VIII. England and Wales

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Each decision described below represents a moment of invention rather than evolution. They each mark a fundamental shift in the tort rules themselves rather than an important but ultimately incremental step in the development of an existing framework. They stand collectively as a powerful reminder both of the central and inescapable importance of judicial decision-making in English tort law, and of the fact that even in a system which regards conservative, careful expansion as its hallmark, moments of stark invention and novelty are nevertheless vital. It is only through balancing these two modes that the common law persists.

1. *Lister*[1]

In *Lister*, the claimants were adults who had been sexually abused as children at the hands of a warden, employed by the defendant, to manage a boarding house in which they had been residents, attached to their school. Suing in respect of the personal injuries they had sustained, the claimants had foundered in the Court of Appeal on the matter of whether the defendant could be held vicariously responsible. At the heart of the claim were two interconnected problems. The first was the contemporary and long-settled test for the circumstances in which D could be held vicariously liable for T's act in relation to C; in the argot of the old cases, when would a servant's tort be within the 'scope of employment' such that their master would be liable? The so-called 'Salmond Test' – drawn from the work of the great textbook author of the same name – required what T had done to either be a wrongful act authorised by the master, or (and, naturally, more commonly) a wrongful and unauthorised mode of carrying out something that the master had authorised.[2] The second was the clearly intentional, indeed criminal nature of the wrong at hand here, a matter with which earlier courts had struggled in the context of vicarious liability.

[1] *Lister v Hesley Hall Ltd* [2001] United Kingdom House of Lords (UKHL) 22, [2002] 1 Appeal Cases (AC) 215.

[2] Para 15 per Lord Steyn.

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Whilst by the time of *Lister* the courts had recognised that vicarious liability could apply in the context of intentional wrongdoing,[3] it was clear that, combining these two features, the Salmond test was inapt here. As Lord Steyn observed in his leading judgment in *Lister*, the test, 'does not cope ideally with such cases'. This was perhaps understandable: in what circumstances could it be said that abusing children in your care was simply an unauthorised way of *caring* for them, which was the task that had been entrusted in the first place? As Lord Millet put it, to suggest this would be 'stretching language to breaking-point'.[4] Indeed, the claimants lost in the Court of Appeal largely on the basis that clear authority in the previous Court of Appeal decision in *Trotman* had refused to apply the test in closely analogous circumstances where a child had been indecently assaulted by a teacher whilst on a school trip. As Butler-Sloss LJ had put it there, the act was 'far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer'.[5] If the claimants in *Lister* were to succeed, *Trotman* would have to be overcome or distinguished.

Before the House of Lords, the former was preferred, and the claimants discovered that a greater degree of flexibility and innovation was possible. Subsequent to *Trotman* in the same year, a pair of decisions by the Supreme Court of Canada had adopted a test for this aspect of vicarious liability focused on whether there was a so-called sufficiently 'close connection' between the act the tortfeasor had been employed to do and the wrongful act.[6] This logic proved seductive to a majority of their Lordships, who viewed such an approach as better attuned to the question of whether vicarious liability could be justified on a given set of facts. Not least, as they acknowledged, given even the second limb of the Salmond test itself hinged crucially on the detail and level of abstraction one adopted in framing the act that the employer had authorised.[7] The knotty question of vicarious liability for intentional and even criminal wrongdoing was settled through careful, authoritative interpretation of a range of past authorities.[8] In doing so, various Lords emphasised that identifying the relevant risk that an employer took on in entrusting a task helped explain vicarious liability here. Deploying something akin to this approach through the lens of the close connection test, it was clear that

[3] Para 19 f per Lord Steyn.

[4] Para 68.

[5] Para 22 per Lord Steyn.

[6] *Bazley v Curry* (1999) 174 Dominion Law Reports (DLR) (4th) 45; *Jacobi v Griffith* (1999) 174 DLR (4th) 71.

[7] Para 23 per Lord Steyn; para 43 per Lord Clyde; para 60 per Lord Hobhouse.

