Exploring the Interface Between the Common Law of Tort and Statute Law

Annual Richard Davies Lecture

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I am grateful for the invitation from the Association to deliver the annual Richard Davies lecture. Twenty years ago Professor Jack Beatson attacked what he termed the "oil and water" approach to the relationship between common law and statute, which sees them as separate sources of law which do not intermingle. But as he said: "Why should statutory manifestations of principle [...] not be part of the armoury of the common law judge in determining a hard case and seeking to determine what best fits the fundamental principles of the legal system?"[2]

My lecture pursues Jack Beatson's theme in the context of the law of tort. I want to explore how the existence and scope of a duty of care in common law is informed by statute. This includes examining how duty of care analysis may be bound up with considerations of public policy. Public policy is a contested field. Where can judges look for guidance on public policy to legitimise the way in which it is prayed in aid by the courts in their reasoning? Statutes are an important source of guidance on public policy and so are capable of informing the courts' approach to duty of care questions at common law.

I will begin by examining the historical foundations of the concept of the duty of care, as that will help to frame the analysis which follows.

1. *Historical foundations of the concept of the duty of care*

It was only following the emergence of an independent action for negligence that duty of care began to play an analytical role in the determination of questions of liability.[3] At around the same time, contract and tort were emerging as distinct legal entities. Generally, this distinction was unproblematic, as actions based on non-performance of an undertaking were clearly contractual, and actions based on the negligent causation of harm independent of any prior relationship were clearly in tort.

By the start of the 19th century, however, procedural differences between contract and tort were emerging. To avoid the procedural disadvantages associated with contract, plaintiffs who had suffered an injury in the course of the negligent mis-performance of a contract began to formulate their declarations in tort by focusing on the source of the defendant's duty. In *Boorman v Brown*,[4] for

[*] Lord Sales, Justice of the Supreme Court of the United Kingdom. I am grateful to my judicial assistant, Alex Hughes, for his excellent assistance in preparing this lecture.
[2] Jack Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 LQR 247, 252.
[3] See James Plunkett, *The Duty of Care in Negligence* (2018, Hart Studies in Private Law), chapter 2.
[4] (1842) 3 QB 511.

example, the Court of Exchequer held that a broker owed a duty to his client because "the principle […] would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort."[5] In this sense, then, duty was being employed as a way of *expanding* the scope of the tort of negligence, by reformulating breaches of contractual duties, which arose by reason of agreement, as breaches of duties in tort, which in other cases arose by reason of law.

In parallel with this interaction between contract and tort, an interaction was emerging between tort and statute in analysing the duty requirement. In *Parnaby v Lancaster Canal*,[6] for example, a statute required the defendant canal company to maintain clear passage on the canal, and to that end gave it powers to dredge up and remove sunken vessels. A sunken vessel was not removed, with the result that the claimant's boat using the canal was damaged. The claimant sued the canal company in tort. The defendant company argued that the statute, which imposed a penalty when a boat obstructed the canal and empowered the canal owners to remove it, was "permissive, not imperative".[7] Tindal CJ accepted that the statute did not impose a duty on the company but went on to hold that a duty existed at common law, "not perhaps to repair the canal, or absolutely free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property."[8]

In the second half of the 19th century, as the action of negligence expanded, judges began to insist that a duty of care was a necessary ingredient. The focus of the duty analysis changed from being used to expand the scope of the action to playing an exclusionary role. One of the earliest such cases was *Degg v Midland Railway Company*,[9] where Bramwell B held: "There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person … there can be no action except in respect of a duty infringed".[10] At the same time, considerations of policy also started to emerge more overtly in judicial decisions. Courts were quick to deny the existence of a duty where they felt it would lead to a significant extension in liability. In *Morgan v The Vale of Neath Railway Co*,[11] for example, Pollock CB denied that a master owed a duty to a servant who had been injured by the negligence of another servant because: "It appears to me that we should be letting in a flood of litigation, were we to decide the present case in favour of the plaintiff."[12]

