is what the hallmarks of proximity actually are.

In what sense can a 'pragmatic' approach based on a court's judgment in all the circumstances, 'guided' only by concepts that turn out to be mere labels, be expected to steer future courts to coherent and predictable decision-making? The existence of important concepts which nevertheless appear not to operate as 'tests' has been a source of some frustration. At the same time, lower-level tests or (at least) common descriptors or groups of reasons emerged after *Caparo*. These suggested that a categorized approach may at least provide a workable framework of analysis for duty questions.

Categories

Guidance on what sort of considerations will be relevant for the determination of a novel case can, under *Caparo*, be gleaned from previously decided cases in similar categories. Of particular importance in *Caparo v Dickman* itself was that the damage caused was purely economic, involving no physical damage to property or the person; equally, that the damage was allegedly caused by negligent statements rather than acts. For both of these reasons, the simple version of 'proximity' to be found in *Donoghue v Stevenson* would not suffice.

p. 183

Incrementalism

Associated with the role of categories is the idea of 'incremental development', which has now been described, by the Supreme Court, as the key contribution of the decision in *Caparo*. Incrementalism, as recognized in *Caparo*, implies that duties of care should be recognized more easily in situations which are similar to previously recognized 'duty situations'. Negligence should develop step by step, allowing proper consideration of the practical impact of the extended duties, rather than allowing huge leaps into unknown territory. One of the most important implications of the *Caparo* decision was that it reversed any 'presumption' of duty which might have arisen from *Anns*. A duty of care will not only require the defendant to be careful, but also impose

the risk of loss upon the defendant. There need to be positive reasons why a duty should be imposed in a novel case. Again, the shadow of potentially limitless liability (and, short of this, of potentially limitless litigation) can be discerned.

Before we evaluate the use of categories and of incremental development, we should dispose of one question. Does the emphasis on 'categories', together with the idea of 'incrementalism', return us to the 'wilderness of single instances', or separate duty situations, obtaining before the decision in *Donoghue*? It does not. It is true that Lord Oliver's remarks in some respects appear to reverse the effect of *Donoghue*. In particular, he observes that 'one looks in vain for some common denominator by which the existence of the essential relationship can be tested'. This directly, probably deliberately, contrasts with Lord Atkin's famous dictum, 'there must be, and is, some general conception of relations giving rise to the duty of care, of which the particular cases found in the books are but instances'. Even so, it is now recognized that all instances in which a duty of care is held to exist are aspects of a single tort.

In *Donoghue*, Lord Macmillan famously stated that the 'categories of negligence are never closed'. The categories of negligence are also not entirely separate. Case law under *Caparo* showed considerable generalization from one category to another. For example, the concept referred to as 'voluntary assumption of responsibility' was relied upon in diverse situations such as negligent misstatement (*Hedley Byrne v Heller* [1964] AC 465), negligent professional services (*Henderson v Merrett* [1995] 2 AC 145), negligent failure to diagnose dyslexia (*Phelps v Hillingdon* [2001] 2 AC 619), and police failure to safeguard the interests of informants (*Swinney v Chief Constable of Northumbria* [1997] QB 464). Most importantly perhaps, it was identified as the key to justifying liability for failure to warn (*Mitchell v Glasgow* [2009] UKHL 11; (2009) 1 AC 874) and, now, for failure to benefit others more generally (*Poole BC v GN* [2019] UKSC 25; [2019] 2 W.L.R. 1478). Did this cross-fertilization suggest the return of principle in a more cautious, more sophisticated, more pragmatic form? It depends whether the concepts applied have at least some reasonably stable and identifiable meaning. The challenge is that if they do not, then the use of previous cases can only be of limited assistance, and 'cross-fertilization' will only be a matter of labels. Alternatively, the notion of 'principle' being applied is one where it is the *established nature* of the justifications, rather than the nature of their content, that allows them to be called 'principles'.

Evaluation

It will be apparent that where *Caparo* is applied to a truly novel case, the decision on whether a duty of care arises has the potential to be unpredictable. Since all of the component factors we listed earlier will enter into a decision which is finally made by a court on pragmatic grounds, it will be difficult to predict with confidence whether a duty of care will be said to ↵ arise, or not. On the other hand, this uncertainty is greater in some areas than in others; and efforts to head off the uncertainty (and generally, to limit the duties owed) are more satisfactory in some parts of the law than others.

p. 184

2.5 Incrementalism and Established Principle: *Robinson*, *Poole*, and the Reinvention of *Caparo*

In a cluster of recent decisions,[11] the Supreme Court has indicated a new direction in the approach to duties of care. *Caparo* has not been disapproved, but it has been reinterpreted. Many of the leading decisions that followed and applied *Caparo* have themselves been reinterpreted, to fit a new blueprint. To some extent, this is intended to be a simplifying process. Unlike *Caparo*, a relatively limited set of resources appears to be needed in most cases, to answer the question of whether there is a duty of care. There is no 'test', and as part of this, there should be less need for direct appeal to notions of pragmatism and policy. Rather, we should ask what category of case we are dealing with. The new direction is not purely inspired by a need for simplification, however. The continuing fear that courts may not be the best arbiters of 'policy' questions is clearly part of the motivation for this change. The difficulty we will address is that the established categories themselves must be based on something: reticence about pragmatism might deny courts the resources to decide a novel case.

As explained above, *Caparo* has been reinterpreted, rather than departed from. What, precisely, is the current status of the *Caparo* approach?