[8] Para 19 f per Lord Steyn; paras 71–78 per Lord Millet.

entrusting the care of children to the warden had carried with it a risk of just such abuse such that it was fair to impose vicarious liability on the defendant.[9] Conversely, had the employment merely furnished the opportunity for the abuse rather than been bound up with it, the close connection test would not have been satisfied.[10] Naturally, *Trotman* could not withstand this assault and was overruled as incorrectly decided, standing now as a mark of an older, more mechanically-minded approach that *Lister* ultimately rejected.

Lister heralded the start of a process that has taken almost 25 years to come to some sort of fragile truce within the cases here. In adopting the 'close connection' test, it set English law on a path towards expansion of vicarious liability here into areas that would previously have been unthinkable. Indeed, some of the most controversial cases that have followed have hinged on the spongy uncertainty that was always inherent in such an open-ended test.[11] The crucial matter of exactly how close the supposed connection needs to be such that it is just and fair to impose vicarious liability is one that a majority of their Lordships in *Lister* opted not to grapple with, albeit later practice perhaps reveals that there may be no certainty to be reached here in any case. The stark warning in *Lister* from Lord Hobhouse – less enamoured by the song of the Canadian sirens, albeit reaching the same result on the facts – has proven to be fiercely perceptive of the challenge with which, having taken this step, future English courts would be faced: 'an explanation of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be.'[12] Indeed, given the ructions that have followed *Lister*, what perhaps stands out most in retrospect is the entirely plausible alterna-

[9] Para 28 per Lord Steyn, describing it as 'inextricably interwoven'; para 79 per Lord Millet.

[10] To take the example memorably explored by Lord Hobhouse, had it been the school's groundsman that had committed the abuse, the defendants may not have been liable, given the groundsman would not have been entrusted with the care and authority over the boys of the actual tortfeasor.

[11] *Mohamud v WM Morrison Supermarkets* [2016] United Kingdom Supreme Court (UKSC) 11, [2016] AC 677; *Bellman v Northampton Recruitment Ltd* [2018] Court of Appeal (Civil Division) (EWCA Civ) 2214, [2019] 1 All England Law Reports (All ER) 1133; *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15, [2024] AC 567.

[12] Para 60 per Lord Hobhouse.

tive path not taken but nevertheless canvassed by Lord Hobhouse in *Lister*.[13] The need to expand the scope of vicarious liability might have been avoided had the court instead declared that the defendants owed a non-delegable duty to ensure that care was taken by those agents to whom the practicalities of the duty had been entrusted. As it was, the pressure of these cases was, through *Lister*, funnelled into vicarious liability and although the Supreme Court has stood by that decision such that it is now unthinkable that they would depart from it, the doctrinal and practical consequences of doing so mark *Lister* as a generationally important tipping point.

2. *Fairchild*[14]

In *Fairchild*, a number of claimant employees had all been exposed to asbestos dust during successive periods of employment by the respective defendants. The claimants then suffered from mesothelioma. Suing in the tort of negligence, the claimants faced a simple problem. Due to the state of knowledge about the aetiology of that disease, it was possible that they had contracted it following the inhalation of a single fibre and that, having done so, further exposure would not worsen or aggravate the condition. As such, whether the defendant was in breach of a duty of care to the claimant, the necessary link of factual causation was rather muddied. On the orthodox application of the relevant principles, which required proof on the balance of probabilities,[15] each defendant would be able to point to the negligence of the other and, in so doing, defeat the claim. It was, in short, impossible for the claimants to satisfy the relevant requirement of factual causation in such overdetermined circumstances where they had nevertheless undoubtedly been wronged by *someone*. Having failed before the Court of Appeal, the claimants appealed to the House of Lords, who granted the appeal in all cases.

