Arrested Development: Police Negligence and the Caparo ‘Test’ for Duty of Care

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Abstract: Two recent cases concerning police negligence present conflicting interpretations of the landmark case of Caparo Industries plc v Dickman. In Robinson v Chief Constable of West Yorkshire, the English Court of Appeal held that Caparo is authority for a three-stage test of duty of care that should be applied in all cases (established and novel). In contrast, in Michael v Chief Constable of South Wales, the Supreme Court maintained that previous duty situations should be the focus and that the three-stage Caparo ‘test’ is only applicable in novel cases. This article analyses these cases in order to fulfil two purposes. The first is to shed light on when the police will owe a duty of care; the second (which turns on the first) is to reappraise the decision of Caparo. It is argued that unless that case (and, by extension, the approach for determining duty of care questions) is understood correctly, the law of negligence will continue to be in an unacceptable state of uncertainty.

Introduction

The Incorporated Council of Law Reporting (ICLR) recently identified Caparo Industries plc v Dickman¹ as one of the most important fifteen cases decided during its 150 years of existence. Few tort scholars would dispute its inclusion on such a list. This House of Lords decision held that auditors who prepared accounts for a company did not owe a duty of care to claimants who, relying on the accounts, lost money when buying shares. The purpose of the audit was to enable shareholders to decide how to vote at general meetings rather than to enable them to make investment decisions. Caparo’s lasting significance supposedly stems from its provision of a simple, three-stage method of determining when a duty of care exists in the tort of negligence. As Lord Neuberger said in a recent extra-judicial speech commentating on the ICLR’s list of important cases:

The House of Lords in Caparo identified a three-part test which has to be satisfied if a negligence claim is to succeed, namely (a) damage must be

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¹ [1990] 2 AC 605.
reasonably foreseeable as a result of the defendant’s conduct, (b) the parties must be in a relationship of proximity or neighbourhood, and (c) it must be fair, just and reasonable to impose liability on the defendant.²

This is considered trite law. Indeed, the law reports and articles in learned journals frequently cite Caparo as authority for such a proposition.³ The understanding that the three-stage Caparo test should be applied in every case concerning whether a duty of care is owed — not just cases that involve novel circumstances — was recently accepted in Robinson v Chief Constable of West Yorkshire.⁴ In that case, the Court of Appeal of England and Wales maintained that the police do not owe a duty to take care to avoid causing physical injury to members of the public while carrying out their duties, even where that injury was caused by a positive act (as opposed to an omission to prevent harm). The Court, applying the Caparo test, held that it was not fair, just and reasonable to impose liability on the police in such circumstances.

An alternative view as to the use of Caparo was supported by the United Kingdom Supreme Court in Michael v Chief Constable of South Wales,⁵ where it was confirmed that the police do not owe a duty of care to members of the public to prevent a third party criminal from causing them damage. The Supreme Court held that the normal common law principle that there is generally no liability for one’s omissions applies to the police as much as to anyone else. In the leading judgment, Lord Toulson maintained that Caparo is not authority for a ‘three-stage test’ that is to be applied to all cases, but that the starting point should be decisions as to duty found in previous authorities. This interpretation of Caparo focuses on

developing the law incrementally and by analogy with past duty situations. It contrasts with the view in Robinson (and other cases).

These two cases concerning police liability in negligence are illustrative of the conflicting interpretations of how the duty of care inquiry should be undertaken. Robinson approaches Caparo as authority for a three-stage test to be used in all negligence cases; Michael eschews such an approach and maintains that if the case falls within an established duty category the Caparo ‘test’ has no role to play. These decisions therefore provide a timely opportunity to reconsider which of these approaches is (or ought to be considered) correct.

This article has two main aims, the first of which is more specific than the second. By providing a detailed examination of Robinson and Michael, I aim to shed light on when the police will owe a duty of care in negligence to members of the public. The second, more general, purpose is to determine how Caparo should be correctly construed. I will demonstrate that the view that Caparo is authority for a three-stage test to be used to answer all duty of care questions is not supported by the case itself and the authorities more generally. It must be accepted, however, that the Court of Appeal in Robinson is far from alone in perceiving Caparo as authority for a universal three-part test. For example, in the wrongful conception case of McFarlane v Tayside Health Board, the House of Lords utilised the tripartite test to reject a claim for the economic costs of raising an unwanted child, despite

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7 A search on Bailii for ‘Caparo test’ returned 421 results; one for ‘three-part test’ returned over 1,000 results. Searched 16th January 2016. Furthermore, Halsbury’s Laws states: ‘When considering whether a notional duty of care applies in a particular situation, the courts will consider three questions: (1) whether the damage is foreseeable; (2) whether there is a relationship of proximity between the parties; and (3) whether the imposition of a duty would be fair, just and reasonable. (5th Edn, 2010) Vol 78 <bit.ly/1SmwAZK> Accessed 16th January 2016.

8 [2000] 2 AC 59.
confirming that the facts of the case fell within an established line of precedent which would have allowed recovery. The problem considered here therefore has wider doctrinal implications for the tort of negligence: unless the correct interpretation of Caparo (and, by extension, the suitable approach for determining duty of care questions) is identified, the development of the law in the United Kingdom will continue in a state of confusion.

This article begins by providing a brief overview of the history of the law relating to duty of care in order to place Caparo in its proper context. The decisions of Robinson and Michael are then critically analysed. I argue that Robinson demonstrates the problems that occur when judges follow the popular misinterpretation of Caparo and use the three-stage ‘test’ in every negligence case. In contrast, the leading judgment of Lord Toulson in Michael provides a normatively superior framework for undertaking the duty of care inquiry and is more consistent with precedent. Judges should only use the three-stage Caparo test to determine whether a duty of care exists in novel negligence cases. I then consider the position in other common law countries to demonstrate that the approach I advocate is consistent with the position in other jurisdictions that have struggled with similar duty of care problems. I conclude by outlining how the duty of care inquiry should be undertaken in the future.

**The Notional Duty of Care in Negligence: Established Categories or Overarching Tests?**

The purpose of this section is to place Caparo in its historical context. By doing this I aim to demonstrate that Caparo is not authority for the proposition that a three-stage test must be used in all negligence cases.

In order to be liable in the tort of negligence a defendant must (1) owe the claimant a duty of care; (2) have breached that duty; and (3) the breach must have caused the claimant

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damage that is not too remote. A finding that no duty of care is owed therefore prevents recovery even where a defendant has unreasonably caused damage to a claimant. For a long time English law only recognised liability for careless behaviour in a number of separate situations, ‘where the case can be referred to some particular species [of negligence] which has been examined and classified.’\(^{10}\) It was doubted whether new categories of negligence could be recognised.\(^{11}\) This ensured certainty in the law: people could order their behaviour to make sure they were compliant with the law of torts by looking at previously decided categories of cases. If no prior case existed in which a defendant owed a duty of care in similar circumstances, then an individual could engage in risky conduct without fear of tort liability.\(^{12}\)

However, if the categories of negligence are closed the law may be unable to meet the developing needs of society. The courts were arguably unable to ensure that the established categories remained appropriate and adapted to contemporary standards.\(^{13}\) As such, this stance was too rigid.