The Status of *Caparo* after *Robinson* and *Poole*

i. Novel Cases Only

The Supreme Court clarified in *Robinson* that *Caparo* should be seen as applying *only* to novel categories of case. Within an 'established duty category', there is no need to discuss the notions of proximity, or of what is 'fair, just and reasonable'. This is because *Caparo* only assists with the consideration of *extensions to* established duty situations. In the simplest of cases, this has always in fact been accepted: nobody would (or should!) debate *Caparo* in a simple case of a pedestrian being struck by a car, for example. But in many other cases, this approach is not as simple as it sounds. How is a court to decide what the boundaries of an 'established category' actually are? This is further discussed below in relation to *Robinson* in particular.

ii. Rejection of the 'Three Stage Test'

The key contribution of *Caparo* was described in *Poole* as its emphasis on incremental development. Courts should begin by asking whether the case is within an established duty situation. In *Robinson* and *Poole*, the Supreme Court has said that *Caparo* should not be seen as setting out a 'three-part test': its core is analysis in terms of earlier categories. What has not been addressed is whether this leaves a gap: how can future courts decide when to allow incremental development? *Robinson* and *Poole*, like *Steel v NRAM* ([2018] UKSC 13, extracted in Chapter 5.2), give us limited answers to this, leading to the next point.

p. 185 #### iii. Less (Direct) Reference to 'Policy'

The decision in *Caparo* was shot through with references to 'pragmatic' development, and its application highlighted that policy considerations should be treated in the same way as any other factor. This was important in rejecting the 'two stage' test in *Anns*, since it clarified that policy considerations had the same

status as the foreseeability criterion: duties were not being rejected on policy grounds, since policy was part and parcel of the decision. In *Robinson* and *Poole*, the Supreme Court has made a decisive effort to determine cases on the basis of established principle, thus placing cases within legal categories. Pragmatism, and policy, are not directly referred to as decisive in these two decisions; nor in other cases in this cluster (*Michael*, and *Steel v NRAM*). While it is not entirely clear how this will be worked through in a broader range of cases, some such categories already emerge as important: the distinction between acts and omissions; the distinction between physical injury and pure economic loss; and the (difficult) notion of circumstances where the defendant has 'assumed responsibility' toward the claimant. The role of pragmatic reasoning in extending duty situations incrementally is yet to be clearly determined: in our extracts below, Lord Reed suggests only that the question is whether extension is 'just and reasonable'.

Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 W.L.R. 595

Two police officers—described as 'burly'—attempted to arrest a suspected drug dealer during the afternoon on a shopping street in the centre of Huddersfield. During a struggle, the officers and the suspected drug dealer fell onto the claimant, who was a relatively frail 76 year old woman, and she sustained injuries. She brought a claim on the basis of negligence. The judge found the officers had been negligent, but that no duty of care was owed: since the decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, it had been established that the police did not owe a duty of care to the public in relation to the investigation and suppression of crime. The Court of Appeal agreed that no duty was owed; and added that any duty owed would in any case not have been breached. The Court of Appeal underlined that the *Caparo* test applied to the case.

The Supreme Court disagreed, and reversed the Court of Appeal's conclusion. Lord Reed, with the agreement of two other members of the Court, considered this to be an easy case, which therefore did not need the assistance of the *Caparo* approach. The significance of this categorisation as an easy case should not be underestimated: it meant that much of the existing case law—shot through with policy—in relation to police negligence in the suppression of crime were placed in a different category. This case law, and the impact on it of both *Robinson* and the earlier decision in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732,[12] are considered in Chapter 5.

Lord Reed JSC

> 3 As will appear, the simple facts of this case have given rise to proceedings raising issues of general importance. Most of those issues can be decided by applying long-established principles of the law of negligence. The fact that the issues have reached this court reflects the extent to which those principles have been eroded in recent times by uncertainty and confusion.

p. 186 ↵ The above starting point reveals the extent to which Lord Reed focused on already established principles—at the expense of more recent interpretations. In his view, the law had taken a wrong turning which introduced unnecessary complexity and 'confusion'. He attributed this partly to the influence of *Anns*. We turn next to Lord Reed's discussion of *Caparo*.

(1) Caparo

21 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 JSC pointed out in his landmark judgment in *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] AC 1732, para 106, that understanding of the case mistakes the whole point of the *Caparo* case, 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. ...

26. Applying the approach adopted in the *Caparo* case, there are many situations in which it has been clearly established that a duty of care is or is not owed: for example, by motorists to other road users, by manufacturers to consumers, by employers to their employees, and AC 55by doctors to their patients. As Lord Browne-Wilkinson explained in *Barrett v Enfield London Borough Council* [2001] 2 0 *<http://uk.westlaw.com/Document/I6FD3A610E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>*, 559–560:

> "Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company ... that decision will apply to all future cases of the same kind."

Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty, as Hobhouse LJ recognized in *Perrett v Collins* [1999] PNLR 77 *<http://uk.westlaw.com/Document/I1E02DDA0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>*, 90–91:

> "It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those circumstances comply with established categories of liability, a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case. Indeed, the previous authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied."

27. It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following the *Caparo* case, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is 'fair, just and reasonable'. As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59 <http://uk.westlaw.com/Document/IF5843270E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also 'engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper'.

p. 187

29. Properly understood, the *Caparo* case thus achieves a balance between legal certainty and justice. 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. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries.

    ...