To achieve this result, their Lordships were willing to make an exception to the orthodox rules, basing their logic on the authority of a previous House of Lords decision from the 1970s. That earlier decision, *McGhee v National Coal Board*, had,[16] in the interim, been read as hinging on a robust factual inference. Now instead, it transpired that their

[13] Para 55.

[14] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32.

[15] *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Queen's Bench (QB) 428.

[16] *McGhee v National Coal Board* [1973] 1 Weekly Law Reports (WLR) 1.

Lordships could identify in *McGhee* authority for a principled solution to the problem in *Fairchild*. That a defendant was responsible for a material contribution to merely the *risk* of harm, rather than the harm itself, would suffice for a causal connection. The exceptional nature of the decision here was clearly acknowledged, with Lord Nicholls rightly noting that such an exception from normal principles required a clear and principled basis,[17] and Lord Hoffmann acknowledging that the decision about what causal connection was appropriate in a given case was itself one that depended on the purpose of the law's inquiry.[18] There was a clear and pressing concern that were an exception impossible, the undisputed duty of care imposed on defendant employers in this context would be, as Lord Hoffmann put it, 'empty … of content',[19] with clear acknowledgement throughout of the underlying policy arguments for and against the claimant's position. Central to the justification that underpinned the decision was the fact that the uncertainty with which the claimants were faced was an epistemic one grounded in the current state of medical science. As Lord Roger powerfully stressed, whilst there was an element of 'rough justice' to applying the newly resuscitated principle in *McGhee*, it was to require from the claimants no more than the most that could be asked of them when faced with such an insurmountable gap in human knowledge.[20] This 'rock of uncertainty' – as Lord Bingham put it[21] – could not be let stand in the way of claimants who had suffered a wrong and could demonstrate that a particular defendant had at the very least increased the risk of the consequences of that wrong occurring. Of particular note in *Fairchild* was the appearance of a wide-ranging comparative survey by Lord Bingham,[22] with further comparative and indeed historical views canvassed by Lord Roger;[23] strong evidence of the utility in looking beyond one's own borders on such essentially universal matters as what connection is sufficient to justify, all other things being satisfied, liability in tort. As Lord Bingham put it, whilst the point of such an exercise was not to suggest decision-making by jurisdictional head-count, any choice to remain an outlier could only be taken after 'anxious review' and ulti-

[17] Para 36. See also Lord Hoffmann at para 60.
[18] Paras 49, 56.
[19] Para 62.
[20] Para 155.
[21] Para 7 per Lord Bingham.
[22] Para 23 ff; discussed in *K Oliphant*, Fairchild v Glenhaven Funeral Services Ltd (2002), in: C Mitchell/P Mitchell (eds), Landmark Cases in the Law of Tort (2010) 355.
[23] Paras 158–160.

mately 'there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.'[24]

The consequence of the decision in *Fairchild* has been incalculable. A long line of cases, many before the apex court, have followed as successive panels of judges have attempted to constrain and cohere the logic that was unleashed that day. If *Fairchild* itself appears to civilian eyes as a classic case of alternative causation, English courts were shortly thereafter forced to wrestle with the consequences of confirming a causal link here. What about alternative causation with additional chance?[25] What is the threshold for holding that a material contribution to the risk of harm is present at all?[26] To what extent are differences between two or more types of agents to which a claimant might have been exposed substantial enough to defeat the logic of *Fairchild*?[27] Perhaps most surprisingly, what are the practical consequences for the quantum of liability the defendant is faced with here – a rather crucial question that was not part of the decision in *Fairchild* itself. Indeed, as the cases here have developed, it has also brought censure from Parliament, who were moved to enact a statute essentially repealing the applicability of the *Fairchild* line of cases in the specific context of *Fairchild* itself: asbestos-related mesothelioma.[28] Likewise, a substantial pushback from the insurance industry in an effort – entirely understandably, if practically unsuccessful – to clarify that they would not be liable for the mere *creation* of risk.[29] As such, the hope for a narrow, perhaps even contextually-grounded, exception to the orthodox rules of factual causation has been strained as successive claimants, who would otherwise be faced with a causally complex hurdle to surmount, have attempted to bring themselves within the relief provided by the *Fairchild* enclave. The saga stands as a sobering reminder that the common law strives to make abstract rules that cannot easily be constrained to a given context, type of damage, or exact causal relationship, and that courts must be wary of the broader consequences of the logic of justice beyond the precise case before them.

