

Some Thoughts on Principles Governing the Law of Torts
Singapore Conference on Protecting Business and Economic Interests:
Contemporary Issues in Tort Law
Distinguished Guest Speaker Lecture
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Introductory

1. I was given the option of talking about either tort and illegality or tort and economic interests. Some might say that it is only possible to scratch the surface of either topic in a single lecture. If I was only going to be able to scratch the surface, I thought that I may as well do so in style and deal with both topics.
2. However, as I started to write this lecture, I came to appreciate that what I wanted to say about the two topics was really part of a discussion on a rather wider issue. That issue is whether judges should decide tort cases by applying well established principles to the facts of those cases, or whether they should decide such cases by reference what they see as the appropriate policy considerations as applied to those facts. So, while I will discuss economic interests and illegality, I propose, for better or worse, to cast my net rather more widely, and, consequently, it may unkindly but not inaccurately be said, rather less deeply.
3. I should also state what is both a confession and an assertion. I am not talking today in my judicial capacity: rather, I am making out a case, and I am conscious that it is a case which is not necessarily balanced. My aim is to stimulate interest and maybe debate. My intention is emphatically not to express, or to appear to express, a decided view on any topic which I touch on in this talk. Expressing a concluded view about issues of law, particularly private law, is what I do in court, not in talks. Accordingly, while I can be (and I hope that I am) more authoritative in my judgments, I can be (and on the whole I hope that I am) more controversial in my talks.

The argument

4. My thesis for the purposes of this talk, in a nutshell, is that almost all aspects of the law of torts are grounded on policy, and that any attempt to identify or distil principles will normally be fraught with problems. Ultimately, this is, I think, because tort law reflects most aspects of human life which is, as the 18th century English poet and visionary William Blake pointed out¹, “infinitely various”; consequently no set of principles can satisfactorily cover every situation in which a claim in tort, even in a particular tort, is brought.
5. There is undoubtedly some force in the argument that policy can be said to lie at the root of almost all legal principles, and that therefore the point which I have just made is anodyne. But I would suggest that, when it comes to the field of torts, the area covered is so large, disparate and innately incoherent that the problem of identifying and consistently applying established principles is particularly acute. Issues of policy are particularly prone to arise in tort cases, and to call into question any principles which may initially appear to be justified, even uncontested. I suggest that this is true of individual torts, in particular the most significant and wide-ranging tort, negligence.

The challenges of tort (or torts)

6. It somehow seems characteristic of the whole area that academics cannot even agree whether its name is the law of tort or the law of torts². At the moment, the balance of views seems to favour the plural view³, but rather like the historic argument whether light consists of waves or particles⁴, each competing view will no doubt have its moment in the sun.
7. To anyone seeking principles in tort law, the fact that there is considerable uncertainty as to the nomenclature is a poor start. And, as Professor Harlow QC has written⁵, although we

¹ William Blake, *All Religions Are One*, (1788), Principle VII

² Typified by the comparison between *Salmond and Heuston on The Law of Torts* (21st ed, 1996) and *Winfield and Jolowicz on Tort* (19th ed, 2014)

³ see eg *Central Issues in the Law of Tort Defences* in *Defences in Tort* ed A Dyson, J Goudkamp and F Wilmot-Smith (and authors of article), p 12, fn 65 and 6

⁴ see for instance the brief discussion in https://en.wikipedia.org/wiki/Wave%E2%80%93particle_duality. Of course, as that webpage records, the debate currently seems to be resolved by the intuitively weird notion that light is both wave and particle, so maybe the subject matter of this area of law is both torts and tort.

⁵ Carol Harlow, *Understanding Tort Law* (3rd ed, 2005) p 6; there is a 4th edition – 2011.

may think we know “what tort law is not, we are not much nearer to knowing what it is”, and “two or more centuries after tort law emerged as a discrete subject and the first tort textbook was written, no rational and logical definition has yet been provided; indeed, argument still rages over whether there is any such thing as ‘tort law’”.

8. The great Sir Frederick Pollock made the same point at the end of the 19th century when he wrote:

“If we are asked, What are torts? nothing seems easier than to answer by giving examples. But we shall have no such easy task if we are required to answer the question, What is a tort?—in other words, what principle or element is common to all the classes of cases we have enumerated, or might enumerate, and also distinguishes them as a whole from other classes of facts giving rise to legal duties and liabilities?”⁶

He then had a go at a definition, which he admitted did not amount to much, namely, “A tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract. To that extent we know what a tort is not”⁷. But he went on to try and identify what torts are - without much success, at least in terms of a comprehensive definition.