The landmark decision of Donoghue v Stevenson\(^{14}\) took a different approach. Not only did the case create a new category of negligence (that a manufacturer of goods owes a duty to the consumer of the product to take reasonable care that it does not contain defects likely to cause damage to the person or property), the case is notable for Lord Atkin’s neighbour principle: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’\(^{15}\) Was this an overarching legal principle that, sweeping away the old categories of duty situations, could be applied to

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\(^{10}\) Donoghue v Stevenson [1932] AC 562 at 580 per Lord Atkin.

\(^{11}\) See Winterbottom v Wright (1842) 10 M&W 109.

\(^{12}\) Although it is conceded that most people do not go about their daily business with a working knowledge of tort law, people do adjust their conduct to conform with the law.


\(^{14}\) [1932] AC 562.

\(^{15}\) Ibid at 580.
all future cases involving damage caused by carelessness or ‘just an ethical and aspirational statement of little or no legal force’?16

Initially the courts took a restrictive interpretation.17 But a different attitude gained ascendency with the House of Lords case of Home Office v Dorset Yacht Co.18 In that case Lord Reid said that ‘the time has come when we can and should say that [Lord Atkin’s neighbour principle] ought to apply unless there is some justification or valid explanation for its exclusion.’19 In Anns v Merton LBC20 Lord Wilberforce confirmed:

…in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.21

This two-stage test appeared to do away with the need for claimants to demonstrate that their case accorded with previously decided cases, and there was concern that the courts were being too enthusiastic in their support of this rationalisation of the law.22 Given that the first stage of Anns, if interpreted as merely requiring foreseeability of damage, was easy to satisfy, the test arguably ‘put an enormous burden on defenders’23 as they then had to demonstrate the reasons why a duty should not be imposed — in effect reversing the burden of proof.

Writing extra-judicially on this approach, Lord Oliver said it was ‘perhaps, not surprising that

16 P Cane, Anatomy of Tort Law (Hart 1997) p 7.
19 Ibid at 1027.
21 Ibid at 751-752 (emphasis added).
this had led to a spate of claims which have become more and more repugnant to common
sense.'\(^{24}\) He believed it led to radical changes in the law at the expense of certainty.\(^{25}\)

Although not all of the criticism levelled at the Anns test is well-founded\(^{26}\) — for
example, Stevens’ description of it as ‘the greatest twentieth-century judicial disaster in the
law of torts’\(^{27}\) appears to be something of an overstatement — there are problems with this
principle. If in every case that arrives before the courts, judges must weigh the policy factors
for and against liability, it is difficult to predict how they will be decided and thus what the
law is.\(^{28}\) Although rigid adherence to closed categories of negligence liability is undesirable,
the Wilberforce method goes too far the other way: weighing up policy factors in every case
— and ignoring previous precedent — leads to a lack of certainty in the law.\(^{29}\) After all,
different judges have different ideas about what the policy of the law should be.

Starting with Lord Keith’s decision in Governors of the Peabody Donation Fund v Sir
Lindsay Parkinson & Co Ltd,\(^{30}\) the courts began to retreat from the position in Anns and
instead emphasised ‘the inability of any single general principle to provide a practical test
which can be applied to every situation to determine whether a duty of care is owed and, if
so, what is its scope.’\(^{31}\) A new approach towards determining the duty of care emerged with
the decisions of Caparo and Murphy v Brentwood DC,\(^{32}\) the latter of which overruled Anns.
The courts no longer seek a general test or principle that is capable of deciding each case that
comes before the courts, as ‘to search for any single formula which will serve as a general

\(^{25}\) Ibid.
\(^{26}\) See D Howarth, ‘Negligence after Murphy: Time to Re-think’ (1991) 50 CLJ 58 at 60.
\(^{27}\) R Stevens, ‘Salvaging the Law of Torts’ in P S Davies and J Pila (Eds), The Jurisprudence of Lord Hoffmann
(Hart 2015) p 92.
\(^{28}\) For an excellent discussion of some of the problems with abandoning a ‘pockets of case law approach’ see C
\(^{29}\) See Scullion v Bank of Scotland plc (trading as Colleys) [2011] 1 WLR 3212 at [70] per Lord Neuberger.
\(^{31}\) Caparo, above n 1, at 617 per Lord Bridge.
test of liability is to pursue a will-o’-the wisp.’\textsuperscript{33} Instead, one must first look at previously decided cases to see whether such a duty has been held to exist in the past.\textsuperscript{34} If it has, a duty of care is more likely to be imposed. As Lord Bridge stated in Caparo, this is because

\begin{quote}
[T]he 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.\textsuperscript{35}
\end{quote}

Examples of established duties of care include the duty owed by a doctor towards his patient;\textsuperscript{36} a manufacturer of goods to consumers to ensure the product is reasonably safe to use;\textsuperscript{37} and that owed by an ex-employer to take care in preparing references for former employees.\textsuperscript{38} However, there are many more.\textsuperscript{39} By parity of reasoning, if a line of cases has previously held that a defendant does not owe a duty of care then the courts will follow those cases in analogous circumstances.

However, a defendant’s carelessness may have caused damage in ways that do not fall within circumstances previously considered by the courts. As a result, there might be no established category of cases that determine whether the defendant owes the claimant a duty of care. Alternatively, there may be factors that are similar to a line of cases imposing a duty of care on the defendant and other factors similar to a line of cases that state no duty of care arises. Furthermore, a rule may no longer be socially relevant and so an established category of (no-)duty situations may need to be revisited and overturned. The fact that a duty of care is more likely to be recognised when it can be developed ‘incrementally and by analogy with

\textsuperscript{33} Caparo, above n 1, at 633 per Lord Oliver. See also J Morgan, ‘The Rise and Fall of the General Duty of Care’ (2006) 22 PN 206 at 206 where he states ‘the days of a general conception of duty identified by a simple “test” are over.’

\textsuperscript{34} Caparo, above n 1, at 635 per Lord Oliver.

\textsuperscript{35} Ibid at 618 per Lord Bridge.

\textsuperscript{36} Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428.

\textsuperscript{37} Donoghue v Stevenson [1932] AC 562.

\textsuperscript{38} Spring v Guardian Assurance Plc [1995] 2 AC 296.

\textsuperscript{39} See N McBride and R Bagshaw, Tort Law, 4\textsuperscript{th} Edn (Pearson 2012) pp 130-132 for examples of recognised duties of care.
established categories, does not help in novel circumstances: there may not be an established category of cases that covers the present facts. In these situations, judges will rely on the three-stage Caparo ‘test’.

The first stage of the Caparo test, reasonable foreseeability, is normally easy for a claimant to satisfy. As for the latter two stages, it has been argued that they cannot provide a clear answer to the duty of care question. In Caparo itself, Lord Bridge said the three stages of this method are ‘not susceptible of any such precise definition as would be necessary to give them utility as practical tests’ and that they ‘amount in effect to little more than convenient labels’.

If appellate judges describe these three stages as labels of limited utility, how are lower courts to decide whether a duty of care is owed? The concept of proximity does not refer to physical closeness and is undeniably vague. The third stage places emphasis upon weighing the policy factors for and against imposing liability. Whether recognising a duty of care would be fair, just and reasonable involves ‘weighing in the balance the total detriment to the public interest in all cases from holding such a class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.’