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[24] Para 32.

[25] *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.

[26] *Sienkiewicz v Greif (UK) Lt*d [2011] UKSC 10, [2011] 2 AC 22.

[27] A subject of some discussion in *Fairchild* itself but that has required a number of later decisions to better pin down, and even then this now-so-called 'single agent' rule is not without substantial controversy. See *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 WLR 2036; *S Green*, Fairchild and the single agent criterion (2017) 133 Law Quarterly Review (LQR) 25.

[28] Compensation Act 2006 sec 3.

[29] *Durham v BAI (Run Off) Ltd* [2012] UKSC 14, [2012] 1 WLR 867; *International Energy Group Ltd v Zurich Insurance Plc* [2015] UKSC 33, [2016] AC 509.

3. *Campbell*[30]

In *Campbell*, the iconic fashion model Naomi Campbell had been awarded damages and an injunction in relation to publication by the defendant newspaper of details about her drug addiction and the fact that she attended an anonymous self-help group by way of treatment. Whilst she accepted that the fact of her addiction and treatment could be published, she claimed there had been a tortious breach of her rights in the decision to publish additional details about the therapy group along with covertly obtained photographs of her leaving a group meeting. Whilst the claimant succeeded at first instance, the defendant won their case on appeal, resting on the fact that the claimant had publicly denied her addiction – entitling them in the public interest to correct the record – and that elements of the details were insufficiently central or significant to amount to an actionable breach. On appeal to the House of Lords, whilst there was a split as to the result on the facts of *Campbell* itself (with a bare majority holding that she could recover), their Lordships reached a landmark decision about tort's role in the protection of private information. The main barrier to recovery lay in the fact that whilst there was *some* protection given to what could be thought of as 'private' information, this was primarily through the form of the equitable action for breach of confidence such that the cases here were largely centred on contexts where confidence was expressly afoot – say, state or commercial secrets – or where it could be easily implied.[31] The heart of the question their Lordships faced was to what extent this paradigm remained authoritative and exclusive, and to the extent it was not, what was the nature of any further available action?

Famously, their Lordships extended the protection tort could offer here, marking the emergence of the tort now known as Misuse of Private Information. Whilst the root of this lay in the equitable action for breach of confidence, as Lord Nicholls put it, the law had shaken off the need for an 'initial confidential relationship' and it was more accurate to characterise the information that would potentially fall to be protected here as 'private' rather than confidential.[32] Drawing on the impact that arts 8 and 10 of the European Convention on Human Rights had had in cognate areas relating to the publication of information, it was clear that

[30] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[31] See, for instance, *Argyll v Argyll* [1967] Chancery (Ch) 302 concerning, in the context of a divorce, at attempt to prevent disclosure of information exchanged by the parties during marriage.

[32] Para 14 per Lord Nicholls.