9. Looking at matters more philosophically, there are various theories of tort law, including (i) corrective justice (reversing injustice), (ii) deterrence (preventing injustice); (iii) rights theory (a remedy for those whose rights are violated), (iv) civil recourse (a mechanism for holding wrongdoers to account); (v) retributive justice (proportionate punishment for wrong-doers); (vi) distributive justice (achieving a socially just allocation of wealth in society); and (vii) vindication of rights (affirming and reinforcing interests protected by law)⁸. I strongly doubt whether any of these theories, some of which overlap and others of which are complementary, give much help in identifying any reliable principles as to precisely what

⁶ Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law* (4th ed 1895) chapter 1

⁷ *ibid*

⁸ J Edelman and E Dyer, *A Defence of Duress in the Law of Torts?* in *Defences in Tort* (2014) ed A Dyson, J Goudkamp and F Wilmot-Smith, pp 14-16, and *Clerk & Lindsell on Torts* 21st ed (2014), pp 7-13

activities or failures constitute torts - and what should constitute defences to tort claims⁹.

Indeed, the wide and disparate ways in which the theories are expressed may be thought to lend support to the notion that we are in a field where policy considerations should play a prominent part

10. All this casts considerable doubt as to whether “we shall discover any general principles [of tort law] at all”, to quote Pollock, a discovery which he considered would be unlikely ever to occur¹⁰ - and so far at least his view has proved correct.

11. In an attempt to impose some order into this area, Pollock broke down torts into three sub-categories, “Personal wrongs”, “Wrongs to property” and “Wrongs to person, estate and property generally”. But his attempt to find a common thread even within each of his three categories ran into difficulties. Thus, the best he could do was to say that in the first, “which may be said to have a quasi-criminal character, there is a very strong ethical element. In [the second] no such element is apparent. In the third such an element is present, though less manifestly so.”¹¹ These attempts seem to me to provide yet more support for the notion that there is unlikely to be very much in the way of principle in relation even to sub-categories of tort (or torts).

Focussing on individual torts

12. Of course, none of what I have said so far necessarily means that it must be impossible to identify any clear principles in relation to individual torts. However, the fact that the whole area of torts is such unfertile ground for any clear, general underlying philosophy is scarcely a promising start when one comes to consider such a question. And indeed when one comes to examine the position in relation to individual torts, it seems to me that the notion that there are clear principles which can be applied with confidence is much more the exception than the rule.

⁹ I accept of course that they may on occasion give some help – eg on certain aspects of measure of damages or of contributory negligence, but such assistance would, I think, be likely to be of a policy rather than a principled nature

¹⁰ Pollock, *op cit*

¹¹ *ibid*

13. Thus, the point that there is little by way of hard and fast principle in the field of torts derives, I suggest, real support from the fact that analysis of tort cases, at least in the United Kingdom, appears to demonstrate a notable degree of disarray and a marked lack of reliable principle. First, there are some well-established principles which, on analysis, are hard to justify, and that makes one wonder about the value of having principles. Secondly, there are cases where apparently well-established principles are subsequently disapproved and changed, which many may think is worse than having no principles in the first place. Thirdly, there are supposedly fundamental principles which then turn out to be subject to significant exceptions, which do not so much prove the rule as call the reliability of the rule into question. Fourthly, there are some principles which, while they are expressed as such by the courts, turn out, on analysis, to be so broadly expressed or so coarsely textured that they are, in truth, little, if anything, more than policy dressed up as principle. Fifthly, there are cases where the courts have grasped the nettle and accept that there is no clear principle and, depending on one's view, frankly or shamelessly base their decisions on policy.

Questionable principles

14. Examples of the first category, dubious principles, include the rule that duress is no defence to a claim in tort. It is stated to be the law in a number of leading textbooks on tort¹², and it is supported by a clear dictum in 1773 from Blackstone J¹³, no less. Yet, as pointed out by Justice Edelman and Professor Dyer¹⁴, (i) the principle rests on a very slender foundation (one version of a report of a judicial decision apparently arrived at without argument¹⁵), (ii) the principle is inconsistent with the fact that duress is (as Blackstone himself acknowledged¹⁶) a defence in criminal law, and (iii) the principle is hard to reconcile with another principle, namely that necessity is a defence to a tort claim¹⁷, and “the boundary between the recognised defence of necessity and a defence of duress can be paper-thin”¹⁸.