30. Addressing, then, the first of the issues ..., the existence of a duty of care does not depend on the application of a '*Caparo* test' to the facts of the particular case. In the present case, it depends on the application of established principles of the law of negligence.

Discussion

In this extract, Lord Reed emphasizes that the law after *Caparo* has been capable of being settled in various categories. He describes the law in these categories as responding to what is 'just and reasonable'. This very open idea features in *Caparo*, but allows Lord Reed to avoid the language of 'policy', which flowed throughout the *Caparo* judgment. Arguably, the result is that the *reasons* why categories of case have become established are not very strongly emphasized, compared with the fact that they are settled. To the extent that this is an approach based on 'principle', and referring to our discussion in Section 2.3, it is not principled in a particularly strong, content-based sense.

Reflecting the fact that Lord Reed was keen to achieve a reorientation in the law, in the direction of simplification and reduction in direct appeal to policy considerations, he took the relatively unusual step of dealing directly with some of the remarks of Lord Hughes, who had doubts about the approach being taken. This would have been unnecessary if Lord Reed was simply trying to determine the correct outcome for this case, since Lord Hughes did not dissent. In the first part of the extract below, Lord Reed further deals with the role of policy in his approach. In the second, he defends the centrality of a distinction between acts and omissions in his approach, which we will observe further in relation to *Poole BC v GN*, below.

p. 188 **Lord Reed, *Robinson v Chief Constable of West Yorkshire***

69. In relation to this discussion, it is necessary to respond briefly to some of the points made by Lord Hughes JSC in his judgment:

    1. I do not suggest that the discussion of policy considerations in [previous cases of police negligence] … should be consigned to history. But it is important to understand that such discussions 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. I would not agree with Lord Hughes JSC's statement that they are the ultimate reason why there is no duty of care towards victims, suspects or witnesses imposed on police officers engaged in the investigation and prevention of crime. The absence of a duty towards victims of crime, for example, does not depend merely on a policy devised by a recent generation of judges in relation to policing: it is based on the application of a general and long-established principle that the common law imposes no liability to protect persons against harm caused by third parties, in the absence of a recognised exception such as a voluntary assumption of responsibility.

    2. The courts are not policy-making bodies in the sense in which that can be said of the Law Commission or government departments. But the exercise of judgment about the potential consequences of a decision has a part to play when the court is asked to decide whether a novel duty of care exists, together with a consideration of existing principles and of the need for the law to develop coherently and incrementally: see para 24. …

    3. *Hill*, *Brooks* and *Smith* were all cases in which novel types of claim were made. *Hill* was also decided at a time when, following *Anns*, policy arguments were particularly prominent in judicial reasoning, and when the principle in *East Suffolk Rivers Catchment Board*, which could otherwise have provided a solution, had been rejected. *Brooks* and *Smith* were cases in which existing principles pointed strongly towards the rejection of a duty of care, but since those principles were challenged or argued to be subject to exceptions which would accommodate the instant case, it is entirely understandable that the House of Lords referred to policy considerations as supporting their conclusion.

    4. 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). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is

p. 189

> generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm.

Lord Hughes, whose judgment is referred to in the extract above, was not alone in doubting Lord Reed's new direction. In the following extract, Lord Mance directly addresses the issues raised by Lord Reed in the extract above. The first paragraph, in particular, expresses clear doubts about Lord Reed's reliance on 'long-established principles' (that only a more enlightened judiciary can discern). Rather, he proposes, it is necessary to bear in mind that a whole range of considerations, including policy considerations, go into the decisions which make up the 'established categories' themselves. In reasoning to a conclusion in a novel situation, these reasons may be very important: do they apply to the new case in hand, or not?

The other point made by Lord Mance is also a serious one. How are we to determine what the parameters of an 'established category' actually are? Lord Reed purports to know that the relevant category of case here is that there is a positive act, causing personal injury. But why are the circumstances of the events not relevant? For example, why is it not part of the established category that the injury was caused in the 'investigation and suppression of crime'? This, for Lord Reed, is merely an obstacle to applying 'long-established principle'. But in many recent decisions before *Robinson*, this formed the basis of a recognised category of problem case.

Lord Mance, *Robinson v West Yorkshire Police*

84. It would be unrealistic to suggest that, when recognising and developing an established category, the courts are not influenced by policy considerations. No one now suggests that the common law has not changed since the Saxon era, merely to be revealed from time to time by an increasingly perceptive judiciary. As Lord Reid said famously in *The Judge as Law maker*: 'There was a time when it was thought almost indecent to suggest that judges make law—they only declare it … But we do not believe in fairy tales any more': (1987) 63(3) Journal of the Chartered Institute of Arbitrators 180, see also Lord Goff's comments on the declaratory theory of the common law in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 <http://uk.westlaw.com/Document/ID4C293B0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, 377–379. The courts are not a Law Commission, but, in recognising the existence of any generalised duty in particular circumstances they are making policy choices, in which considerations such as proximity and fairness, justice and reasonableness must inhere. Landmark examples are *Donoghue v Stevenson* [1932] AC 562 <http://uk.westlaw.com/Document/I99FC57C0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, in relation to physical injury, and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 <http://uk.westlaw.com/Document/IBC23A100E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, in circumstances where there has been an assumption of responsibility to give accurate information upon which it is foreseeable that the recipient will rely to its economic benefit or detriment.