Lord Atkin's speech in *Donoghue v Stevenson* sought to produce a unified analytical approach to the tort of negligence based on the duty of care concept. It built on the attempt by Sir William Brett MR in 1883 in *Heaven v Pender*[13] to do the same. Lord Atkin's neighbour principle was based on the idea of foreseeability and a rather slippery limiting notion of "proximity".[14] There was resistance to making duty of care a governing concept, including by Buckland who said it was an "unnecessary fifth wheel on the coach".[15] However, it has remained central, essentially for two reasons. First, it provides an important yet flexible focus for attention on the precise nature of the relationship

[5] Ibid., 526 (Tindal CJ).
[6] (1839) 11 AD & E 223; 113 ER 400.
[7] Ibid., 403.
[8] Ibid., 407-8.
[9] (1857) 1 H&N 773.
[10] Ibid., 781–82.
[11] (1865) 1 QB 149 (Ex).
[12] Ibid., 155.
[13] (1883) 11 QB 503, 509.
[14] *Donoghue v Stevenson* [1932] AC 562, 580–81.
[15] W Buckland, "The Duty to Take Care" (1935) 51 LQR 637.

between the parties and the normative implications of that in a range of contexts. Secondly, it provides a useful basis for striking out claims at an early stage, if analysis shows no duty of care is owed, thereby obviating the expense and delay associated with a full trial on the facts.

The modern formulation to determine the existence of the duty of care arrived with the decision in *Caparo v Dickman*.[16] Lord Bridge observed that what emerges from the caselaw is that, "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."[17]

Where a duty of care is authoritatively established in the caselaw, there is no warrant for constantly revisiting its existence by repeated application of the "fair, just and reasonable" formula.[18] But where there is an open question whether a duty of care exists in a particular context, resort to that formula is appropriate.

2. Considerations of policy in the duty of care analysis

The third stage of the *Caparo* test, whether it is fair, just, and reasonable to impose a duty, invites attention to considerations of policy.[19] This is inevitable, because when a court declares that a common law duty of care exists, the state imposes legal obligations on a person. The court performs a role which is to some degree legislative. That is so even if the process is conceived of as a sort of recognition of something identified through the application of background legal principles. Those background principles themselves involve resort to policy considerations. For this purpose "policy" must be identified in a reasonably determinate way, and in a manner which properly legitimises the court's decision to impose the duty.[20]

For example, in *Hedley Byrne v Heller* Lord Pearce said that the "sphere of the duty of care in negligence […] depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others".[21] Lord Denning referred to this in the Court of Appeal in *Home Office v Dorset Yacht* and said that the determination of a duty of care was "at bottom a matter of public policy which we, as judges, must resolve",[22] a comment that was later approved by Lord Diplock in the House of Lords.[23] Policy considerations are perceived to play an important part in determining questions regarding duty of care, particularly at the ultimate appellate level.[24]

How, then, can the courts formulate a concrete guide to the policy considerations in recognising or denying a duty of care at common law, or extending or narrowing the scope of such a duty?

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[16] [1990] 2 AC 605.
[17] Ibid., 617-8.
[18] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [27].
[19] *Michael v Chief Constable of South Wales Police* [2015] AC 1732, [160] (Lord Kerr). See also *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181, 190 (Lord Bingham).
[20] Cf Stephen Guest, *Ronald Dworkin* (2013, 3rd ed, Stanford University Press), 91: policy may be a term which is "used loosely, sometimes even just to mean that the judge has run out of good arguments."
[21] *Hedley Byrne v Heller* [1964] AC 465, 536.
[22] [1969] 2 QB 412, 426.
[23] [1970] AC 1004, 1058.
[24] J. Morgan, "'Policy Reasoning in Tort Law': The Courts, the Law Commission and the Critics" (2009) 125 LQR 215, 215. For a further example of explicit policy reasoning, see the speech of Lord Wilberforce in the "nervous shock" case, *McLaughlin v O'Brian* [1983] 1 AC 410, 421-422.