¹² *Clerk & Lindsell on Torts* 20th edition (2013), p 1040. Curiously, it is not appear to be mentioned in the most recent, 21st, edition. *Winfield and Jolowicz on Torts* 19th ed (2014) para16-127

¹³ *Scott v Shepherd* (1773) 2 Black W 892, 896

¹⁴ J Edelman and E Dyer, *A Defence of Duress in the Law of Torts?* in *Defences in Tort* (2014) ed A Dyson, J Goudkamp and F Wilmot-Smith

¹⁵ *Gilbert v Stone* (1647) Style 72, but compare (1647) Aley 35

¹⁶ Sir W Blackstone, *Commentaries on the Laws of England* (1765-1769), Vol 4, ch2, pt2

¹⁷ see eg *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218

¹⁸ J Edelman and E Dyer *op cit*, p 168

15. Then there is the peculiar tort of lawful means conspiracy. Unsurprisingly, a defendant's use of unlawful means to cause a plaintiff economic harm can entitle the plaintiff to seek damages in tort against the defendant. And of course it follows that where two defendants join together to cause the plaintiff economic harm, a claim for damages in tort can follow. By contrast and equally unsurprisingly, where a defendant uses lawful means to cause a plaintiff economic harm, the plaintiff has no cause of action in tort. However, and this is where it gets puzzling, where two defendants get together to cause the plaintiff harm by lawful means, the plaintiff can sue for damages in tort. It does seem counter-intuitive at best, and downright perverse at worst, that an action which gives rise to no claim in tort if carried out by one person can give rise to such a claim if carried out by two people together – provided that the “real” or “predominant” purpose of the conspirators is to harm the claimant¹⁹.
16. In the 1982 *Lonrho v Shell*²⁰ case, Lord Diplock described the tort of lawful mean conspiracy as having had “a chequered history” and said that it had “attracted more academic controversy than success in practical application”. And there is obvious force in Professor Neyers's view that the tort of lawful means conspiracy breaches the fundamental and “well-accepted common law principle” that an inappropriate motive does not convert an otherwise lawful act into an unlawful one²¹.
17. It is true, as Lord Hoffmann pointed out yesterday²², that this malignancy requirement means that a claim based on the tort will rarely succeed, but it seems odd to say the least to retain an anomalous claim on the basis that it includes an unprincipled ingredient which renders it almost incapable of being successfully invoked. However, a claim based on this anomalous tort can still succeed as it did in the 2014 Singapore High Court *SH Cogent*²³.
18. The obverse situation, namely that established principle means that there is no tort when there should be, can be said to exemplified by the attitude of the common law to monopolies. As Lord Hoffmann explained yesterday, until 1973, English law, somewhat

¹⁹ *Total Network SL v Revenue and Customs* [2008] UKHL 19, [2008] AC 1174, para 41 citing *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, and Lord Justice Clerk Aitchison at 1940 SC 141, 155-156

²⁰ *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173, 188

²¹ Jason Neyers, *The Economic Torts as Corrective justice* (2009) 17 Torts LJ 1, 5

²² Lord Hoffmann giving the keynote speech opening the conference on 17 August 2016

²³ *SH Cogent Logistics Pte Ltd v Singapore Agro Agricultural Pte Ltd* [2014] SGHC 203

anomalously, did not recognise agreements in restraint of trade or other monopolistic or anti-competitive practices as giving rise to a cause of action²⁴. It was only when the UK joined the European Union that a person harmed by anti-competitive practices could seek damages from those involved in those practices²⁵.

19. Another example of a dubious negative principle is exemplified by the decision of the English Court of Appeal in the 1990 case of *Kaye v Robertson*²⁶. In that case, the English Court of Appeal, reluctantly but firmly, upheld the conventional view that the common law did not recognise a free-standing right of privacy. A newspaper journalist deceptively obtained access to a hospital room where a seriously injured TV star was lying unconscious, and took photographs of him lying in bed bandaged and helpless. It was held that the TV star could not enjoin the newspaper from publishing the photographs. In his judgment, Glidewell LJ said that the case was “a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals”. The decision was rightly described as “a compelling demonstration of the limits of ... existing English law”²⁷. In two subsequent cases, *Hunter v Canary Wharf*²⁸ and *Wainwright v Home Office*²⁹, the House of Lords approved the notion that the courts should not develop a right to privacy as a matter of common law.
20. Of course, less than ten years after *Kaye* was decided, the UK Parliament did act, albeit somewhat indirectly, by passing the Human Rights Act 1998, which, in effect, brought the European Convention on Human Rights into UK law, and Article 8.1 famously provides that “Everyone has the right to respect for his private and family life, his home and his correspondence”. Although the 1998 Act came into force too late to assist the plaintiffs in the three cases I have just mentioned, in the later of the House of Lords cases, *Wainwright*, the passing of the Act was cited by the House of Lords in that case by as an additional reason for the courts not developing a separate common law of privacy³⁰.

²⁴ See the discussion in *Norris v United States of America* [2008] UKHL 16, [2008] 1 AC 920, paras 7-23

²⁵ *ibid*, paras 32-44.