85. The key to the application of the above principles is to ascertain whether or not a particular situation falls within an established category. Lord Reed JSC treats physical loss resulting foreseeably from positive conduct as constituting axiomatically such a category, whatever the precise circumstances. I accept that principle as generally correct: see e.g. *Alcock v* <http://uk.westlaw.com/Document/I546B3320E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>**p. 190** ↵ *Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 396, per Lord Keith of Kinkel. But I am not persuaded that it is always a safe guide at the margins. I note that Lord Oliver of Aylmerton went no further in the *Caparo case* [1990] 2 AC 605 <http://uk.westlaw.com/Document/I821B84F0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, 632F than to say that, 'in the context of loss caused by physical damage', 'the

existence of the nexus between the careless defendant and the injured plaintiff can rarely give rise to any difficulty'. He went on, at p 633, to identify *Hill's* case, 'so far as concerns the alternative ground of that decision', as a case:

> "where, in any ordinary meaning of the words, a relationship of proximity (in the literal sense of 'closeness') exists but where the law, whilst recognising the fact of the relationship, nevertheless denies a remedy to the injured party on the ground of public policy."

86. Lord Reed JSC says, at para 28 above, that *Smith v Ministry of Defence (JUSTICE intervening)* [2014] AC 52 <http://uk.westlaw.com/Document/I86722C10D8D111E2B4EC91F9DB95B3F4/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, was a case where it was appropriate to apply the three-stage *Caparo* approach because it raised 'a novel legal issue, relating to the provision of protective equipment to soldiers on active duty, and the scope of combat immunity: it did not concern an established category of liability'. But, why not? Combat immunity, where it applies, is, I suggested [2014] AC 52, para 114, itself:

> "not so much an entirely separate principle as the result of a general conclusion that it is not fair, just or reasonable to regard the Crown or its officers, soldiers or agents as under a duty of care to avoid injury or death in their acts or omissions in the conduct of an active military operation or act of war."

And, however that may be, a reading of the judgments shows that no distinctions were there drawn between acts and omissions, either generally or in the specific context of the discussion which is to be found on prior authority … see *Smith v Ministry of Defence (JUSTICE intervening)* [2014] AC 52 <http://uk.westlaw.com/Document/I86722C10D8D111E2B4EC91F9DB95B3F4/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, at, for example, paras 82–83, 95–96, 97, per Lord Hope of Craighead DPSC and paras 108–109, 114, 117, 136, per Lord Mance JSC (dissenting).

Discussion

Lord Mance's point—and it is a very important one—is that the very definition of an 'established category' of case is or should be dependent on recognising the reasons why it stands as it does, as either a duty situation, or a no duty situation, or as a situation requiring closer examination or lower-level principles to resolve it. Simply because there are recognized distinctions between acts and omissions, and between different types of harm, does not *mean* that these define settled categories in which no case can be seen as problematic. He is, in other words, rejecting the simplicity of the proposed approach. With a certain amount of irony, he raises the question that we saw was dealt with by Milner in his work on negligence—the question of change. 'Recent' decisions involving policy debate are certainly no less important than the 'long-established' principles mentioned by Lord Reed. There is a disagreement here between the Justices about the status of different

sources of law –with a hint from Lord Reed that some aspects of law are relatively timeless, and that these take priority. Lord Mance could have asked why it had taken until 1932 (and the decision in *Donoghue v Stevenson*) for English judges to have recognized the 'long-established principle' referred to, and why it was then qualified by the notion of 'proximity'. To the extent that they are unexplained, 'categories' will not give the guidance that courts have been searching for in novel cases since *Donoghue* was decided.

p. 191 ↵ In the following extract, Jonathan Morgan expresses some similar doubts.

Jonathan Morgan, 'Nonfeasance and the End of Policy?' (2019) 35 PN 32-53, 53 (footnotes omitted)

> Whether *Robinson* does herald a radical shift in negligence reasoning depends on acceptance of Lord Reed's argument that virtually all we need to explain public authority liability is the acts-omissions distinction. For Lord Reed that means that the formerly extensive reliance on public policy is to be side-lined: an unfortunate relict of the *Anns v Merton* heresy, now best forgotten. Lord Mance and Lord Hughes were not persuaded by this revisionism. Understandably so. The nonfeasance principle needs to be explained and justified, not just postulated as an axiom of liability. It is dubiously axiomatic when other legal systems have taken different stances towards (eg) the duty to rescue, and when public authorities have extensive positive duties as a matter of public law—not least under article 2 of the ECHR which may lead to Human Rights Act damages claims. Finally, although the simplistic 'test' view of *Caparo* was rightly disapproved again, it is regrettable that the *Robinson* court did not consider criticisms of the vacuity (even the mendacity) of 'assumption of responsibility'. Clearly it will continue to feature prominently in nonfeasance claims against public authorities. It will be another conduit for policy reasoning.
>
> When faced with an arguable point on duty the courts should openly acknowledge and rigorously analyse all the arguments for and against liability. History suggests that attempting to subsume these beneath doctrinal concepts does not ultimately work, but leads to unnecessary formalist gymnastics if judges are to reach acceptable decisions without trespassing on forbidden ground. Hopefully *Robinson* does not point the way into such a dead-end.

Notwithstanding these doubts, in the following case Lord Reed took the opportunity to extend the same thinking, and to underline its general significance across the range of different duty categories. It was not the only subsequent decision of the Supreme Court to follow the approach in *Robinson*: in *Steel v NRAM* [2018] UKSC 13; [2018] 1 WLR 1190, the Supreme Court also emphasized that *Caparo* had not set out a 'three-part test', in a case concerning pure economic loss. Again, the emphasis was instead on whether there had been an assumption of responsibility. This underlines that the developments are intended to be of general application, across the range of negligence cases. That decision is explored in Chapter 5.