Looking to statutes can play a significant role for the courts in approaching this question. Statutes are a concrete expression of the public interest in legal form, endorsed by the democratic legislature. Moreover, law in the form of statutes increasingly governs in many contexts and it is unavoidable that the courts, in exercising their quasi-legislative role to impose duties of care, have to take account of this. A common law duty of care has to slot in alongside, and be coherent with, any relevant statutory regime in the field of its application. In Guido Calabresi's words, the common law has to be a common law for the age of statutes.[25]

3. Explicit reliance on public policy by reference to statute

In conducting the duty analysis, the common law must always give way to statute and any statutory duty must be complied with. It therefore often makes sense to address the question of explicit statutory rules at the outset, because statute may impose, or preclude, a duty of care.[26]

In some cases, a statute might be found to impose a duty itself, breach of which sounds in damages at common law. In a sense, these are simple and relatively uninteresting cases, in that statute itself tells us the answer. In these cases, public policy is fully incorporated in the statute itself. But this itself calls for some process of policy analysis to determine the purpose which the statute was intended to serve.

In other cases, however, there is a more subtle interplay between statute and common law. These are cases in which a common law rule is framed by reference to, or in the light of, public policy, and draws on statute to inform the content of the public policy standard to be applied. The way in which this happens is a general phenomenon, of which duty of care analysis is one part.

Leaving tort to one side for a moment, one can see this phenomenon in contract law. Public policy may render a contract unenforceable. Changes in legislation have operated as a "catalyst" to prompt changes in judge-made law.[27] An example is the law in relation to champerty and maintenance, the doctrine which rendered unenforceable contracts to provide funding to promote litigation.[28] The policy was the desire to ensure that individuals did not stir up litigation at no risk to themselves.[29] But such a view began to be called into question. Legal rights ought to be capable of enforcement, but litigation is expensive. Third party funding may be a necessary part of giving the rule of law practical effect. The introduction of legal aid in 1949[30] effected an important statutory exception to the rule against maintenance. Conditional fee agreements were introduced by the Courts and Legal Services Act 1990.

This affected the courts' perception of the public interest. In 2002 the Court of Appeal in *Factortame (No 8)* explained that only those funding arrangements that tended to "undermine the ends of justice" should fall foul of the prohibition on maintenance and champerty.[31] This opened the way to more extensive third party funding of legal claims as a means to secure access to justice.

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[25] G. Calabresi, *A Common Law for the Age of the Statutes* (Harvard University Press, 1982).
[26] See *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [3] (Lord Steyn).
[27] M. Leeming, "Theories and Principles Underlying the Development of the Common Law" (2013) UNSW Law Journal 36(3) 1001, 1002.
[28] Law Commission, *Proposals for the reform of the Law Relating to Maintenance and Champerty* (1966), para 9; *Hill v Archbold* [1968] 1 QB 686.
[29] *Wallis v Duke of Portland* (1798) 3 Ves. Jun. 494, 502.
[30] The Legal Aid and Advice Act 1949.
[31] *R (Factortame) v Secretary of State for Transport (No 8)* [2003] QB 381, 400.

4. The implicit operation of public policy in duty of care analysis by reference to statute

In relation to duty of care, there are many cases where the statute confers rights or imposes obligations but is silent on the extent to which a common law duty of care may exist alongside them. In this category of case public policy operates implicitly, with the judicial analysis latching onto the statutory duties to inform policy arguments in shaping common law duties.

Many judicial statements in recent tort cases make reference to the need to be "principled" in developing the law,[32] with principle operating in contrast to "policy". Certain judges have sought to explain that the type of policy that is relevant to the determination of whether the defendant owes a duty of care is primarily "legal" policy. The aim is perhaps to indicate that this type of policy lies within the competence of judges.