In novel circumstances the courts therefore take a pragmatic approach to determining whether a duty of care exists by concentrating on the circumstances of the case and weighing

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40 Caparo, above n 1, at 635 per Lord Oliver.
41 Ibid at 618 per Lord Bridge.
42 See C Witting, Street on Torts, 14th Edn (Oxford University Press 2015) pp 36-37.
43 Caparo, above n 1, at 618. See also Caparo at 628 per Lord Roskill, at 633 per Lord Oliver and Stovin v Wise [1996] AC 923 at 932 per Lord Browne-Wilkinson for the expression of similar sentiments.
44 Ibid. See Howarth, ‘Negligence After Murphy’ above n 26, at 60 for a criticism of the concept of proximity and Witting, ‘Duty of Care: An Analytic Approach’, above n 28, for a defence.
45 See Morgan, ‘Rise and Fall’ above n 33, at 210.
up the factors for and against imposing a duty of care. However, the fact that the courts undertake this exercise in novel cases or where a rule is no longer socially relevant does not mean that Caparo is authority for a three-stage test to be used in every case. The House of Lords were clear that the starting point should be previous precedents. As Morgan has stated:

The great irony of Lord Bridge’s speech in Caparo is that it has been described as laying down a ‘three stage test for duty of care’ countless times ever since, whereas in fact Lord Bridge expressly disclaims an intention to do any such thing. One wonders whether anyone who describes Caparo as creating a ‘test’ for duty of care, can actually have read the case — as opposed to one single sentence in Lord Bridge’s speech, ripped from its context.\footnote{Morgan, ‘Rise and Fall’ above n 33, at 209.}

It is hard to disagree. What, after all, would be the point of the House of Lords going to great lengths to overrule Anns merely to insert an extra stage into a universal duty of care test? The better view is that Anns was incorrect because it tried to decide all duty of care questions under a single overarching principle. In contrast, Caparo reaches an appropriate balance between certainty and justice. In the normal run of cases, one looks to what has been decided previously and follows those decisions: this creates certainty. However, the modern approach recognises that in exceptional circumstances this will not be appropriate. Where this is so, judges weigh up the policy reasons for and against imposing liability to arrive at the result that has the best outcome.\footnote{See, eg, Spring v Guardian Assurance plc [1995] 2 AC 296 at 346 per Lord Woolf.} Negligence may be a fluid principle that can be ‘applied to the most diverse conditions and problems of human life’\footnote{Bourhill v Young [1943] AC 92 at 107 per Lord Wright.} but ‘certainty of the law is of the utmost importance.’\footnote{Leigh and Sillavan Ltd. v Aliakmon Shipping Co. Ltd. (the Aliakmon) [1986] AC 785 at 816 per Lord Brandon.} In this respect, Caparo accords with the mainstream view that ‘policy goals have a legitimate but limited role to play in private law.’\footnote{A Robertson, ‘Introduction: Goals, Rights and Obligations’ in A Robertson and H Wu Tang (Eds), The Goals of Private Law (Hart Publishing 2009) p 5. See also J Morgan, ‘Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics’ (2009) 125 LQR 215, 221. For the view that policy should have no role to play in the tort of negligence, see A Beever, Rediscovering the Law of Negligence (Hart Publishing 2007) p 173 and R Stevens, Torts and Rights (Oxford University Press 2007) ch 14.}
The Universal Test Approach: Robinson v Chief Constable of West Yorkshire

This section will undertake a close textual analysis of the decision of Robinson and demonstrate how, by misinterpreting Caparo, the Court of Appeal arrived at a decision that is inconsistent with authority, principle and policy.

In Robinson, a police officer, DS Willan, spotted a man named Williams dealing drugs in a busy street in Huddersfield. DS Willan sought the advice of a senior officer and they agreed that an arrest should be made as quickly as possible. DS Willan called for backup, with the intention that he and another officer would approach Williams from the front while two other officers would approach from behind in a ‘pincer movement’. Unfortunately, when the arrest was attempted Williams struggled so violently that his momentum moved the first two officers further up the street and the group knocked into the claimant, Mrs Elizabeth Robinson, a passer-by. She suffered personal injuries as a result and sued the defendant Chief Constable for damages in negligence. At first instance, Mrs Robinson’s claim was unsuccessful. Mr Recorder Pimm held that although the police owed a duty of care to her and had breached that duty by acting carelessly in carrying out the arrest, they had immunity from suit. The case was therefore dismissed.

On appeal it was held that although the police were not immune from liability, they did not owe the claimant a duty of care and had not acted carelessly in carrying out the arrest. Mrs Robinson therefore lost her claim in the Court of Appeal.

Counsel for Mrs Robinson submitted that if a defendant has caused personal injury to a claimant by a positive act then it is unnecessary to go through the three-stage Caparo criteria as a duty of care exists provided that the damage is foreseeable. Lady Justice Hallett, giving the leading judgment, rejected this argument and, applying the Caparo test, held that
there was a lack of proximity between the claimant and defendant\textsuperscript{53} and that it ‘would not be fair, just and reasonable to impose a duty on police officers doing their best to get a drug dealer off the street safely.’\textsuperscript{54} In other words, the police did not owe Mrs Robinson a duty of care as the policy factors considered under the third stage of the Caparo inquiry pointed against recovery.

It should be noted in passing that the Court of Appeal ultimately held, perhaps questionably, that the damage to Mrs Robinson was caused by the police failing to prevent Williams from injuring the claimant, and therefore concerned personal injury caused by an omission rather than a positive act.\textsuperscript{55} Nonetheless, the Court fully examined the issue of whether a duty of care is owed for personal injury caused by positive acts and how Caparo should be interpreted. The focus of this section will therefore be on these aspects of the case.

Hallett LJ considered that, in all cases, determining whether a duty of care exists requires consideration of the three-stage Caparo ‘test’ as the starting point.\textsuperscript{56} In other words, she did not focus on previously established categories of cases, notwithstanding that a defendant clearly owes a duty of care to avoid causing physical injury to people by a positive act.\textsuperscript{57} Authority for this proposition can be found in the Court of Appeal decision of Perrett v Collins (a case not mentioned in Robinson).\textsuperscript{58} In this case, a light aircraft was negligently built and inspected. As a result, the plane crashed and a passenger in the plane was injured. The passenger succeeded in the Court of Appeal in his personal injury claim against the

\textsuperscript{53} Robinson, above n 4, at [56]-[58]. This does not form the focus of this article but if a situation where physical contact is made between two individuals does not constitute a proximate relationship then it hard to see what does. If this finding is correct (and the author has severe doubts that it is) it renders the concept of proximity to be of even less utility than even its staunchest critics have feared.

\textsuperscript{54} Ibid at [51].

\textsuperscript{55} It is doubtful whether this conclusion was warranted. If A pushes B causing B to injure C then A’s positive act will have caused C’s injury, even if it is only B who makes physical contact with C. See Haystead v Chief Constable of Derbyshire [2000] 2 Cr App R 339. Therefore, where A and B are both carelessly engaging in a struggle that injures C, this can be classed as being caused by the positive acts of both A and B. The mere fact that it was the drug-dealer rather than a police officer who made physical contact with the claimant does not mean that C’s injury was caused by an omission.

\textsuperscript{56} Robinson, above n 4, at [40].

\textsuperscript{57} See Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 495 per Dean J.

\textsuperscript{58} [1999] PNLR 77.
builder of the aircraft, the inspector of the aircraft, and a non-profit-making organisation concerned with the advancement of amateur flying that oversaw the inspection.