the common law had developed 'in harmony' with those articles such that Lord Nicholls declared: 'The time has come to recognise that the values enshrined in arts 8 and 10 are now part of the cause of action for breach of confidence.'[33] Once it was established that the defendant had or was proposing to disclose information that was private – that is to say, information in relation to which there was a reasonable expectation of privacy, thus engaging art 8 – the analysis turned to balancing the competing interests involved,[34] without according one precedence over the other.[35] Where this engages the defendant's right to freedom of expression, then the two rights must be weighed against one another in a judicial balancing exercise to assess whether interference with the claimant's right can be justified. Such an exercise looks to the proportionality of the interference given the countervailing interest, taking into account the facts of the given case.[36] In *Campbell* itself, a bare majority was prepared to find that disclosure of the relevant information gave rise to an action. Lords Nicholls and Hoffmann were less convinced, in part on the basis that the *additional* details added little to the information the claimant conceded could be disclosed, given the well-known nature of the relevant therapy group,[37] and the fact the photos showed 'nothing untoward' or embarrassing, adding little beyond the text itself.[38] In any case, they felt the balancing exercise fell squarely in favour of the defendant given the 'comparatively minor degree' of intrusion into the claimant's life,[39] and the need to provide some latitude for editors in taking decisions about what to publish.[40] For the majority, the information clearly gave rise to a reasonable expectation of privacy and the resulting balancing exercise instead fell to the claimant's advantage. The fact the additional details went beyond what was required to credibly report the story and that the photographs – taken intentionally and covertly in a public place – likewise added little, such that their publication alongside the article would have represented to any person in that position a 'gross interference with

[33] Para 17 per Lord Nicholls, see also Lord Hoffmann at para 51 noting 'a shift in the centre of gravity of the action for breach of confidence' as a result of the Human Rights Act 1998.

[34] Para 134 per Baroness Hale.

[35] Para 138 per Baroness Hale.

[36] Para 139 f per Baroness Hale.

[37] Para 28 f per Lord Nicholls; para 60 per Lord Hoffman.

[38] Paras 30–32 per Lord Nicholls; paras 72–75 per Lord Hoffmann.

[39] Para 28 per Lord Nicholls.

[40] Para 62 per Lord Hoffmann.

her right to respect for private life',[41] sufficed to outweigh the defendant's right to freedom of expression.[42]

Campbell is of foundational importance within the modern law of tort, and whilst sometimes this is not always obviously how the judges themselves see it in the moment, that was not the case here. As Baroness Hale rather magnificently put it, 'this case raises some big questions'.[43] *Campbell* is the wellspring for many cases that have followed and, as in other cases discussed here, its contribution was not only in identifying the normative values to which the law would respond, but in defining the basic shape of the legal analysis that lay at the heart of the tort it recognised. Beyond this, it is a signal instance of the law of tort drawing on the force and logic of the Convention rights as a light by which to develop.[44] That move involved not only accepting the values set out there as important in their own right, but in acknowledging a hierarchy of influence between the more abstract shape of the action available in tort, and those values. The latter could and were indelibly drawn on to give form and utility to the former. This has not always been the case otherwise, and certainly other torts have generally suggested a relationship that is separate but parallel at best, leaving *Campbell* and the powerful action it enabled all the more significant by example.

4. *Rhodes*[45]

In *Rhodes*, the claimant was the son of the defendant, a renowned and famous classical pianist, and, through his mother, sued to injunct the publication of the defendant's autobiography in which he detailed the history of his own sexual abuse as a child. The fear was that this would cause psychological harm to the claimant. What action in tort would provide the basis for such a claim? Injunctions are, after all, a relatively rare remedial option in English tort as is usually any hope of remedial intervention in advance of either harm to or interference with a claimant. Whilst there were a number of options suggested by the claimant in the lower courts, whether to be found in the torts of misuse of private information or negligence, the Court of Appeal focused on the action

[41] As Baroness Hale bluntly noted of their publication, at para 56, 'There was no need to do this.'

[42] Para 124 per Lord Hope.

[43] Para 126 per Baroness Hale.

[44] See paras 49–51 per Lord Hoffmann.