²⁶ [1991] FSR 62

²⁷ B Markesinis; C O’Cinneide; J Fedtke; M Hunter-Henin. *Concerns and Ideas about the Developing English Law of Privacy*, p 8, http://www.ucl.ac.uk/laws/global_law/publications/institute/docs/privacy_100804.pdf

²⁸ *Hunter v Canary Wharf Ltd* [1997] AC 655

²⁹ *Wainwright v. Home Office* [2003] UKHL 53, [2004] 2 AC 406

³⁰ *ibid*, para 34

21. The 1998 Act has been called “possibly the most important ‘tort statute’ ever enacted”³¹.

However, there are cases where the common law recognises no cause of action in negligence although, under the Human Rights Act 1998, the courts have held that there is a cause of action on precisely the same facts. In the recent *Michael* case³² in 2015, the UK Supreme Court struck out a negligence claim against the police brought by the relatives of a woman who had been attacked and killed following an unjustifiable delay by the police in responding to her emergency telephone call. The basis of the decision was that, at least in the absence of special factors, the police owed no duty of care to the woman under common law. However, we refused to strike out the claim, founded on the same facts, in so far as it was based on article 2 of the Human Rights Convention (the right to life), because Strasbourg jurisprudence made it clear that, under that article, the police had a duty to take reasonable steps to protect a life if the “knew or ought to have known ... of a real and immediate risk to th[at] life ... from the criminal acts of a third party”.³³ The same disconnect exists in relation to local authorities social services department’s duty of care to individual children whom they fail to protect in their own homes³⁴.

22. It is not really possible to say that the more generous Convention is wrong (or right) or that the more restrictive common law is right (or wrong) in those two types of case. The fact that the two systems take different and mutually inconsistent positions is, I suggest, symptomatic of such issues being ultimately driven by policy considerations rather than any great principle.

Principles which turn out to be wrong

23. I turn to the third category, principles which turn out to be wrong. For instance, in the *Bolam* case decided by the House of Lords in the 1950s³⁵, it was decided that “a doctor's omission to warn a patient of inherent risks of proposed treatment constituted a breach of the duty of care was normally to be determined by the application of the test ... whether the omission

³¹ Robert Stevens, *Torts and Rights* (2007, 2012 reprint), p 289

³² *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 1 AC 1732

³³ *Ibid*, para 54

³⁴ *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 and *Z v United Kingdom* 34 EHRR 97, *E v United Kingdom* (2003) 36 EHRR 31.

³⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 587 and

was accepted as proper by a responsible body of medical opinion”³⁶. That test was generally applied in medical negligence cases for over half a century, and particularly since the majority House of Lords decision in the *Sidaway*³⁷ case in 1985. However, in the 2015 *Montgomery* decision³⁸, Lord Kerr and Lord Reed speaking for the UK Supreme Court described this approach as “unsatisfactory”³⁹, and preferred the views expressed by the dissenting Lord Scarman in *Sidaway*. They then stated that the normal proper approach is now that a “doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments”⁴⁰.

24. In other words, a principle or yardstick by which doctors’ professional competence in some situations had been assessed for at least thirty years was significantly changed. Now, I am not saying the Supreme Court was wrong to make the change (and it would be a bit odd if I was saying that, as I was a member of the panel which decided *Montgomery*). But what I am suggesting is that the notion that there are reliable principles by which allegations of professional negligence or of other torts are to be assessed must be called into question if apparently well-established and clear principles can be fairly radically changed. The fact that the change may well be attributable to altering professional and social standards may be a perfectly sound justification for the change, but I would suggest that it supports the notion that, in the end, it is policy not principle which rules when it comes to the law of torts.

25. A somewhat less recent, but even more fundamental, example of mistaken principle can be found in Lord Wilberforce’s judgment, which prompted no dissents, in the 1976 *Anns* case in the House of Lords⁴¹, when he stated that a duty of care existed where the defendant should have reasonably contemplated that his negligence would be likely to cause damage to a person in the plaintiff’s position, and there was no reason not to hold the defendant liable to the plaintiff. This was accepted and applied in the court of England and Wales until the House of Lords unanimously decided to backtrack in the *Murphy* case fifteen years later⁴², and

³⁶ To quote from *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430, para 26

³⁷ *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871

³⁸ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430

³⁹ *ibid*, para 86

⁴⁰ *ibid*, para 87

⁴¹ *Anns v London Borough of Merton* [1977] AC 728

⁴² *Murphy v Brentwood Borough Council* [1991] AC 398

disapprove of the reasoning in *Anns* and expressly to overrule any case which had been decided on its reasoning⁴³

26. Another mistaken approach of principle may be found in the apparently well-established rule that there can be no cause of action in malicious prosecution where the prosecution had been of civil, rather than of criminal, proceedings. In the 2001 *Gregory v Portsmouth* case⁴⁴, the House of Lords very fully considered the law on this issue and confirmed the principle, which seemed to have been accepted in cases going back more than a century. However, prompted by a majority Privy Council decision a couple of years ago⁴⁵, the Supreme Court held in *Willers v Joyce*, decided last month⁴⁶ that such a cause of action did exist. This, I suggest, is a striking example of mistaken principle, as it relates to the very existence of a tort. And it is striking on reading the judgments (both for and against the existence of the tort) how much the reasoning relies on policy and practicality rather than any principle.