Although this case also involved a 'public authority', it arose in a very different context. In particular, it raised the question of negligence duties in the context of statutory duties to protect child welfare. The relationship between duties of care in negligence, and statutory powers and duties, is complex and is discussed in Chapter 5.3. Once again, we focus here primarily on the general implications of the decision for the way in which the duty of care is approached. However, it will be apparent that the distinction between preventing harm, and causing harm, is treated in this decision as being of fundamental importance for the whole field of public

authority liability. It is this distinction which allows Lord Reed to say that all that is required is an application of the same principles that apply to individuals. As in *Robinson*, the 'category' of case is defined without reference to the 'pragmatic' or policy issues which have been thought to make this context problematic.

p. 192

Poole BC v GN [2019] UKSC 25; [2019] 2 WLR 1478

The two claimants argued that they had suffered physical and mental harm through the negligence of the defendant local authority. One of them, being particularly vulnerable, was defined as a child 'in need' within s.17 Children Act 1989. The children and their mother were placed by the defendant in a property where they were subject to harassment and abuse by a neighbouring family, known to the defendants as having a history of persistent anti-social behaviour. The claimants argued that the defendant, if it had discharged its duties under the Children Act appropriately, would have moved the family, or moved the neighbouring family who were causing the harassment and distress. The question was whether there was an arguable duty of care in negligence in such a situation. The Supreme Court agreed with the Court of Appeal that there was not; but on very different grounds.

Lord Reed, *Poole BC v GN*

> 28. Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example, by protecting them from harm: see, for example, *Sheppard v Glossop Corpn* [1921] 3 KB 132 <http://uk.westlaw.com/Document/IA7C596E0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> and *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 <http://uk.westlaw.com/Document/I9F35EDA0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>. In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as, for example, where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 <http://uk.westlaw.com/Document/IC3259AD0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, as explained in *Gorringe v Calderdale Metropolitan Borough Council [2004] 1 WLR 1057* <http://uk.westlaw.com/Document/IB2C20C51E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, para 39.
>
> 29. This traditional understanding was departed from in *Anns v Merton London Borough Council* [1978] AC 728 <http://uk.westlaw.com/Document/I5E758AF0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, where Lord Wilberforce laid down a new approach to determining the existence of a duty of care. It had two stages. First, it was necessary to decide whether there was a prima facie duty of care, based on the foreseeability of harm. Secondly, in order to place limits on the breadth of the first stage, it was necessary to consider whether there were reasons of public policy for excluding or restricting any such prima facie duty. These included, in the case of public authorities exercising discretionary powers, the supposed non-justiciability of decisions falling into the category of policy as opposed to operations. That two-stage approach had major implications for public authorities, as they have a

> multitude of functions designed to protect members of the public from foreseeable harm of one kind or another, with the consequence that the first stage inquiry was readily satisfied, and the only limits to liability became public policy, including the distinction between policy and operations.
>
> 30. The *Anns* decision led to a period during which the courts struggled to contain liability, particularly for 'pure' economic loss (ie, economic loss which was not the result of physical damage or personal injury) and for the failures of public authorities to perform their statutory functions with reasonable care. Clarification of the general approach to establishing a duty of care in novel situations was provided by *Caparo Industries plc v Dickman* [1990] 2 AC 605 <http://uk.westlaw.com/Document/I821B84F0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>, but the decision was widely misunderstood as establishing a general tripartite
> p. 193 test which amounted to little more than an elaboration of the *Anns* approach, basing a prima facie duty on the foreseeability of harm and 'proximity', and establishing a requirement that the imposition of a duty of care should also be fair, just and reasonable: a requirement that in practice led to evaluations of public policy which the courts were not well equipped to conduct in a convincing fashion.

In the extract above, Lord Reed again—as in *Robinson*—appeals to principles of common law which, he said, were long-standing ('traditional'), suggesting that these had been forgotten as a consequence of the decision in *Anns* and its influence. *Caparo*, too, had been misunderstood, leading the courts to deal with questions of policy for which they were 'not well equipped'. Again, this seems to suggest that what Lord Reed intends by the question of what is 'just and reasonable' may not be on all fours with the meaning of that term in the decisions that followed *Caparo*, despite use of the same language.

Lord Reed continued by drawing attention to the decisions in *Stovin v Wise* and *Gorringe v Calderdale*, which are extracted in Chapter 6.3. These decisions have generally been taken to be important decisions concerning liability for omissions in the context of statutory powers and duties. Lord Reed attributed to them a great deal more significance than that.

Lord Reed, *Poole BC v GN*

> 34. It took time for the significance of *Stovin v Wise* and *Gorringe* to be fully appreciated: they were not cited, for example, in *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] 1 AC 225 <http://uk.westlaw.com/Document/ID4F993F05EC411DDAB7DC9767090C799/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>. Confusion also persisted concerning the effect of *Caparo* until clarification was provided in *Michael* and *Robinson*. The long shadow cast by *Anns* and the misunderstanding of *Caparo* have to be borne in mind when considering the reasoning of decisions concerned with the liabilities of public authorities in negligence which date from the intervening period. Although the decisions themselves are generally consistent with the principles explained in *Gorringe* and later cases and can be rationalised on that basis, their reasoning has in some cases, and to varying degrees, been superseded by those later developments.