The defendants in Perrett submitted that it was not fair, just and reasonable to hold them liable. This argument was met with short shrift by Lord Justice Hobhouse (as he then was), in whose view it ‘represent[ed] a fundamental attack upon the principle of tortious liability for negligent conduct which had caused foreseeable personal injury to others’. 59 Hobhouse LJ also believed that, where a case fits into a recognised duty category, the question of whether imposing liability is fair, just and reasonable does not arise. 60

On the assumption that the police in Robinson caused personal injury to the claimant by a positive act, the case would appear to fit neatly within an established category of duty: namely that duty which arises wherever careless conduct causes foreseeable personal injury to another. 61 Thus, on the orthodox view defended in Perrett, there is no need to apply the Caparo method. 62

Lady Justice Hallett disagreed with this conclusion and cited Marc Rich v Bishop Rock Marine Co Ltd 63 to support her argument that the three-stage ‘test’ should be undertaken in all cases. There, a classification society had carelessly recommended that a damaged ship would be fit to sail after temporary repairs (instead of permanent ones). In the result, the ship sank and its cargo was lost. The House of Lords utilised the three-stage test and held that imposing liability on the classification society would not be fair, just and reasonable.

59 Ibid at 80.
60 Ibid at 86.
61 It is arguable that the conduct of the inspector and the voluntary organisation was an omission (failing to prevent the builder of the aircraft from flying it) rather than a positive act but this does not detract from the argument that causing foreseeable personal injury by a positive act is an established duty situation.
62 It is true that there have been cases involving personal injury in which the courts have concluded against imposing liability (See Sutradhar v Natural Environment Research Council [2006] UKHL 33). But these have been ones where the damage was caused by an omission rather than a positive act.
63 [1996] AC 211.
One difficulty with Hallett LJ’s reliance on Marc Rich is that the ‘physical damage’ in that case was damage to property and, further, was a result of careless advice. It was not, as occurred in Robinson, personal injury caused by physical contact. It would be remarkable if the law did not draw a distinction between these types of harm: the freedom from physical injury to the person is the most important interest that tort law safeguards. In ordinary cases where a defendant has caused physical injury to the person by a positive act, a claimant merely needs to show that such injury was reasonably foreseeable to the defendant.\(^64\) If physical contact by a positive act of the defendant has been made then it is obvious that the claimant and defendant were in sufficient proximity to one another and that it is fair, just and reasonable to impose a duty of care. It seems appropriate that bodily integrity should be protected in a wider range of circumstances than damage to property and that — to this end — a duty should ordinarily be assumed to exist in cases involving straightforward personal injury.\(^65\) As Hobhouse LJ stated in Perrett:

Marc Rich should not be regarded as an authority which has a relevance to cases of personal injuries or as adding any requirements that an injured plaintiff do more than bring his case within established principles. If a plaintiff is attempting to establish some novel principle of liability, then the situation would be different.\(^66\)

It is peculiar, then, that Hallett LJ relied upon Marc Rich to decide a personal injury claim when the Court of Appeal has previously held that it is inapplicable to such decisions.

Hallett LJ also utilised more recent authorities to justify her view, stating that ‘the adoption of the Caparo test to claims in negligence generally is reflected in all the most recent appellate decisions.’\(^67\) In support of this she cited the example of Smith v Ministry of

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\(^64\) Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310 at 396 per Lord Keith.

\(^65\) This view is also supported in the Australian case law. See Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 495 per Deane J and Tame v New South Wales (2002) 211 CLR 317 at [15] per Gleeson CJ.

\(^66\) Perrett, above n 58, at 92.

\(^67\) Robinson, above n 4, at [41].
Defence, a case brought against the Ministry of Defence by British service personnel injured, and the families of personnel killed, while serving in Iraq.

While it is true that numerous decisions from the House of Lords and Supreme Court have focused on the three-stage Caparo enquiry, this is because those cases predominantly raise novel legal issues. After all, if a case easily fits within an established category of negligence then it will not usually raise an issue of law that requires its appeal to the highest court in the United Kingdom. Smith v Ministry of Defence itself is illustrative of this. It was a novel case where the defendant had not caused personal injury by a positive act (the Ministry of Defence had failed – that is, omitted – to provide protective equipment to British soldiers) to the claimants, and the claimants were challenging an area of ‘no liability’ that was arguably no longer socially acceptable (that is, in which a duty ought now to be recognised). It is entirely appropriate that the Supreme Court would consider the three-stage Caparo enquiry in such circumstances. Hallett LJ’s citations therefore fail to support her argument that the Caparo ‘test’ was appropriately utilised in Robinson.

Numerous cases have recognised that the police owe a duty of care where they have caused personal injury by a positive act. For example, in Ashley v Chief Constable of Sussex Police, the claimants were the family of the deceased who was shot by police while unarmed during a drugs raid. In the House of Lords, the issue was whether they should be able to take their claim for assault and battery to trial. What is notable about the case for present purposes is that the defendant had accepted full liability in negligence and this went unquestioned in the House of Lords. Implicit in this is that the police, like any other defendants, owe individuals a duty of care not to cause physical injury by a positive act.

68 [2013] 3 WLR 69.  
The recent case of MacLeod v The Commissioner of Police for the Metropolis\textsuperscript{70} confirms this. The police had run over the claimant cyclist while responding to an emergency call. The issue before the Court of Appeal was whether they had breached their duty of care — a question that would not arise if they did not owe a duty of care in the first place. To hold otherwise is to give the police an immunity from liability and involves treating them differently from other defendants. As the approach of Lord Toulson in Michael discussed later in this article confirms, this does not represent English law. The police are treated no differently from other public authorities in that they do not owe a duty of care to prevent damage caused by third parties: that is, they are not liable generally for omissions. Similarly, the police should not be treated differently from other defendants who cause personal injury by a positive act.\textsuperscript{71}

Despite this, Hallett LJ remarked: ‘The idea that the common law would impose a duty, in circumstances where it is unfair unjust and or unreasonable to do so, is…nonsensical.’\textsuperscript{72} With respect, this misunderstands the law. Common law reasoning places value on precedent. If an analogous case has already held a defendant liable in similar circumstances then the question of justice and fairness has already been decided. As Hobhouse LJ stated in Perrett, ‘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.’\textsuperscript{73} Indeed, the law would be chaotic if each first instance judge was considering the factors for and against imposing a duty of care on a driver each time, say, a run-of-the-mill road traffic accident case was presented before them. According to Lord Brandon in The Aliakmon:

\textsuperscript{70} [2015] EWCA Civ 688
\textsuperscript{71} See also the two pre-Caparo cases where the police have been held liable for causing physical injury by a positive act: Rigby v Chief Constable of Northamptonshire [1985] 1 WLR 1242 and Knightley v Johns [1982] 1 WLR 349.
\textsuperscript{72} Robinson, above n 4, at [41].
\textsuperscript{73} Perrett, above n 58,90-91.
...where a general rule, which is simple to understand and easy to apply, has been established by a long line of authority over many years, I do not think that the law should allow special pleading in a particular case within the general rule to detract from its application. If such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that the certainty, which the application of the general rule presently provides, would be seriously undermined.74

If the police officer had caused personal injury to Mrs Robinson by a positive act then the case is not a novel one. Based on Perrett, a duty of care should have been imposed without the policy factors in the third-stage of Caparo being considered because the claim would fit within a recognised line of cases where a duty of care has previously been held to exist. Put simply, an individual owes a duty of care not to unreasonably cause physical injury to others by their positive acts. The only circumstances in which resort to the so-called Caparo ‘test’ should be undertaken is if there is no clear authority on the issue or if the current rules are no longer socially relevant. Neither of these circumstances applied on the facts of Robinson.