Under *Caparo*, the three elements can be seen as a balance between questions of principle and policy. The principles of "foreseeability" and "proximity" must be considered against the more policy-driven question of whether it is "fair, just and reasonable" to impose a duty of care; but the other two elements have a policy dimension as well. Consideration of policy in this analysis is part of the positive process of establishing a duty of care, rather than a merely limiting factor. The Supreme Court clarified in the *Robinson* case that *Caparo* should be seen as applying only to novel categories of case.[33] Within an "established duty category", there is no need to discuss the notions of proximity, or of what is "fair, just and reasonable". This is because *Caparo* only assists with the consideration of extensions to established duty situations. The key contribution of *Caparo* was described by the Supreme Court in the *Poole Borough Council* case as its emphasis on incremental development.[34] Courts should determine cases on the basis of established principle, thus placing cases within legal categories. Pragmatism, and policy, are not directly referred to as decisive.

But this leaves something of a gap: how can future courts decide *when* to allow incremental development? Policy factors have to inform the determination of whether and how far to extend a duty of care incrementally. To say that development should be incremental only tells one that that dramatic leaps of development are ruled out. This is justified on grounds of the need to ensure a reasonable degree of predictability in the law and by the limited role of courts to effect change in the law without the democratic mandate of legislation. But it does not in itself tell one whether the law ought to be developed, or in what direction. Perhaps a proposed and admittedly incremental development is not in fact justified. How can one tell if that is so or not?

Since consideration of policy is inevitable and since statute encapsulates public policy with a democratic imprimatur, looking at statutory duties may be an essential part of the analysis.

From the perspective of the law of tort, statutory duties can be divided into two types. The first is duties which are clear, precise, designed to benefit a particular group including the claimant, and intended to be actionable at common law.[35] Such duties are actionable through the distinct tort of breach of statutory duty. One needs to look at the object of the statutory duty in question. As explained in *Cutler v Wandsworth Stadium*: "if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be

[32] See, e.g., *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32, [36] (Lord Nicholls).
[33] *Robinson* (n 18), [27].
[34] *GN v Poole Borough Council* [2019] UKSC 25, [64].
[35] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731

but a pious aspiration. But 'where an Act […] creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner'."[36]

However, this general rule is subject to exceptions, which are policy-based. In *Black v Fife Coal Co*, affirmed in *Cutler*, Lord Kinnear considered, in relation to a statutory duty on an employer to take actions to protect employees, that there was no basis "for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute".[37] This was determined by looking at the purpose (that is, the underlying policy) of the statute to determine for whose benefit it was intended and what could be inferred from that to be the intended remedial consequence. That statute was intended to ensure the safety of the employees so it was held that there was a corresponding cause of action in damages at common law for the employees where there was a breach of the duty.[38] This can be contrasted with the facts in *Cutler*, where the primary intention of the statute was to regulate the conduct of racetracks, not to benefit bookmakers, even if "in consequence of those regulations being observed some bookmakers [carrying on business there] will be benefited".[39]

The second, more usual, type of statutory duty is one which is *not* actionable at common law. A very general statutory duty, or one not designed to benefit a particular group of people including the claimant, or one that Parliament did not intend to be actionable in damages, will not be enforceable through the action for breach of statutory duty.[40] Many duties where there is a criminal or other sanction set out in the statute will fall into this category, although this may not be conclusive. An example of a duty not actionable at common law arose in *O'Rourke v Camden*.[41] The duty to offer accommodation to those who are homeless was not narrow and defined and was not for the benefit of a prescribed class of people. It was a general social welfare duty. A person who was not housed when he presented himself as homeless could not seek damages in tort, and must instead seek judicial review.[42]

Statutory duties may be contrasted with statutory powers which confer discretion: these specify that the conferee of the power may do something, not that they must. Public law provides remedies if discretion is improperly exercised, or if there is an improper failure to exercise a power. Generally speaking, in light of the *Cutler* type of analysis, damages are not available in an action for breach of public law in relation to the exercise of discretion. However, in certain situations the general criteria under common law to identify a duty of care may be satisfied when a public authority acts in exercise of a public law discretion, so that a common law cause of action arises. This is an interesting and difficult area to which I will return.