Later, Lord Reed emphasized the significance of *Robinson* once again, which (naturally) he proposed as merely providing a 'clarification' in the applicable legal principles.

> 64. *Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo* did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles
>
> p. 194
>
> of law, rather than basing their decisions on their assessment of the requirements of public policy. Secondly, the decision reaffirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael*. Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority

In these extracts, Lord Reed suggests that the actual outcomes of the leading cases relating to public authority liability following *Caparo* are in fact correct. This states a somewhat curious position: Lord Reed is offering a reinterpretation of the leading decisions which is compatible with *Robinson* and corrects the misunderstanding of *Caparo*. He is suggesting that their outcomes are correct, even though their reasoning is inappropriate. As we will see in Chapter 5, this means putting to the fore not just the distinction between causing harm and failing to benefit (or acts and omissions Section 3), but also the guiding principle of

'assumption of responsibility', which were not the key features of the decisions themselves. At the same time, it means downplaying policy considerations which featured strongly in the decisions. The difficulty is that it is hard to understand how these decisions have come to reflect a set of principles which at the time, were not recognized by the courts deciding them. Lord Reed's answer may be that the underlying principles were intuitively understood all along. But if this is the case, we may well ask whether he is correct in identifying what 'really' explains judicial intuition (a narrow range of settled legal principles), in contrast to the idea of sensitivity to social context which was advocated by Milner as the hallmark of advances in the law (section 3.2). While the whole Court agreed with Lord Reed in this instance, there is room to consider Lord Mance's sceptical remarks in *Robinson* in relation to this case also, and to consider whether *Robinson* and *Poole* really provide the tools for courts deciding whether and how to *advance* the law.

It is one thing to assert that *Caparo* 'did not endorse the threefold test', as Lord Wilson did in *Steel v NRAM*. If this is taken to suggest that the three factors are merely factors, not amounting to tests, this is a simple reminder of the flexibility of the approach in *Caparo*. But since the Supreme Court in the decisions discussed in this section have seen no need to refer to the factors discussed in *Caparo*, the problem arises of exactly how novel cases are now to be decided.

3 The Special Case of Omissions: Positive Duties to Act

It will be apparent from the discussion above that through the decisions in *Michael*, *Robinson* and *Poole*, the distinction between acts and omissions has been given a much more central role in the duty of care enquiry. The distinction was recast in those decisions in terms of the difference between causing harm, and failing to benefit or prevent harm. Prior to those decisions, the status of this distinction was much less clear, with few authors considering it to lie at the heart of the duty of care enquiry.[13]

More generally, omissions are certainly capable of giving rise to liability in negligence, but special considerations have long been thought to apply to them. These special considerations may be expressed as
p. 195 questions of duty; of breach; of causation; or of remoteness. Cases of omissions ↵ liability will be found represented in various parts of the book. The purpose of this section is simply to introduce the law's general approach to omissions as a category. The key to this general approach lies in the question of when a positive *duty* to act will, or will not, be recognized.

Omissions liability arises as an issue where the defendant's alleged negligence consists in *not* doing something. In *Anns v Merton* (earlier), this factor was not treated as particularly relevant, but *Anns v Merton* is now isolated in this respect as in all others (*Gorringe v Calderdale* [2004] UKHL 15, above and Chapter 5). The status of omissions in negligence law has been clarified not only by the Supreme Court in *Michael*, *Robinson* and *Poole* (above), but before that in *Mitchell v Glasgow* [2009] UKHL 11; (2009) 1 AC 874—a decision which was treated as significant in the later cases, and is extracted below.

3.1 Distinguishing Acts from Omissions

There is sometimes said to be ambiguity in the very distinction between acts, and omissions. This is, in fact, one of the reasons why Lord Reed preferred to speak in terms of causing harm, and failing to benefit. It has been argued by Sandy Steel that recasting the enquiry along these lines is generally speaking preferable: instead of asking whether or not the defendant has done anything, or failed to do something, we should ask 'whether the defendant's conduct makes the victim worse off than they would have been independently of the defendant's body or resources at the time of the careless conduct'.[14] (Conduct here includes failures to act). A 'mere' omission or 'pure' omission on the other hand can be said to involve doing nothing at all (an expression used by Lord Hoffmann in the case of *Gorringe v Calderdale* [2004] UKHL 15, where a highway authority had not chosen to renew road markings advising motorists to slow down approaching the brow of a hill).

We can certainly contrast this sort of case with omissions that occur *in the course of acting*. A clear example of an omission in the course of acting is where a driver fails to put his foot on the brake. Negligence law would have no difficulty in treating this as equivalent to an act. It is a case of driving inappropriately. At the other end of the scale, the 'classic' example of a pure omission attracting no liability is the failure to warn a stranger. If I see somebody about to walk over a cliff I am generally under no duty (in English law) to shout a warning. On the other hand, we will see later in the present chapter that this outcome depends on who that person is and whether I have any pre-existing relationship with or duty in connection with that person, perhaps because I have assumed responsibility. Alternatively, it may depend on whether I have any special role in connection with the danger itself, for example, if it arises on land that I occupy, or if it is a danger that I have created.

3.2 Liability for Omissions: The General Approach

The judgments extracted in this section are often treated as the starting point in this area.