Leaving this to one side, and assuming that the case was one where a consideration of the third limb of Caparo was appropriate, the discussion of whether imposing liability was fair, just and reasonable left much to be desired. In weighing up the claimant’s interest in not being injured compared with the public’s interest in seeing drug dealers arrested, Hallett LJ stated that ‘provided the police act within reason, the public would prefer to see them doing their job and taking drug dealers off the street.’75

The public may prefer to see the police doing their jobs and arresting drug-dealers if the former are acting ‘within reason.’ Hallett LJ’s judgment should therefore displease them. Without wishing to labour an obvious point, the inevitable result of a finding of ‘no duty’ is that it is completely irrelevant whether the police act reasonably or not. If a duty of care was imposed, then reasonable police officers would not be held liable in negligence if they

74 Leigh and Sillavan Ltd. v Aliakmon Shipping Co. Ltd. (the Aliakmon) [1986] AC 785 at 816-817.
75 Robinson, above n 4, at [47].
caused injury to passers-by when arresting criminals as they would not have breached their duty of care. This is the basic difference between the duty and breach elements of the tort.

Nevertheless, it is not clear that denying the police owe a duty of care in the factual circumstances of Robinson would actually be fair, just and reasonable. A relevant factor is the principle derived from Hill v Chief Constable of West Yorkshire. Hill was a claim brought by the mother of the last known victim of a serial killer known as the Yorkshire Ripper. The House of Lords held that Miss Hill was not at special risk merely because she was young and female. As a result, there was a lack of proximity between the victim and the police sufficient to ground a duty of care. Furthermore, Lord Keith held that as a matter of public policy the police were ‘immune’ from allegations of negligence arising from their investigation and suppression of crime. This latter aspect of the judgment subsequently proved controversial and judges have distanced themselves from such terminology as it implies an exemption based on the defendant’s status. Yet the case remains clear authority for the principle that the police do not ordinarily owe a duty of care to members of the public to safeguard them from attacks by third parties, that is, are not liable for omissions.

Hallett LJ placed much emphasis on Hill. However, the facts of Robinson can be distinguished from this decision and the cases that have followed it because in Hill the defendants had no control over the criminal third party. It could be argued that Robinson is more closely analogous to Home Office v Dorset Yachts Co Ltd, where several borstal boys escaped from an island where they were being supervised by the defendant public authority and caused damage to the claimant’s yacht. The House of Lords held that the Home Office

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77 Ibid at 64.
79 This is consistent with the law concerning non-police defendants. See Mitchell v Glasgow City Council [2009] UKHL 11; [2009] 1 AC 874 and Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61.
was liable in these circumstances. They had control over the borstal boys and had created a situation where it was likely that they could escape and do harm. One important exception to the rule that there is no liability for omissions is when a defendant has control over the situation. This has been confirmed by Michael.  

A comparison can be drawn here with the present case: unlike the Hill-style cases, DC Willan, by choosing to arrest Williams in a busy street, had created a dangerous situation and should therefore be responsible for failing to control it when it resulted in harm to another. This factor was not considered in Robinson and so the Court of Appeal arguably gave too much weight to the Hill principle.

By incorrectly identifying the starting point as the three-stage Caparo test, a number of binding decisions and relevant principles were overlooked by the Court of Appeal in Robinson. If the injury in this case had been caused by the defendant’s positive act then it was not a case where any policy reasoning should have taken place at all as there is overwhelming authority that a duty of care is owed in such circumstances. Indeed, most scholars who are critical of the law’s distinction between acts and omissions wish to expand liability for injuries caused by omissions. Few think that liability for carelessly causing harm by a positive act should be curtailed. Hallett LJ’s judgment erodes the protection that

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81 Michael, above n 5, at [99].
82 One case contrary to this thesis is that of Brooks, above n 78. The facts are outlined in my discussion of Michael, below. As McIvor has correctly pointed out, this is not actually a third party liability case in the same way that Hill is (‘Getting Defensive About Police Negligence’ above n 6, at 142). There, Lord Steyn rejected an argument that Hill should be distinguished on the basis that in that case the police’s negligent omission was the cause of Ms Hill’s murder whereas in Brooks the positive act of the police was a cause of harm to him. It was a case of misfeasance rather than nonfeasance. However, this can be reconciled with my argument in that although physical injury and psychiatric harm are considered to be equivalent when the claimant is put at a reasonably foreseeable risk of physical danger from the defendant’s conduct (see Page v Smith [1996] AC 155), outside of those ‘primary victim’ cases, the courts impose a number of restrictions on recovery for psychiatric harm. Mr Brooks’ case was more akin to those that fall outside of the ‘sudden shocking event’ paradigm, such as W v Essex CC [2001] 2 AC 592 and Barber v Somerset CC [2004] UKHL 13. As such, it is a novel case where a weighing up of the factors for and against imposing liability was appropriate and was therefore very different to the facts of Robinson.
the tort of negligence provides and makes the law on police negligence unpredictable. The reasoning in this case exemplifies the problems that occur when Caparo is interpreted as a three-stage yardstick by which any duty of care issue can be decided.

**Affirming the Incremental Approach: Michael v Chief Constable of South Wales**

Fortunately, doubt has now been cast on whether the ‘overarching three-stage test’ interpretation is an accurate understanding of Caparo and, by extension, the correct approach to determining when the police will owe a duty of care in negligence. This section will undertake a close textual analysis of the Supreme Court decision in Michael in order to demonstrate the benefits of a different construal of Caparo.

Joanna Michael was murdered by her ex-boyfriend Cyron Williams. He had turned up at her house in Cardiff in the middle of the night and hit her after finding her with another man. Although she lived in the area of the South Wales Police, her 999 call was picked up by a Gwent Police operator. She informed the call handler that Williams had taken her car to drive the other man home and had said that when he came back he was going to kill her.\(^4\)

The call handler informed Ms Michael that she would pass the call on to the police in Cardiff.

Gwent Police graded the call as requiring an immediate response and Ms Michael’s home was no more than six minutes’ drive from the nearest police station. The call handler gave an abbreviated version of what Ms Michael had said to South Wales Police. However, no mention was made of the threat to kill. As a result, South Wales Police categorised the call as requiring a response within 60 minutes.

Ms Michael dialled 999 again approximately 15 minutes after the first call. This was also received by Gwent Police. The operator heard Ms Michael scream and the line went dead. South Wales Police arrived at her home within eight minutes of the second call to find

\(^4\) There was a factual dispute about whether the operator heard the word ‘kill’ or misheard it as ‘hit’ but the issue before the Supreme Court was the legal one of whether a duty of care was owed so the case was decided on the basis that the facts occurred as alleged.
she had been brutally stabbed to death. Williams subsequently pleaded guilty to murder and was sentenced to life imprisonment.

Ms Michael’s parents and her children brought a claim against the Chief Constables of Gwent and the South Wales Police for damages for negligence at common law and under the provisions of the Fatal Accidents Act 1976 and Law Reform Miscellaneous Provisions Act 1934 (the negligence claim). A second claim was brought under the Human Rights Act 1998 for failing to protect Ms Michael's right to life under Article 2 of the European Convention on Human Rights (the human rights claim).