At this stage, I want to highlight the extent to which statutory duties can be relevant to the common law duty of care analysis between private persons. The existence of legislation might be taken as a pointer of particular weight regarding the public interest, and of the direction in which the common law should be developed. One could say that in these instances the statute operates as a

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[36] *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 407 (Lord Simonds).
[37] *Black v. Fife Coal Co Ltd* [1912] AC 149, 165.
[38] Ibid.
[39] *Cutler* (n 36), 409.
[40] *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832, 840 (Bankes LJ).
[41] [1998] AC 188.
[42] Ibid., 193.

positive social proposition, capable of drawing the common law along in the same direction of travel.[43]

For example, *Reynolds v Times Newspapers*[44] concerned the scope of defences available to a newspaper which publishes an article which is defamatory of a politician. There was an established, but narrow, defence of qualified privilege for a person who is under a duty to report on the conduct of another, so that no liability would attach if they did so in good faith and without malice. The defendant argued for adoption of a wider version of that defence to cover a newspaper which reports honestly on the conduct of a leading politician, on the grounds that it is under a form of moral obligation to report to the public on what it believes to be the truth. The House of Lords was conscious that Parliament had passed the Human Rights Act 1998 ("HRA") which effectively incorporated a similar wide view of protections for fair journalism by newspapers drawn from the case law of the Strasbourg court in relation to article 10 of the European Convention on Humant Rights (freedom of expression), even though the Act had not yet come into force. The House took this as one indication, among others, that it would be right for it to extend the defence of qualified privilege at common law. The legislation showed the direction of travel of public policy, in a way which supported and could not be taken as blocking the development of the common law.[45]

Looking further back in time, one sees the interface between the common law and statute in the area of the employer/employee relationship.[46] Historically, the primary structural feature of employers' liability for injuries suffered by their workmen was the doctrine of common employment, which provided that an employer was not liable for an injury to one of his employees where it was caused by a fellow employee's carelessness in the course of common work with the injured employee. The theory was that an employee had assumed the risk of carelessness of fellow employees by agreeing to work alongside them. Exceptions to the doctrine came to be recognised, such as the tort of breach of statutory duty. In *Groves v Lord Wimborne*, the Court of Appeal held that the defence of common employment was unavailable where a worker had been injured by machinery that, in breach of the employer's statutory duty, had not been securely fenced.[47] The statutory obligation was placed upon the employer personally, which allowed the courts to say that a breach of it fell outside the doctrine of common employment because the doctrine was all about the risk that a third party might breach their duty. Here, by contrast, the employer was being made accountable for a breach of his own duty.[48]

It was not until 1937, with the decision of the House of Lords in *Wilsons and Clyde Coal Company v English*,[49] that the modern duty of care owed by an employer to an employee was clearly established. Side-stepping the common employment doctrine, the House of Lords held that an employer was deemed to owe a duty of care to his employees, which was personal to the employer and non-delegable. Looking at the statutory schemes in place, Lord Thankerton highlighted the "fallacy" of the argument that the employer, being under a duty to take due care in the provision of a reasonably safe system of working, could then be absolved from that duty by the appointment of a competent person to perform the duty.[50] The courts in this area were mindful of the rise in industrial