Principles which turn out to be subject to exceptions

27. There are a number of significant cases which can fairly be said to suggest that any principle, however fundamental it is stated to be, turns out in fact to be subject to exceptions. Those cases includes three important fairly recent House of Lords decisions. In *White v Jones*⁴⁷, the House of Lords held by a bare majority that a disappointed beneficiary under a negligently drafted, and therefore ineffective, will could sue the negligent solicitor. One does not need to read the impressive dissenting judgment of Lord Mustill to see that the result was inconsistent with established principles, and in particular that it is inconsistent with the normal principles relating to the scope of a negligent defendant's duty of care – a pretty fundamental principle one might think. Lord Goff, for the majority, in what some may think could fairly be described as a rather tortured judgment, stated what the court was doing as “to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present”⁴⁸. In other words, when the court

⁴³ And to disapprove and overrule Lord Denning MR in *Dutton v Bognor Regis Corporation* [1972] QB 373

⁴⁴ *Gregory v Portsmouth City Council* [2000] 1 AC 419

⁴⁵ *Crawford Adjusters (Cayman) Ltd v Sagico General Insurance (Cayman) Ltd* [2014] AC 366

⁴⁶ *Willers v Joyce* [2016] UKSC 43, [2016] 3 WLR 477

⁴⁷ *White v Jones* [1995] 2 AC 207

⁴⁸ *ibid*, p 268

considers that policy, or justice, requires a departure from a fundamental principle, the court does just that – departs from principle.

28. Another fundamental principle of tort law is, of course, that in order to succeed in a negligence claim, the plaintiff must show, albeit only on the balance of probabilities, that the defendant's negligence caused the plaintiff's loss. *Chester v Afshar*⁴⁹ involved what Lord Steyn, speaking for the majority, described as “a narrow and modest departure from traditional causation principles”⁵⁰, in order to justify an award of damages to a patient who suffered injury as a result of an operation, even though she had not established that she would not have had the operation if she had been warned of the risk of the injury. As Lord Steyn went on to say, this departure from fundamental principle was justified because it was “in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision ... reflects the reasonable expectations of the public in contemporary society”⁵¹.
29. Again, one does not need to read the brief, almost contemptuous, dissenting judgments of Lord Bingham and Lord Hoffmann to see that there is no getting away from the fact that one of the most fundamental principles of tort law, causation, is now no longer an absolute principle at all, but must yield to policy. As Lord Bingham said, it is basic law that “satisfying the ‘but for’ test is a necessary if not a sufficient condition of establishing causation”⁵², yet this classically necessary condition was held to be unnecessary by the majority.
30. A slightly earlier example where the fundamental causation principle was departed from was the 2002 *Fairchild* case⁵³, where the claimant contracted the frightful and fatal disease of mesothelioma as a result of exposure to asbestos fibres at some point during the course of his employment with two different successive employers. Unfortunately, it was impossible to say which of the two employers had been responsible for his contracting the disease. Well established principle therefore would have resulted in neither employer being liable, as responsibility could not be established on the balance of probabilities. But the House of Lords held that each employer was equally liable on the ground that, as Lord Nicholls put it,

⁴⁹ *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134

⁵⁰ *ibid*, para 24

⁵¹ *ibid*, para 25

⁵² *ibid*, para 8

⁵³ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] AC 32

“good policy reasons exist for departing from the usual threshold ‘but for’ test of causal connection”⁵⁴. The four other Law Lords effectively agreed with him. It is noteworthy that they included Lords Bingham and Hoffmann, who were therefore prepared to countenance a departure from causation principle in that case, in contrast with their position in *Chester*. The problematic fall-out from this departure from principle is plain to anyone with sufficient patience to read the judgments in the 2015 decision of the UK Supreme Court, *Zurich v IEG*⁵⁵.

Policy masquerading as principle

31. I turn to the fourth category of cases, namely those which show that what appears to be principle turns out, on examination, to be policy. A good example is to be found in the House of Lords *Caparo* decision⁵⁶, which is part of the saga which started with *Anns*⁵⁷ (indeed, some might say it started with *Donoghue v Stevenson*⁵⁸ in 1932). *Caparo* was, indeed still is, regarded by many as finally laying down the test for determining whether a duty of care exists. To quote from the leading speech of Lord Bridge:

“in 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.”⁵⁹

The first aspect of that famous three-fold test, foreseeability of damage, involves a principle, and the second aspect, proximity, could just about be said to do so, although it involves a degree of policy, and the third aspect, fairness justness and reasonableness, it seems to me, is pure policy, and it may be said to subsume the first two ingredients in any event.