[45] *O (A Child) v Rhodes* [2015] UKSC 32, [2016] AC 219.

supposedly available through the 19th century decision of *Wilkinson v Downton*.[46] In *Wilkinson*, Wright J had granted an action where, as he famously put it, the defendant had 'wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her'.[47]As such, the *Wilkinson* tort focuses on an intentional act causing harm to the claimant and on that basis the Court of Appeal in *Rhodes* had granted an injunction to the claimant, rejecting the argument in the High Court that *Wilkinson* was limited to merely false or threatening words.[48] This was somewhat surprising for a range of reasons, not least the sense that the *Wilkinson* tort had long ossified and diminished in utility, if not, in fact, disappeared altogether. Other torts, primarily the tort of negligence, had, in the century after *Wilkinson*, come to offer meaningful protection in the area where it appeared to have been most useful in the handful of cases where it had been relied on: the recovery of damages for psychiatric (rather than physical) injury. The appeal to the Supreme Court was nakedly about the role and scope of the *Wilkinson* tort. Did it have a role in the modern law? What were its boundaries? Would it apply even in the context of true statements? In what sense did an interference have to be intended by the defendant?

The Supreme Court, over a carefully reasoned pair of judgments, held that there was indeed a role for the *Wilkinson* tort – or as they came to describe it, the tort of intentionally inflicting physical or psychological injury – within modern tort law. Parsing the preceding case law, in particular a decision marking the nadir of the tort's relevance in the earlier 2000s,[49] the Supreme Court held that the tort would ordinarily require three elements. The first was a mental element on the part of the defendant, who must intend the claimant to suffer physical injury or severe emotional distress.[50] The second was a conduct element, which required words or conduct on the part of the defendant, directed towards the claimant, which lacked justification or reasonable excuse, with the burden of proof falling on the claimant.[51] The third was a consequence element, requiring the claimant to prove psychiatric illness or physical harm.[52] In reaching this conclusion, the court rejected the idea that recklessness would suffice

[46] *Wilkinson v Downton* [1897] 2 QB 57.
[47] Ibid at 58.
[48] Paras 21–23 per Baroness Hale.
[49] *Wainwright v Home Office* [2004] 2 AC 406.
[50] Paras 85–87.
[51] Para 74.
[52] Para 73 per Baroness Hale.

for the mental element, that the conduct needed to be 'extreme, flagrant or outrageous',[53] or that it would be enough if all that the claimant suffered was distress falling short of a recognised psychiatric illness, albeit this last matter earned some dissent from Lord Neuberger in an otherwise concurring judgment. He was understandably curious about the obvious imbalance between what needed to be intended and what needed to result.[54] As to the tort's relevance on the facts of *Rhodes* itself, it was clear that there was neither a sufficient mental element present nor a sufficient conduct element. Indeed, in relation to the latter, Baroness Hale was at pains to note that the context here, 'the curtailment of freedom of speech … gives rise to its own particular considerations',[55] not least the relevant human rights implications, which suggested that assessment of the conduct element will always mould itself to the particular context of the case. It was neither plausible to think the conduct in *Rhodes* was directed to the claimant, nor that there was anything that would justly bar the defendant from telling the world his own story. Indeed, short of speech that was deceptive, threatening or abusive, the court doubted that truthful speech could in fact be caught by the newly refreshed tort at all.[56]

Rhodes is an essential case in modern English tort law, albeit not for its practical importance. Given the understandably narrow parameters that the Supreme Court set for the tort, it is not often that a defendant will satisfy the requirements in a situation where other forms of action are themselves, for whatever reason, unavailable.[57] Yet the confirmation of the action's continued role is of undoubted importance. It fills the abstract doctrinal space for an intentional but indirect interference with the claimant and so, alongside the tort of trespass – whose concern is intentional but *direct* interferences – *Wilkinson* provides a degree of conceptual scaffolding, clarity and completeness to the law of tort more generally. Even if in practice it cannot be expected that it will be frequently drawn on, it both gives confidence that English tort law is built on something more abstractly stable than a response to the facts of a given case and that the modern courts are willing and able to undertake the sort of architectural reasoning necessary to identify and clarify the role of a particular action within the broader constellation of possibilities. Even accepting

[53] Para 88, noting this bar had been accepted by the analogous Canadian authorities.
[54] Para 119 per Lord Neuberger.
[55] Para 74.
[56] Para 77 per Baroness Hale; para 107 f per Lord Neuberger.
[57] For an example of *Rhodes* in action, see *C v WH* [2015] England & Wales High Court (EWHC) 2687 (QB).

the characteristic flexibility of English tort law, a formal shift away from describing something as 'the tort in…' *Wilkinson v Downton* to, however inelegant, the tort of intentionally causing physical or psychological harm must be celebrated.