[43] See the discussion of "social propositions" in M. Eisenberg, *The Nature of the Common Law* (1988) and in P. Sales, "The Common Law: Context and Method" (2019) 135 LQR 47, 53-55.
[44] [2001] 2 AC 127.
[45] Ibid., see in particular: 200 (Lord Nicholls); 207–208 (Lord Steyn); 223–224 (Lord Cooke); 234 (Lord Hope).
[46] See P. Mitchell, *A History of Tort 1900-1950* (2014 CUP) chapter 8.
[47] [1898] 2 QB 402, 406-7.
[48] Ibid., 418.
[49] [1938] AC 57.
[50] Ibid., 64-65.

production methods and sought to ensure, through a re-framing of the common law duties of care owed by employers, that employers paid compensation where those methods caused injury to their employees. The fact that the duty was non-delegable, albeit the employer might have to appoint an agent to carry it out, meant that the employer could not say the duty was discharged by its appointment of a qualified person. The employer had to take the risk of that person negligently making an error.

Although the legal relationship between employee and employer has become settled law, it should be recalled that it was a highly political issue in the 19th and early 20th centuries. By referring to statute, the courts had access to a legitimising source of public policy with a democratic warrant authorised through the political process.

Similarly, the courts had to respond to the increasing use of motor vehicles in the 20th century.[51] In *Croston v Vaughan*[52] in 1938 the courts were faced with the question of the extent to which the obligations under a statutory instrument informed the duty of care at common law. The trial judge held two drivers jointly liable for injuries caused to the claimant in a road accident. The negligence of one of them consisted in stopping suddenly and failing to give a hand signal. This finding was challenged on appeal because the driver had used his brake light, which regulations required him to have, and the Highway Code's section on hand signals stated that they should be given "where mechanical indicators are not used".[53] For the majority of the Court of Appeal, compliance with the Code and the regulatory requirement was insufficient to rebut an allegation of failure to take reasonable care. As Scott LJ put it, the Code and the regulations "still leave upon every driver a common law duty of taking action outside the Code and the regulations in circumstances where it becomes essential."[54] For Slesser LJ, however, the relationship between the common law and the regulations was being made too sophisticated: a driver who complied with the statutory regulations on rear brake lights had, by definition, given adequate warning to the car behind and so had not been negligent.[55] On Slesser LJ's view, the negligence standard was given by the regulation. On the view of the majority, the common law imposed its own autonomous standard. The difference in approach highlights a basic choice which falls to be made in a range of contexts, including whether a common law duty of care can be identified in the first place.

In general terms, the majority of statutes enacted in the area of the law of obligations presuppose the existence of common law duties and can only work within the framework given by them.[56] For example, the Law Reform (Contributory Negligence) Act 1945 makes no sense other than by presupposing the common law of tort and legislating to modify it to some degree.

In some circumstances, however, the implication from the enactment of a statutory regime is that Parliament has removed the ability for the courts to identify a duty of care by adopting their own view of public policy. This is evident from the cases on the tort of breach of statutory duty, where it is Parliament's policy choice which is important. As Lord Scott explained in the *Gorringe* case: "if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for

[51] See Mitchell (n 46) chapter 7.
[52] [1938] 1 KB 540.
[53] Ministry of Transport, *The Highway Code* (London, HMSO, 1935) 16.
[54] *Croston* (n 52), 564.
[55] Ibid., 556.
[56] See A. Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232.

damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care".[57] However, it is for the courts to infer what was Parliament's choice regarding "the policy of the statute", and in doing that they may draw on their own understanding of what policy factors it is plausible to suppose Parliament took into account.[58]