⁵⁴ *ibid*, para 41

⁵⁵ *Zurich Insurance PLC UK Branch v International Energy Group Ltd* [2015] UKSC 33, [2016] AC 509

⁵⁶ *Caparo Industries plc v Dickman* [1990] 2 AC 605

⁵⁷ See para 25 above

⁵⁸ *Donoghue v Stevenson* [1932] AC 562

⁵⁹ *Caparo*, p 617, per Lord Bridge of Harwich

32. The view that this is really policy masquerading as principle is, I would suggest, supported by Lord Bridge's express approval of the notion expressed by Brennan J in the High Court of Australia that "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'"⁶⁰. In other words, let the problems thrown up by the cases, rather than any established principles, govern the way in which the law develops.
33. It is also worth mentioning out that the "fair, just and reasonable" test was adopted and applied by the UK Supreme Court in the so-called *Christian Brothers* case in 2012⁶¹ in relation to the question of whether it was right to impose liability on a defendant for the tort of a third party on the ground that the defendant's alleged vicarious liability for the third party's actions. I also note that this approach was specifically justified by reference to policy⁶².
34. The usefulness of the "fair just and reasonable" approach was however somewhat undermined three years later in the majority judgment of the Supreme Court in the *Michael* case⁶³ in 2015, where Lord Toulson said that Lord Bridge's speech in *Caparo* "has sometimes come to be treated as a blueprint for deciding cases, despite the pains which the author took to make clear that it was not intended to be any such thing"⁶⁴. Indeed, *Michael* may be seen as endorsing an even more pragmatic approach. At para 103, Lord Toulson described the "quest" for "some universal formula or yardstick" for identifying the principles upon which negligence claims could succeed as "elusive"⁶⁵, and also, reflecting another aspect of what was said in *Caparo* that:

"The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court

⁶⁰ in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43–44

⁶¹ *The Catholic Child Welfare Society v Various Claimants & The Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1, paras 34, 47 and 94

⁶² *ibid*, para 35

⁶³ *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 1 AC 1732.

⁶⁴ *Ibid*, para 106. It is interesting that Lord Kerr's dissenting speech is very much based on the reasoning in *Caparo* - see eg paras 150-158 and 173

⁶⁵ *Ibid*, para 103

involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account.”⁶⁶

35. In the *Spandeck* case in the Singapore Court of Appeal, the incremental approach proposed by Brennan J, approved by Lord Bridge, and reiterated by Lord Toulson was described by Chan Sek Keong J, giving a judgment on behalf of the Singapore Court of Appeal, as “of little value as a test in itself”⁶⁷ – reflecting a view previously expressed by Lord Bingham⁶⁸. The Court of Appeal then stated that in Singapore there should be a three-stage test to determine if a duty of care exists: the damage must be foreseeable, there must be proximity between the parties, and then “[p]olicy considerations should then be applied to the factual matrix to determine whether or not to negate this duty”⁶⁹ – ie the *Caparo* approach to all intent and purposes. Given that proximity is a pretty fluid concept, with an underlying element of policy and foreseeability will, as the Court of Appeal accepted, “almost always be satisfied”⁷⁰, Singapore seems to be in the same policy rather than principle territory as England.

36. Many of the so-called principles governing the recovery of damages are ultimately really policy. Let me give one example. The general rule in English law that recovery of economic loss for negligence is restricted to cases where the plaintiff had suffered physical damage⁷¹ is only really justifiable simply on policy grounds. As McLachlan J (now Chief Justice of Canada) explained, the rule is based on “the fear of indiscriminately opening the floodgates of

⁶⁶ *Ibid*, para 102

⁶⁷ *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR (R) 100; [2007] SGCA 37, para 43

⁶⁸ In *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181

⁶⁹ *ibid*, para 83

⁷⁰ *Ibid*, para 75 quoting Phang J in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853, para 55

⁷¹ *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453 and for a more recent example see *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27

liability”⁷². After flirting with a more generous approach, the House of Lords in 1990 confirmed that the law was, as McLachlan J put it, in a “narrow, if arbitrary state”, namely that the rule was as it originally had been with the only exception being in the case of negligent misstatement. Australian law is more generous to plaintiffs who have suffered economic loss⁷³. Canadian law is more pragmatic, and applies a two-stage test, namely

“(1) is there a duty relationship sufficient to support recovery [of economic loss]? and, (2) is the extension desirable from a practical point of view, i.e., does it serve useful purposes or, on the other hand, open the floodgates to unlimited liability?”⁷⁴

In the end, an approach of incremental development on a case by case basis was approved, and the Singapore Court of Appeal has reached a fairly similar conclusion in the *Spandeck* case⁷⁵.