5. *Robinson*[58]

Of the cases selected here it is *Robinson* that stands out for the blinding simplicity of its facts. Elizabeth Robinson, 76-years-old, was bundled to the ground when she happened to be caught in the midst of an attempt by two of the defendant Chief Constable's police officers to arrest a suspected drug dealer on a high street in the middle of the day. Ending up at the bottom of this pile of bodies understandably left the 'relatively frail' Mrs Robinson suffering personal injury.[59] Nevertheless these simple facts apparently required a decision of the UK Supreme Court to settle…

The central issue was thus: in the years running up to *Robinson*, the English courts had been wrestling with the methodology of assessing whether there was a duty of care owed to a given claimant by a defendant. The 20th century had explored a range of approaches to this question, culminating, it was generally thought, in an approach that rested primarily on the three matters of whether harm was foreseeable, whether there was a relationship of 'proximity' between the defendant and claimant, and whether imposing a duty of care would be fair, just and reasonable. This was famously drawn from the decision of the House of Lords in *Caparo*.[60] Whilst decided cases could provide a degree of scaffolding around which the parties would have to argue, and the burden of argument lay on the claimant, this invitation to open policy reasoning formed the crux of many, if not all, cases where duty was disputed. Crucially, even where previous cases had decided the matter one way or another, the opportunity for such open policy reasoning always provided the defendant a conceptual space whereby they could plead that imposing such a duty would be unfair in their particular circumstances.

A further complication in *Robinson* was the fact that the claimant was suing the police. In a series of cases over the years beforehand, the courts had signalled that there were often compelling policy reasons why a duty of care would *not* be owed by the police in the execution of their duties. Notably, in the *Michael* decision in 2014, a majority of the Su-

[58] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736.
[59] Para 1.
[60] *Caparo Industries plc v Dickman* [1990] 2 AC 605.

preme Court declared there was no duty of care where they were aware a claimant was in immediate life-threatening danger from a third party.[61] This was justified partly on the basis of open policy reasoning, but also on the dual bases that, setting policy reasoning aside, there was generally no duty of care where D's behaviour was an omission rather than a positive act, and that there was no distinct or different approach to the duty of care in the context of public authorities. The duties they would owe were the same as any private individual: *ergo*, no duty there.

Robinson marked the apotheosis of these strands of reasoning and heralded a seismic shift in the methodology of the duty of care in all cases that will follow. The core of the reasoning was that the decision in *Caparo* itself had been misunderstood! Far from permitting free-for-all policy arguments over the duty of care in any case, in fact it was authority for the opposite. Their Lordships in *Caparo* had, in fairness, emphasised the importance 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.'[62] In *Robinson* this appeal to the power of precedential, analogy-driven reasoning was anointed as the dominant methodology for tackling duty questions. Setting out a two-step process, the Supreme Court confirmed that where, considering previous authorities, a case fell within an 'established category' (where what has been 'established' is whether there is a duty or not) then, unless the relevant party is seeking to overturn those authorities, nothing further is needed and there is simply no scope for policy reasoning, the answer is automatic.[63] Conversely, where there is not an established category into which the case can be coherently sorted, there is scope for the parties to introduce policy reasoning, working from the closest analogous cases and conscious of the emphasis on, and supposed importance of, merely incremental development.[64] Applied to the case at hand, far from a situation where either policy reasoning was permissible, or where the facts could be framed as a form of omission or otherwise as a more abstractly complex relationship between the parties,[65] this was, in the end, a straightforward case of causing personal injury by a positive act in a situation where it was foreseeable that carelessness