Lord Diplock, *Dorset Yacht v Home Office*
[1970] AC 1004, at 1060

> The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to no legal liability in the doer or omitter for loss or damage
> p. 196 sustained by others as a consequence of the act or omission, however ↵ reasonably or probably that loss or damage might have been anticipated. The very parable of the good *Samaritan (Luke 10, v. 30)* which was evoked by Lord Atkin in *Donoghue v. Stevenson* illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law. Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.

Lord Reid, at 1027

> ... when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty.

None of this implies that there is *never* a positive duty to act in negligence law. Lord Diplock went on to draw a parallel with Lord Atkin's question 'who is my neighbour?' in *Donoghue v Stevenson*:

Lord Diplock, at 1061

> This appeal, therefore, also raises the lawyer's question: 'Am I my brother's keeper?' A question which may also receive a restricted reply.

The question receives a restricted reply. It does not receive a *wholly negative* reply.

Mitchell v Glasgow City Council [2009] UKHL 11; (2009) 1 AC 874

The pursuer argued that the deceased ought to have been warned that his neighbour Drummond, who had previously threatened to kill him, had been called to a meeting at the Council to discuss, in part, his behaviour towards the deceased. The meeting left Drummond in an agitated state, and on returning home he carried out his earlier threat, attacking and killing the deceased.

Lord Hope, *Mitchell v Glasgow City Council* [2009] UKHL 11

> 15. Three points must be made at the outset to put the submission into its proper context. The first is that foreseeability of harm is not of itself enough for the imposition of a duty of care … Otherwise, to adopt Lord Keith of Kinkel's dramatic illustration in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, 192, there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning. The second, which flows from the first, is that the law does not normally impose a positive duty on a person to protect others. As Lord Goff of Chieveley explained in *Smith v Littlewoods Organisation Ltd*, 76, the common law does not impose liability for what, without more, may be called pure omissions. The third, which is a development of the second, is that the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability: *Smith v Littlewoods Organisation Ltd*, 77–83, per Lord Goff.

p. 197

Mitchell was a case where the positive duty claimed was a duty to warn M about the potential criminal acts of another (in fact, at one remove: the claimed duty was to warn M about a meeting with the third party, which might be expected to make him angry, in the context of earlier threats to kill M). Related issues are explored in relation to 'remoteness' or 'novus actus' in Chapter 6.3. In *Mitchell*, Lords Hope, Scott, and Brown set out in broadly similar terms those circumstances where there may be liability in negligence for the criminal acts of another. Here we extract Lord Brown's version. The circumstances are:

1. where there is vicarious liability (Chapter 10);
2. where there is an obligation to supervise;
3. where the defendant creates the risk of danger (for example, by giving off-duty employees access to firearms);
4. where there is an assumption of responsibility (Chapter 5).

Lord Brown, *Mitchell v Glasgow City Council* [2009] UKHL 11

> 81. Generally speaking, people are not liable for the crimes of others. A is not ordinarily liable to victim B for injuries (or damage) deliberately inflicted by third party C. In some situations, of course, where, for example, C is employed by A or otherwise acting on A's behalf, A may be vicariously liable for C's crime. But it cannot be said that a landlord is vicariously liable for his tenant's crimes and a consistent line of authority holds that landlords are not responsible for the antisocial behaviour of their tenants: *Smith v Scott* [1973] Ch 314, *O'Leary v London Borough of Islington* (1983) 9 HLR 83, *Hussain v Lancaster CC* [2000] QB 1, and *Mowan v Wandsworth LBC* [2001] LGR 228.
>
> 82. A may also be liable for C's crime where he is under an obligation to supervise C and fails to do so: *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, where Borstal boys escaped (and caused damage in the vicinity whilst escaping: important because proximity too is a necessary condition of liability in these cases) whilst their warders were asleep, is a good illustration of this. Similarly, if A specifically creates a risk of injury, by, for example, arming C with a weapon, he may be liable for the resulting damage, as in the particular circumstances of *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR …
>
> 83. Similarly, A may be liable if he assumes specific responsibility for B's safety but carelessly then fails to protect B: see, for example, *Costello v Chief Constable of Northumbria* [1999] 1 All ER 550. It cannot credibly be suggested, however, that any of these situations arise here. Landlords are under no obligation to supervise their tenants and prevent their committing criminal acts; by threatening a disruptive tenant with eviction a landlord cannot sensibly be said to be creating the risk of personal violence towards others in the same way as the British Virgin Islands police created a risk by arming an erratic probationer; and there can be no question of landlords assuming responsibility for the safety of neighbours (or, indeed, visitors) even if they know their tenants to be threatening them.

p. 198

These remarks were treated by the Supreme Court in *Robinson* and *Poole BC v GN* as accurately setting out the bases of omissions liability in English law. As we have seen, the Supreme Court at the same time expanded the significance of this extract, treating it as central to two separate, and important fields of public authority liability, suggesting that its significance is overarching. Its application in specific instances depends, of course, on how we can go about addressing whether an 'assumption of responsibility' exists.