Policy accepted as the basis for the decision

37. The final category of cases which cast doubt on the role of principle in relation to torts is those where judges admit that policy is the basis for the decision. A very recent example is the United Kingdom Supreme Court’s decision last month in *Patel v Mirza*⁷⁶, where guidance was given as to how courts should deal with cases where the defendant seeks to avoid liability by raising a defence that the claimant’s case in some way rests on illegality. (The issue in the case was in fact concerned with contractual claims involving illegality, but the Court decided to give general guidance on the topic⁷⁷). Rejecting the view of the minority who did seek to articulate a unifying applicable principle, Lord Toulson, speaking for the majority six of the nine Justices, cited with approval⁷⁸ an observation he had made in an earlier case⁷⁹:

⁷² *Canadian National Railway Co v. Norsk Pacific Steamship Co* [1992] 1 SCR 1021

⁷³ *Caltex Oil (Aust.) Pt Ltd v The Dredge "Willemstad"* (1976), 11 A.L.R. 227

⁷⁴ *Kamloops (City of) v. Nielsen* [1984] 2 SCR 2, approved and followed in *Canadian National Railway*

⁷⁵ *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR (R) 100; [2007] SGCA 37

⁷⁶ *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399

⁷⁷ *ibid*, para 2

⁷⁸ *ibid*, para 69

⁷⁹ *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840, para 52

“Rather than having over-complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each case for reasons articulated by it”.

38. Towards the end of his judgment⁸⁰, Lord Toulson suggested that the decision whether to refuse relief to which plaintiff was otherwise entitled on the ground of illegality was to be determined by reference to “proportionality”⁸¹. He then said that the essential question was whether it would be

“contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts”.⁸²

39. It is to be noted that this is virtually identical to the approach taken by the Singapore Court of Appeal to this issue in the judgment of Andrew Phang Boon Leong JA in the 2014 decision of *Ting Siew May v Boon Lay Choo*⁸³.

⁸⁰ *Patel v Mirza*, para 107

⁸¹ *ibid*, para 101

⁸² *ibid*, para 120

⁸³ *Ting Siew May v Boon Lay Choo and another* [2014] SGCA 28, especially at paras 69-71

Concluding remarks

40. The cases I have so far referred to tend to suggest that principle rather than policy may be a dangerous guide to those analysing, advising on, debating, or deciding cases involving claims in tort. However, it can fairly be said that judges and academics owe it to the public to seek to establish clarity in the law: certainty of outcome is important for anyone about to embark on an enterprise, and for anyone involved in a dispute. Clarity and predictability are vitally important ingredients of the rule of law. Accordingly, it can be said with considerable force that it is quite right for the judges to be striving to identify principles in this field. Furthermore, even if a particular principle cannot always apply, it may prove reliable in the great majority of cases, and, even in other cases, it may provide helpful guidance. But there is no getting away from the fact that there are real risks in developing principles in the field of torts, as they may not infrequently operate to mislead rather than to help.
41. As may be apparent, I suggest that there is a strong argument that, in some areas at least, it may be more helpful to abandon principle and to take a stand on policy. Of course, policy may often be less reliable than a principle at indicating a specific outcome in a specific case. But policy may often be more reliable in the sense that it is less prone to founder on exceptions or turn out to be unsound. And, since principle is based on policy, there can be said to be less of a risk of losing the thread if one applies principle rather than policy. Certainly, there is much to be said for the view that considerable caution should be employed before a court adopts or approves a principle on the basis that it is susceptible of general application – and even more caution if it is suggested that the principle should not be subject to exceptions or development.
42. It is true that Lord Scarman argued strongly against judges basing their decisions on policy, suggesting that they should stick to common law principles and leave it to Parliament to sort things out whenever application of established principles was thought to produce unacceptable results⁸⁴. There is plainly a great deal to be said for that view (although some may think that its force is weakened by Lord Scarman's suggestion in the same passage that the application of principle ensures that the common law is thereby rendered "flexible").

⁸⁴ *McLoughlin v O'Brian* [1983] 1 AC 410,430

43. There are of course arguments, well summarised by Professor Stevens⁸⁵, as to why judges should leave policy alone: judges are unelected, judges lack the technical competence, and policy leads to less certain outcomes. Lord Hoffmann expanded in this yesterday when he explained that judges are often neither informed or experienced enough to make the economic and social judgments which questions of policy in the field of torts so often involve. I wonder. Many of the most important judicial decisions in the field of torts seem to me to involve those sort of judgments. *Donoghue v Stevenson*⁸⁶ is a prime example: it involved a considerable extension of product liability; *Hedley Byrne*⁸⁷ involved extending liability for negligent misstatements to consequential economic loss; the House of Lords 1996 *SAAMCo* decision⁸⁸ involved effectively capping recoverable damages for professional negligence – ultimately a policy issue. And, leaving negligence cases, the recent UK Supreme Court decision in *Lawrence v Fen Tigers Ltd*⁸⁹, to the effect that the fact that a particular use has planning permission does not assist in rebutting an argument that it constitutes a nuisance, was essentially a policy-based conclusion; and going back in time, *Rylands v Fletcher*⁹⁰ was, it seems to me ultimately a policy based development. And, if one casts one’s eyes more widely, perhaps the most marked development in the common law in the past fifty years has been the very substantial growth in domestic judicial review: nobody can deny that it is a development for which the judges are responsible, or that it is a development with substantial macro-social and economic implications.