[61] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732.
[62] *Caparo* (fn 60) at 618 per Lord Bridge.
[63] *Robinson* (fn 58) paras 21–26.
[64] Ibid, paras 27–30.
[65] Ibid, paras 43–72, canvassing a broad range of authorities concerning the police in execution of various aspects of their role.

would result in such injury.[66] As such, a duty of care was straightforwardly owed and, given the other findings, Mrs Robinson would recover damages.[67] Whereas preceding cases had begun to gently reformulate classic cases from the *Caparo* era as being justified on the basis of a fundamental act/omission distinction within the duty of care cases, *Robinson* marked the triumph of this approach with the evident centrality of that distinction proving vital to the decision that was reached. Alongside the shift in the broader methodology of the duty of care that *Robinson* confirms, whilst this is far from the only relevant categorical distinction in the cases, it is clearly a crucial one around which many important authorities now turn. Likewise, *Robinson* confirmed beyond contestation the parity of approach to duty of care whether the defendant is an individual or the state.[68] Any suggestion that the latter requires or invites special approaches or reasoning must now be rejected.

That said, *Robinson* is telling for the fact that whilst all five judges agreed in the result and the basic categorisation of the case itself, a very strong pairing of Lords Mance and Hughes was not entirely convinced by the entire logic of the plurality (Baroness Hale, and Lords Reed and Hodge). They highlighted the evident role of policy reasoning in the very act of constructing and developing by analogy the established categories upon which the methodology of *Robinson* depends.[69] As Lord Mance noted, it was not even necessarily the case that the category in which *Robinson* itself was thought to fall would inevitably generate a duty on *any* set of facts, whether concerning the police or otherwise.[70] Equally, Lord Hughes doubted that the act/omission distinction was clear enough to yield simple answers in many cases, not least, as he noted, as 'the rule against liability for omissions is by no means general',[71] and 'there is no firm line capable of determination between a case of omission and of commission'.[72] Their arguments deserve close consideration by future scholars and judges and form a yardstick against which the broader success of *Robinson* can be measured as a body of cases grow from it.

Certainly, the effect of *Robinson* was immediate and will likely be of lasting impact. Subsequent cases at all levels have now adopted the two-step logic it set out and there are clear examples of cases being decided in

[66] Para 73.
[67] Para 74.
[68] Para 32 f.
[69] Para 84 per Lord Mance.
[70] Paras 85 ff, 93.
[71] Para 115 per Lord Hughes.
[72] Para 117.

line with each step. Where a decision is regarded as merely evidencing an existing 'established category', the consequences have been immediate.[73] Where no sufficiently close analogy can be found, there, and only there, do we find explicit consideration of the policy factors that might sway the court either way.[74] Yet the concerns raised by Lords Mance and Hughes echo loudly. The decision as to whether a case falls within an 'established category' is clearly not always so clear cut as to make that a straightforward assessment. The act of parsing the past cases to (re-)construct them as categories is an exercise which is itself clearly susceptible to policy reasoning and the process of seemingly needing to appeal a case through the courts to have an authoritative view confirmed only appears to emphasise this.[75]

Recognising this, it is impossible not to wonder whether, for all the flaws of the high-policy era, it may not have been preferable to adopt such open and ultimately transparent reasoning. The somewhat more opaque methodology confirmed in *Robinson* is not without risks itself. It imbues duty of care cases with something of the quality of a magic show, where answers may appear instantly and strikingly, but without convincing explanation. Seeing a rabbit pulled from a hat may impress some in the audience some of the time, but to learn from that experience the question always remains: how *did* they do that? On that score, *Robinson* reveals a continuing preference for mystique over candour in this important area of English tort law.

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[73] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2019] AC 831; *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780.

[74] *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 WLR 4021.

[75] *Sumner v Colborne* [2018] EWCA Civ 1006, [2019] QB 430; *Rushbond Plc v JS Design Partnership LLP* [2021] EWCA Civ 1889; *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25, [2022] 4 WLR 104.