The Supreme Court held by a majority that the negligence claim should fail (Lord Kerr and Lady Hale dissented, maintaining that the police could owe a duty of care in these circumstances) but unanimously held that the human rights claim should go to trial.

The leading judgment was delivered by Lord Toulson (with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agreed). On the duty of care issue he maintained that, from ‘time to time the courts have looked for some universal formula or yardstick, but the quest has been elusive’.85 His Lordship also said that the

established method of the court 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.86

Lord Toulson stated that the passage in Lord Bridge’s speech in Caparo regarding the three-stage test ‘has sometimes come to be treated as a blueprint for deciding cases, despite the

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85 Michael, above n 5, at [103]. Michael is not the only case to eschew the ‘single test’ interpretation of Caparo. The judgments in Customs and Excise Commissioners v Barclays Bank Plc [2007] 1 AC 181, for example, emphasises the importance of weighing up policy factors instead of focusing on a single test. However, unlike that case, Michael articulates most clearly that the correct starting point should be previous precedent.

86 Ibid at [102].

87 Ibid.
This accurately reflects the modern approach to duty of care reasoning described earlier: the courts no longer use an overarching test in every case – the starting point is what the previous authorities say. It may seem rather astonishing that the fact a judge has correctly reiterated the approach contained in a House of Lords’ decision that has reflected the law for over 25 years is worthy of comment but given the extent that academics and judges still mistakenly refer to Caparo as authority for a three-stage ‘test’ by which all cases should/must be decided, this reiteration is necessary and welcome. If Lord Toulson’s judgment corrects the false reading of Caparo, then it is a landmark opinion in its own right.

The judgment of Lord Toulson thereby identifies the definitive approach to duty questions. It acknowledges that one should start with the previously decided cases but also that the rules can be changed in novel circumstances or when the law needs to develop to meet new social conditions. How did this apply to Michael?

Lord Toulson, citing Smith v Littlewoods Organisation Ltd, stated that English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T). The reason for this is that the common law does not generally impose liability for pure omissions. The exceptions to this arise where a defendant is in a position of control over the third party, as occurred in Home Office v Dorset Yacht Co Ltd, or when a defendant has assumed a positive responsibility to safeguard C under the principle derived from Hedley Byrne & Co

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87 Ibid at [106].
88 See the discussion of Robinson (above).
89 [1987] AC 241
90 Michael, above n 5, [97]
91 Ibid. For criticisms of this, see Tofaris and Steel, ‘Negligence Liability for Omissions and the Police’ above n 83.
Ltd v Heller & Partners Ltd. It was held that neither of these exceptions applied to the current case.

More specifically, there have been a number of actions against the police where similar issues have arisen before the courts. Lord Toulson gave a detailed consideration of the relevant authorities but the main ones for present purposes are Hill v Chief Constable of West Yorkshire (discussed above), Brooks v Commissioner of Police of the Metropolis and Smith v Chief Constable of Sussex.

In Brooks, a claim brought by Duwayne Brooks, a witness to the notorious racist murder of Stephen Lawrence, against the Commissioner of the Metropolitan Police failed in the House of Lords. Mr Brooks argued that the police failed to provide him with appropriate support as a victim of, and witness to, a crime, thus causing him psychiatric harm. Lord Steyn maintained that while ‘a more sceptical approach to the carrying out of all public functions is necessary … the core principle of Hill’s case has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years.’ Hill remained good law.

In Smith, the claimant had repeatedly informed the police that his former partner, Jefferys, had sent him a ‘stream of violent, abusive and threatening telephone, text and internet messages, including death threats.’ Mr Smith reported this on several occasions but the officers declined even so much as to look at the messages, made no entry in their notebooks, took no statement from the claimant and did not complete a crime form. The police had plenty of evidence and information to arrest Jefferys but made no attempt to do so.

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94 As Lord Toulson stated in Michael, above n 5, at [138]: ‘The only assurance which the call handler gave to Ms Michael was that she would pass on the call to the South Wales Police. She gave no promise how quickly they would respond.’
95 [2005] 1 WLR 1495.
97 [2005] 1 WLR 1495 at 1509 per Lord Steyn.
98 [2009] 1 AC 225 at 254 per Lord Bingham.
As a result, he attacked Mr Smith with a claw hammer causing him severe injuries, including brain damage.

Mr Smith brought a claim against the police for failing to prevent the attack. The House of Lords (Lord Bingham dissenting) confirmed that the case fell within the Hill principle and that in the absence of special circumstances the police owed no common law duty of care to protect individuals against harm caused by criminals. These authorities suggest that the police are unlikely to be found liable in negligence for failing to prevent a third party from injuring a claimant.

In Michael, Lord Toulson reiterated that Lord Keith’s use of the phrase ‘immunity’ in Hill ‘was, with hindsight, not only unnecessary but unfortunate’, as it gave rise to misunderstandings. However, the clear weight of authority pointed against the claimant being successful. Lord Toulson stated that a refusal to impose a private law duty of care on the police to safeguard victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. Instead, such refusal is consistent with the way in which the common law has been applied to other authorities vested with public law powers. It is also consistent with the treatment of private individuals who are not generally liable for omissions. In this respect, ‘The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case.’ Lord Toulson was unpersuaded that an exception to this rule should apply in the present case.

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99 Michael, above n 5, [44].
101 Ibid at [116].
102 Ibid at [114].
The authorities therefore give a clear answer. It is difficult to argue that cases such as
Hill, Brooks and Smith give much scope for a duty of care being imposed in the
circumstances of Michael. Given the extent to which these decisions have been criticised,
though, it is arguable that this is an area of law where social mores have changed.
Consequently, it could be argued that the rule against imposing a duty of care on the police
for pure omissions should either be overruled or a new exception to it developed. As such,
Lord Toulson considered some of the factors for and against imposing liability on the police.

One such factor is derived from the judgment of Lord Keith in Hill, who maintained
that:

The general sense of public duty which motivates police forces is unlikely to be
appreciably reinforced by the imposition of such liability so far as concerns their
function in the investigation and suppression of crime. From time to time they
make mistakes in the exercise of that function, but it is not to be doubted that they
apply their best endeavours to the performance of it. In some instances the
imposition of liability may lead to the exercise of a function being carried on in a
detrimentally defensive frame of mind. The possibility of this happening in
relation to the investigative operations of the police cannot be excluded.

This defensive practices argument has been described as being ‘wholly conjectural.’
Given the lack of evidence to support the idea that imposing liability on the police in such
circumstances would be detrimental to the public interest, it could be argued that one factor in
favour of imposing liability is that it could improve the performance of the police service and
reduce incidences of violence. Such arguments have found favour outside of the context of
police negligence. For example, in Phelps v Hillingdon LBC, where the House of Lords
held that an educational psychologist might owe a duty of care to pupils where it was
foreseeable that those pupils might be injured by his or her carelessness, the defensive

104 Michael, above n 5, at 63.
105 McIvor, ‘Getting Defensive About Police Negligence’, above n 6, at 135. See also Home Office v Dorset
Yacht Co Ltd [1970] AC 1004 at 1033 per Lord Reid and Tofaris and Steel, ‘Police Liability in Negligence for
Failure to Prevent Crime’, above n 83, at 5.
practices argument was rejected. Lord Clyde believed that imposing a duty of care ‘may have the healthy effect of securing that high standards are sought and secured.’  