5. References to statute to deny a duty of care at common law

Another category of case displays a similar reasoning pattern. The enactment of a statutory remedy might serve as a signal to the courts that they should *not* develop the common law in the same area. One could say that in these instances the statute operates as a sort of negative social proposition, blocking the development of the common law. In *Johnson v Unisys*,[59] for example, the essential question was whether the unfair dismissal legislation had frozen the development of the common law on damages for breach of the contract of employment by the manner of the dismissal. The House of Lords held that it should not develop the common law to allow wrongful dismissal damages for mental distress or a psychiatric illness by way of a departure from the earlier restrictive decision in *Addis v Gramophone*,[60] because to do so would undermine the special statutory compensation scheme for unfair dismissal. Parliament had provided a remedy for such harm, but at a much lower level than would be available if the common law categories of damage were extended. The fact that Parliament had legislated for a remedy tended to diminish the pressure for the common law to develop to reflect current social standards, and at the same time indicated that it would be inappropriate for it to do so in a manner which would bypass the deliberate compromise between competing interests enshrined in the statutory regime. If a positive choice by Parliament is identified not to provide for a claim in damages, although it does not formally prohibit the courts from developing the law to do just that, it operates as a guide as to the public policy whether they should do so or not.

A different variation on this theme arises where it is clear that Parliament *could* have legislated in an area, but has chosen not to. Since Parliament has the primary role in identifying public policy and legislating to give effect to it, its abstention from legislation may indicate that, for public policy reasons, the courts should also abstain from development of the law according to their own judgment of public policy in the field. Courts are mindful of their own institutional limitations and that legislative change of the law is primarily a matter for Parliament.

For example, in the *Michael* case the Supreme Court held that the police should have no liability in the tort of negligence where they had failed to respond to a 999 call from a woman who was murdered shortly afterwards by her former partner. As this involved a complex issue of social policy, the Court considered that any development in this area was for Parliament.[61] In deciding whether reform is best left to Parliament, courts may be mindful of whether or not Parliament has demonstrated any willingness to legislate in this area, including whether they have done so in the past, or to review whether legislation is required. If not, the inference may be that Parliament has

[57] *Gorringe* (n 26), [71].
[58] P. Sales, "In Defence of Legislative Intention" (2019) 48 Australian Bar Review 6, 18-19.
[59] [2003] 1 AC 518.
[60] [1909] AC 488.
[61] *Michael v Chief Constable of South Wales* [2015] AC 1732, [130]. Cf *Aitken v Scottish Ambulance Service* [2011] CSOH 49 where it was said that a duty of care arose with respect to the manner in which the 999 call was responded to and an ambulance despatched.

simply left the area free for development according to the usual processes of the common law and courts may be more inclined to proceed to do that.

6. Public authorities

A significant chapter in the interface between statute and the law of tort concerns public authorities which have statutory functions. A central tenet of the English legal tradition, most commonly associated with the constitutional scholar Dicey, is the idea that public authorities and public officials are subject to the ordinary law as administered in the ordinary courts. Indeed, for Dicey, this equivalence principle was one of the three pillars of the rule of law.[62] English law begins from the starting point that when exercising its public law functions a public authority is subject to the same private law obligations as any other legal actor, and so can be liable in tort if in the course of its performance of those functions it violates a private law right. The principle also applies in negligence, as the Supreme Court reiterated in *Robinson*.[63]

As made clear in the *Gorringe* and *Michael* cases, and most recently in *Robinson*, the equivalence principle cuts both ways, in the sense that as a matter of private law analysis, public bodies and officials are also, generally speaking, not subject to any *additional* liabilities by virtue of their status. This means that "public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm".[64]

How far the analogy between public authorities and private persons can be taken is open to question. As explained in *Stovin v Wise*: "Unlike an individual, a public authority is not an indifferent onlooker. Parliament confers powers on public authorities for a purpose. An authority is entrusted and charged with responsibilities, for the public good. The powers are intended to be exercised in a suitable case."[65] In other words, public authorities are expected and required to act in situations where a private person is not. When considering whether to impose a duty of care on a public authority, the court may find that its analysis has to be shaped to some extent by the special position occupied by the defendant, since "the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done".[66]

The statutory framework under which the defendant operates may make it plausible to argue that it has a relationship of proximity with those whom the legislation is intended to benefit such as to give rise to affirmative obligations towards such persons. Conversely, however, where a duty of care *would* ordinarily be owed if a private person acted to assume a responsibility, it may be excluded or restricted "where it would be inconsistent with the scheme of the legislation under which the public authority is operating".[67]

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[62] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (London: Macmillan, 8th edn, 1915) 114. An early example of the operation of the equality principle is *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93.