44. More broadly, the life of the common law is, famously, experience not logic⁹¹. Although any particular judge may have limited experience, one of the strengths of the common law is that a judge’s decision in a particular case is ultimately based on centuries of judicial experience of multifarious cases. And, particularly in a field such as torts, any principles which have been developed have been initiated and developed by judges, and those principles are inevitably very much based on policy. Accordingly, one may wonder how much there is in the notion that judges are not competent to deal with, or to decide cases on the basis of, policy issues

⁸⁵ Robert Stevens, *Torts and Rights* (2007, 2012 reprint) pp 308-310

⁸⁶ [1932] AC 562

⁸⁷ *Hedley Byrne v Heller & Partners Ltd* [1964] AC 465

⁸⁸ *South Australia Asset Management Corp v York Montague* [1996] UKHL 10, [1997] AC 191

⁸⁹ *Coventry v Lawrence* [2014] UKSC 13, [2014] 1 AC 822

⁹⁰ *Rylands v Fletcher* (1868) LR 3 HL 330

⁹¹ Oliver Wendell Holmes, *The Common Law* (1881) p 1

45. Of course, there are different sorts of policy issues, and in some cases, it would be right for a judge to say that the question whether the law should be extended in a certain direction is not a point which should be determined by the judiciary but by the legislature. The very fact that judges have the right, indeed sometimes the duty, to develop the law means that self-restraint is an important weapon in the judicial armoury: it is important for a judge to know when to stand back and leave policy-based developments in the law to the legislature. But that is a very different thing from saying that judges should not develop the law themselves by reference to policy.
46. Quite apart from this, if a judge makes a policy-based decision with which the legislature is not happy, the remedy in a system with parliamentary supremacy, such as we enjoy in the UK, lies with Parliament. Any decision made by a court can always be reversed by the legislature.
47. Slightly inconsistently with that point, it must be admitted, the argument that judges should leave it to Parliament to develop policy-based changes in the law seems to me to be somewhat unrealistic. The notion that Parliament will step in is, at least in the UK, often little more than a pious hope, given the enormous pressure on legislative time and the relatively slender political importance which some may think is attributed to most legal issues (as is apparent from Parliament's failure to take up judicial invitations, indeed judicial pleas, to enact a law on illegality, leading the courts to do so, in *Patel v Mirza*). Further when Parliament does intervene the consequences are by no means always happy – see for instance the legislative contribution to the confused situation following *Fairchild*.⁹²
48. I accept that there may be something in the argument that judges should not make policy-based decisions as that would lead to greater uncertainty. However, as I have mentioned, given the way principles are treated by judges in the field of torts, some may question how strong the certainty argument really is.

⁹² See fn 59. After *Fairchild*, the House of Lords held in *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572 that damages should be apportioned between the employers; Parliament did not approve and enacted the Compensation Act 2006, which led to the difficulties described in the *Zurich* case – fn 61

49. The fact is that, true to form, the common law wants to have the best of both worlds. It develops and applies principles as far as it can in order to introduce predictability and logical cohesion into the law, but it accepts that, with the infinite variety of human experiences, and with developments in the social, economic, ethical and technological spheres, hardly any principles can be applied blindly and most principles will have to be subject to exceptions, to changes or even to discarding at various stages of their existence. Both judges and academics can and do contribute to the development of the common law in this way. And, while they both have a duty to establish clarity and not to give up on suggesting and developing principles, it may be that their functions in this connection are, on some occasions at any rate, distinct. I put the point in *Patel v Mirza*⁹³ this way:

“[I]n the end, the correct analysis is not the centrally important issue, given that the question as to how the court deals with illegal contracts is ultimately based on policy. The ultimate function of the courts in common law and equity is to formulate and develop rules of a clear and practical nature. Now that the judiciary (rightly) pay more attention than we did to legal books and articles, we judges can look to legal academics not only to identify what they think are judicial inconsistencies and errors, but also to develop and modify their analyses of legal principles when we consider it necessary to change, develop or clarify the law.”

(It is only fair to add that this was a concurring judgment, with which none of my colleagues specifically agreed).

50. There is something a little self-regarding in ending a talk with a quotation from a judgment of one’s own. I hope you will forgive me. Thank you.

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Singapore

19 August 2016

⁹³ *Patel v Mirza*, para 170