In Michael, Lord Toulson said that the criticisms of the above statement of Lord Keith in Hill ‘have force’. However, just because there is no proof that the imposition of liability would lead to an unduly defensive attitude does not mean that imposing a duty of care would improve the performance of the police in catching criminals or dealing with actual or threatened domestic violence. Lord Toulson stated that:

the court has no way of judging the likely operational consequences of changing the law of negligence in the way that is proposed [and that] the court would risk falling into equal error if it were to accept the proposition, on the basis of intuition, that a change in the civil law would lead to a reduction of domestic violence or an improvement in its investigation… [I]t is speculative whether the addition of potential liability at common law would make a practical difference at an individual level to the conduct of police officers and support staff.

What factors might point towards imposing a duty on the police? The dissenting judges in Michael were influenced by an article by Tofaris and Steel. Tofaris and Steel deplore as a ‘false starting point’ the belief that the ‘starting point in such cases is that there is no duty of care on the basis of the Hill principle’, which means that ‘the balancing [under the third stage of Caparo] is weighed in favour of the Hill policy factors, so that they can be displaced only in exceptional cases by potent considerations of public policy to the contrary’.

Instead, they argue that a better approach would be to recognise that one consideration of ‘utmost importance’ is that wrongs should be remedied, meaning ‘that a claimant in a relationship of proximity with the police who has suffered foreseeable harm as a result of

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107 Ibid at 672 per Lord Clyde.
108 Michael, above n 5, at [121]
109 Ibid.
111 Ibid at 24.
112 Ibid.
113 Ibid.
police carelessness should not remain uncompensated.'\textsuperscript{114} Once the claimant has shown that the defendant has committed an interpersonal moral wrong (that the damage suffered was reasonably foreseeable and that they were in a relationship of proximity with the police) a duty of care should be owed provided there are no valid policy reasons to the contrary.\textsuperscript{115}

In other words, Tofaris and Steel wish to revive the Anns test. The courts could not have been more emphatic in their rejection of the ‘why not?’ approach towards determining duty of care. In the post-Caparo world, the starting point is what the authorities have held. Previous cases have affirmed that police do not owe a duty of care in such circumstances and so unless it can be shown that those cases were wrongly decided then they should be followed. The burden of proof is on the claimant to show that the prevailing rules are no longer socially relevant or that a new rule is warranted. As Lord Hoffmann stated in Stovin v Wise:

\begin{quote}
The trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from a person (preferably insured or a public authority) whose act or omission can be said to have caused it. The default position is that he is not.\textsuperscript{116}
\end{quote}

There are good reasons for this. Given that the correct approach in novel cases is to weigh up the factors for and against imposing liability, the Anns test made this ‘more difficult to perform properly when likelihood of damage seemed somehow to tilt the scales, and there was no indication of what weight of countervailing factors was required to displace the prima facie duty of care.’\textsuperscript{117} Pace, Tofaris and Steel it is not for the defendant to show that imposing a duty would be detrimental to the public interest: the burden is on the claimant to show that the weighing of the relevant policy factors indicate that a duty should be owed.

\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid. Valid policy reasons would not include those given in Hill.
\textsuperscript{116} [1996] AC 923 at 949.
\textsuperscript{117} Rodger, ‘Reflections on Junior Books’ above n 23, p 65.
In his dissenting judgment in Michael, Lord Kerr said ‘what one group of judges felt was the correct policy answer in 2009, should not bind another group of judges, even as little as five years later.’ One can question this statement. Even if it is arguable that a previous decision erroneously weighed the policy arguments, there is still some value in certainty and following previous cases. This does not necessarily mean that a bad rule should be maintained, but it does mean that there needs to be proof that it is the wrong policy for the law to have and that the benefits of changing it outweigh those in maintaining it. Hill may have been based on questionable policy reasons but following it provides certainty. In order to change the law, conclusive proof that it is wrong — namely, evidence that negligence liability would improve police performance — would need to be provided.

Since this article is more concerned with the appropriate methodology for determining duty of care questions, it is not necessary to reach a conclusive view as to whether the correct result was reached in Michael. An argument can be advanced that Lord Toulson’s weighing of the policy factors was not entirely convincing and the law on liability for omissions should be reconsidered. But the decision not to overhaul the omissions rule, while timid, can hardly be considered unequivocally wrong. Even if empirical evidence conclusively drives a stake through the defensive practices argument, there is still scope for disagreement on such issues. At least now future debates can focus on such normative issues. Accordingly, while Lord Toulson’s weighing of policy arguments is certainly not immune from criticism,

118 Michael, above n 5, at [161] per Lord Kerr
120 See e.g. Lord Neuberger’s use of statistics in Scullion v Bank of Scotland Plc (t/a Colleys) [2011] 1 WLR 3212 at 3224-3225 to distinguish that case from Smith v Eric S Bush [1990] 1 AC 831.
121 For such arguments see E Chamberlain, ‘Negligent Investigation: Tort Law as Police Ombudsman’ in A R and H Wu Tang (Eds), above n 52, pp 284 and 288 and Tofaris and Steel, ‘Negligence Liability for Omissions and the Police’ above n 83.
123 For reasons why there should generally be no liability for pure omissions, see Stovin v Wise [1996] AC 923 at 943-944 per Lord Hoffmann and Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 at [114]-[115] per Hayne J
the framework he used to reach his decision is to be preferred to that of Hallett LJ in Robinson as it provides an authoritative reiteration of the correct interpretation of Caparo and the law’s concern with certainty and justice.

The Approach in Canada and Australia: A Brief Survey

So far the focus has been on English law. It is instructive to consider the law in other common law countries that reject the use of the Caparo test for determining whether a duty of care exists and compare the position in those jurisdictions to the argument advanced in this article.

Australia has rejected a single overarching test in favour of an approach that focuses on the ‘salient features’ (or factors) affecting the appropriateness of imposing a duty of care.\(^{124}\) In Sullivan v Moody,\(^{125}\) the High Court of Australia said: ‘Developments in the law of negligence over the last 30 or more years reveal the difficulty of identifying unifying principles that would allow ready solution of novel problems.’\(^{126}\) Adopting the three-stage Caparo test in every case would mean that ‘the matter of foreseeability (which is often incontestable) having being determined, the succeeding questions will be reduced to a discretionay judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case.’\(^{127}\) As was stated in Perre v Apand\(^{128}\) by McHugh J: ‘there is a danger that the Caparo test will be used as the test of duty in every case where duty is in issue. That would deny the operation of the established categories and the certainty that they provide.’\(^{129}\) On this view, the concepts of fairness and justice are too vague to be of use ‘to

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124 See Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 at [103] per Allsop P for a useful summary of some of the salient features that are taken into account.
127 Ibid at [49].
the practitioners and trial judges who must apply the law to concrete facts arising from real
life activities.¹³⁰ Instead, the Australian approach is summed up as follows:

…first to ascertain whether the case comes within an established category. If the
answer is in the negative, the next question is, was the harm which the plaintiff
suffered a reasonably foreseeable result of the defendant's acts or omissions? A
negative answer will result in a finding of no duty. But a positive answer invites
further inquiry and an examination of analogous cases where the courts have held
that a duty does or does not exist. The law should be developed incrementally by
reference to the reasons why the material facts in analogous cases did or did not
found a duty and by reference to the few principles of general application that can
be found in the duty cases.¹³¹

Ideas of justice and morality should be invoked ‘only as criteria of last resort when more
crude reasons, rules or principles fail to provide a persuasive answer to the problem.’¹³²

The Australian courts have therefore rejected the use of simplistic overarching tests
that can decide whether a duty of care exists in every case. Instead, the starting point is what
previous categories of cases have decided. This ensures a measure of certainty in the law. In
novel cases, the courts develop new duties incrementally by analogy with previous cases and
by weighing up relevant factors. Questions of policy and fairness are a last resort. Although
the courts reject the use of the three-stage Caparo test, this framework is similar to the
interpretation of Caparo that I have advocated in this article. It could not be more different
from the ‘universal test’ method adopted in Robinson.