4 Conclusions

i. As we saw at the start of this Section of the book, the tort of negligence requires a breach of a duty of care, owed by defendant to claimant, which results in damage which is not too remote from the breach of duty (or, in other terminology, which falls within the scope of the duty of care). Chapter 3 considered how the breach of duty is established. In this chapter, we have outlined the general evolution of the duty of care.

ii. After the emergence of a general tort of negligence in *Donoghue*, there was a process of generalization in the applicable concepts and principles. This process, however, was reversed in *Caparo v Dickman*, resulting in far more caution about recognizing novel duties. The notion of duty emerged as a means of controlling, rather than simply expanding, liability in negligence, and the principles upon which the existence of a duty is to be determined was perceived as sensitive to many different factors and circumstances. A degree of categorization was therefore recognized, and still exists in the current law. We will see in Chapter 5 how far this has contributed to the complexity of the modern law of negligence.

iii. In the most recent change in direction, the Supreme Court has 'clarified' the core significance of the decision in *Caparo*, and at the same time, has reinterpreted much of the existing law on public authority duties in particular. As we will see in Chapter 5, it has also attempted to sidestep any *Caparo* 'test' in relation to economic loss.

iv. In its recent decisions, the Supreme Court has suggested that *Caparo* should not be interpreted as laying down a 'test' for the duty of care. Simply put, there is no such test. Rather, at the heart of *Caparo* was the idea of incremental development, by analogy to existing categories of case. So much is consistent with *Caparo* itself. But since the decisions in *Robinson* and *Poole*, the emphasis is on 'established principles', and there is much less direct reference to policy or pragmatic concerns, which permeated the approach in and following *Caparo*. This is plainly intended to be a simplifying move.
p. 199 The established principles which have so far been apparent are, particularly, the distinction between physical injury and other forms of damage; the distinction between causing harm and failing to benefit (drawing on the case law on acts and omissions); and the idea of 'assumption of responsibility' as providing an important exception to the general principle—applicable across all categories of case—of non-liability for omissions.

v. Some questions about the new direction taken by the Supreme Court have been raised in this Chapter. In particular, the emphasis on established principles is clearly a way of re-explaining decisions reached on other grounds. How is it possible that judges preoccupied with pragmatic concerns should have reached decisions which are also compatible with a few core principles? Perhaps, those principles have pragmatic foundations. But if this is the case, how are future courts to extend the law in response to new claims and changing conditions? In proceeding by analogy, they are directed to consider what is 'just and reasonable', and advised that this has always been essential to existing authorities. It seems likely that pragmatism will continue to be on the menu.

vi. Finally, it seems that in a range of cases, the enquiry will begin and end with a categorisation of the claim as falling within, or outside, an established duty situation. This was the case in *Robinson* itself. The question remains, how exactly are duty situations to be defined? For example, why was it concluded that (all?) cases of positive actions causing personal injury are unproblematic, and fall within an established duty situation? The emphasis here is on one sort of settled principle, taking priority over the pragmatic concerns that have previously exercised the courts. The attempt at stating a relatively simple set of principles may, therefore, lead to a new form of uncertainty in the courts. We will see in the Chapter 5 the kinds of issues that have arisen in different contexts, in relation to the duty of care, and will continue the process of debating the likely influence of the new approach.

Further Reading

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Goudkamp, J., ‘A Revolution in Duty of Care?’ (2015) 131 LQR 519–524.

Heuston, R., ‘*Donoghue v Stevenson* in Retrospect’ (1957) 20 MLR 1.

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Rodger, A., ‘Lord Macmillan’s Speech in *Donoghue v Stevenson*’ (1992) 108 LQR 236.

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Weir, T., ‘The Staggering March of Negligence’, in P. Cane and J. Stapleton (eds), *The Law of Obligations: Essays in Honour of John Fleming* (Oxford University Press, 1988), 97–140.

Winfield, P.H., ‘Duty in Tortious Negligence’ (1934) 34 Col LR 41.

Notes

[1] To this day, it is not known whether there was a decaying snail in the bottle of ginger beer.

[2] Although in Scotland the subject is not tort but ‘delict’.

[3] This warning was noted by Lord Devlin in the key case of *Hedley Byrne v Heller* [1964] AC 465, and again by Lord Oliver in *Caparo v Dickman* (see Section 2.4).

[4] Ibbetson here considers duties to trespassers, which we will debate in Chapter 13.

[5] For example, *Ross v Caunters* [1980] Ch 297; *Junior Books v Veitchi* [1983] 1 AC 520; *Lawton v BOC Transhield* [1987] ICR 7.

[6] The last aspect of *Anns* to fall was its analysis of negligence in the context of statutory powers: *Gorringe v Calderdale* [2004] 1 WLR 1057 (Chapter 5, Section 3).

[7] See particularly *Taking Rights Seriously* (2nd edn, Duckworth, 1996), chapters 2 and 4.

[8] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; *McFarlane v Tayside* [2000] 2 AC 59.

[9] For a similar description see D. Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, referring to a 'factual' duty of care and a legal or 'notional' duty of care. Unlike Millner, Nolan suggests that 'duty' has become an impediment to understanding and development of the law, partly because this dual usage tends not to be noticed.

[10] See our discussion of the more recent approach of the Supreme Court, in the section that follows.

[11] Apart from *Robinson* and *Poole*, which are extracted here, see also *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] AC 1732, and *Steel v NRAM* [2018] UKSC 13; [2018] 1 WLR 1190. Both are extracted in Chapter 5.

[12] See in particular J Goudkamp, 'A Revolution in Duty of Care?' (2015) 131 LQR 519–524.

[13] See the critical analysis in JC Smith and P Burns, 'Donoghue v Stevenson – The Not So Golden Anniversary' (1983) 46 MLR 147–163.

[14] S. Steel, 'Rationalising Omissions Liability in Negligence' (2019) 135 *LQR* 484–507.