The law in Canada is still based upon the approach identified in Anns. However, the
Supreme Court of Canada has radically reinterpreted Lord Wilberforce’s two-stage test so
that it does not suffer from the problems of uncertainty that the English courts encountered.
The first stage, based upon whether harm is reasonably foreseeable, is now supplemented by
the concept of proximity. However, whether the claimant and defendant are in a sufficiently

¹³⁰ Ibid at [80] per McHugh J.
¹³¹ Ibid at [94].
¹³² Ibid at [82].
proximate relationship is identified through the use of previous categories of duty situations.

In Cooper v Hobart, McLachlin CJ and Major J stated:

The categories are not closed and new categories may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.\(^{134}\)

The second stage of Anns involves considerations of policy but the Supreme Court has emphasised that this ‘generally arises only in cases where the duty of care asserted does not fall within a recognised category of recovery. Where it does, we may be satisfied that there is no overriding policy considerations that would negative the duty of care.’\(^{135}\)

This explanation of Anns differs markedly from the way in which the two-stage test was frequently interpreted in England. Although it seems to be inconsistent with the actual dicta of Lord Wilberforce in that case, it does not suffer from the drawbacks and uncertainty that might result from an accurate interpretation of that case. Instead of disregarding established categories of cases and, once the damage is found to be reasonably foreseeable, focusing on the weighing of policy factors in each case, the Supreme Court of Canada stressed the importance of previous precedents and emphasises that policy has a very limited role to play in determining whether a duty of care exists in most cases. Again this method differs markedly from the Lady Justice Hallett’s judgment in Robinson that a three-stage test concentrating on the weighing of policy factors should be utilised in all duty of care situations.

It is therefore apparent that other common law jurisdictions have rejected the use of simplistic duty of care ‘tests’ that neglect to consider established authorities. The Canadian and Australian courts emphasise the importance of categories of precedent determining when a duty of care exists. Of course, the fact that a comparison with other jurisdictions supports

\(^{133}\) [2001] 3 RCS 537.
\(^{134}\) Ibid at 551.
\(^{135}\) Ibid at 555.
the arguments advanced above does not provide conclusive proof that they are correct. Determining the answer to duty of care questions is not a numbers game. But the fact that other major common law countries have underscored the disutility associated with overarching tests gives us reason to doubt that the idea that Caparo is authority for such a proposition is consistent with common law tort principles.

**Conclusion: Busting the Caparo Myth**

In this article I have focused on two cases concerning police liability in negligence to analyse how the landmark decision in Caparo, determining when a duty of care is owed in negligence, ought to be interpreted.

People require certainty in the law so that they can know what the law is and order their conduct accordingly.\(^{136}\) However, the law should move with the times and acknowledge that sometimes long-standing, albeit certain, rules are no longer socially relevant.\(^{137}\) Discovering the correct balance between certainty and fairness is a fundamental aspect of common law reasoning.\(^{138}\)

Properly understood, the Caparo approach appropriately strikes this balance in determining when a defendant will owe a claimant a duty of care in negligence. It takes the established categories of cases as a starting point but enables reassessment of these rules to take place and for a fair answer to be found by weighing up relevant policy factors.

Even if one agrees with Lord Edmund-Davis’ sentiments in *McLoughlin v O’Brian*,\(^ {139}\) that the idea that policy considerations are not justiciable is ‘as novel as it is startling’,\(^ {140}\) few would maintain that each judge’s opinion on the correct policy should be the starting point in each case. Such a view would mean that the law would depend solely upon the moral

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138 Ibid.
140 Ibid at 427.
intuitions of whichever judge was hearing the case and would lead to an unacceptable lack of certainty. As such, the view that Caparo represents a three-stage test upon which all duty of care cases can be determined — a test that mainly focuses upon the weighing of competing policy arguments — ought to be rejected.

The reaffirmation of the correct interpretation of Caparo in Michael is more in keeping with traditional common law reasoning. Recognising this enables criticisms of duty of care cases to be clarified. We can say that a decision is a bad one because it is inconsistent with precedent or judges have categorised a case incorrectly. For example, Hallett LJ miscategorised Robinson as a case where the three-stage ‘test’ was appropriate rather than utilising the more analogous authorities relating to physical injuries caused by positive acts. As such it was per incuriam. If the argument against holding the police liable for the criminal acts of third parties is that they should, consistently with other defendants, generally not be liable for pure omissions, then it follows that we should treat the police consistently with other defendants where personal injury is caused by unreasonable positive acts: a duty of care should be owed in such circumstances.

Alternatively, we could say that a decision is a bad one because, although consistent with authority and categorised correctly, those rules are no longer good ones to have. It is possible to criticise Michael on these grounds. A bolder judge might have taken the opportunity to overhaul the omissions principle altogether and have such issues dealt with under the heading of breach. That said, Lord Toulson should be commended for unequivocally demonstrating the correct methodology for determining duty of care issues.

Despite Michael reaffirming the correct approach to duty of care questions, Lady Justice Hallett’s view of Caparo cannot be considered an aberration of little practical

importance. The lower courts have continued to misinterpret Caparo.\textsuperscript{142} In the recent case of Rathband v Chief Constable of Northumbria,\textsuperscript{143} it was held that the police did not owe a duty of care to an officer, injured by the fugitive offender Raoul Moat, to warn him of threats that Moat had made against police officers in general. Mr Justice Males said the issue of whether a duty of care should be owed ‘must be decided by reference to the familiar “three stage test” described in the speech of Lord Bridge in Caparo\textsuperscript{144} and that the ‘applicability of this test to negligence claims against the police was affirmed in Robinson.’\textsuperscript{145} The previous categories of cases were not utilised as a starting point and Lord Toulson’s framework for the duty of care inquiry was not adopted.

The view that Caparo is authority for a universal three-stage test therefore remains a powerful meme. In some respects, this is understandable. It is, after all, easier for the busy student, judge or practitioner to remember the three simple stages of a single test than the numerous categories of duty situations. But as this article has demonstrated, perceiving Caparo as authority for such a proposition is contrary to established precedent, sound principles and leads to an unacceptable level of uncertainty in the law. Let us hope that this unfortunate trend does not continue in future cases where the liability of the police and, more generally, duty of care problems are in issue.

\textsuperscript{142} See David v Commissioner of Police of the Metropolis [2016] EWHC 38 at [106] per Nicol J.
\textsuperscript{143} [2016] EWHC 181.
\textsuperscript{144} Ibid at [84].
\textsuperscript{145} Ibid at [85].