[63] *Robinson* (n 18), [32]-[33] (Lord Reed).

[64] Ibid., [34] (Lord Reed). There are, of course, exceptions to this equivalence principle, such as the tort of misfeasance in public office.

[65] *Stovin v Wise* [1996] AC 923, 935.

[66] *X (Minors)* (n 35), 739 (Lord Browne-Wilkinson).

[67] *Poole* (n 34), [75] (Lord Reed).

In making that assessment it will be relevant that when imposing a duty or conferring a discretion on the public authority, Parliament chose not to make it a duty sounding in damages.[68] Generally, statutory discretions are not to be unduly fettered by the authority, which is required to preserve its ability to adjust its behaviour in the light of changing circumstances so as to promote the purposes of the statute and the common good. Breach of duty in public law does not sound in damages. So even if a duty of care might appear to be capable of arising according to usual criteria applicable in relation to private parties when a public authority takes action, it may be that to impose such a duty would unduly limit the freedom of action of the authority to act in the public interest. This might be contrary to the no-fettering principle, by creating a risk of liability in damages if the authority decides to depart from an assurance given or course of action undertaken in the exercise of its statutory functions. Public law has developed its own doctrine of legitimate expectations to balance the no-fettering principle with standards of good government, especially where there has been detrimental reliance by an individual,[69] and that balance could be distorted if, in addition, the common law overlaid duties of care sounding in damages. It is to be expected that this part of the interface between statute and the law of tort will require more examination in future.

The most acute area of the interface arises where an individual claims that the public authority owes them a duty of care in common law based on an assumption of responsibility to protect them from a particular kind of harm. The harm might take the form of physical injury, damage to property or pure economic loss. The assumption of responsibility relied on might be said to be founded on what the authority has done in terms of positive action in the exercise of its statutory functions. Assumption of responsibility as the foundation for a duty of care in tort in relation to pure economic loss came to the fore in *Hedley Byrne v Heller*. The concept has had a vibrant life since then, despite being subject to academic criticism.[70]

However, the concept has deep historical roots and covers cases where a person chooses to enter into particular forms of established relationship, such as relationships between doctor and patient,[71] teacher and student,[72] and educational psychologist and child.[73] Generally, a public authority which enters into such a relationship will become subject to a duty of care, even though it did so in exercise of its statutory functions. It may be said that Parliament created the statutory functions on the understanding that they would carry with them standard recognised duties of care in tort.

But this inference as to Parliament's intention does not carry across to areas where there is no standard form of relationship already recognised at common law, and the role of the authority is more purely "public" in nature. Schemes of public law which confer a high degree of discretion are often seen as inconsistent with imposition of a common law duty of care. For example, in *Davis v Radcliffe*[74] banking regulation powers in the Isle of Man were at issue. In denying that a duty of care was owed to the claimant investors it was pointed out that the authority's exercise of its licensing powers "can well involve the exercise of judgment of a delicate nature affecting the whole future of the relevant bank in the Isle of Man, and the impact of any consequent cessation of the

[68] See *X (Minors)* (n 35)
[69] See P. Sales and K. Steyn, "Legitimate Expectations in English Public Law: An Analysis" [2004] Public Law 564.
[70] See P. Sales, "Pure Economic Loss and Assumption of Responsibility" (PNBA, Peter Taylor Memorial Address, 20 April 2023), available on the Supreme Court website.
[71] See, e.g., *D v East Berkshire Community NHS Trust* [2003] 4 All ER 796.
[72] See, e.g., *X (Minors)* (n 35).
[73] See, e.g., *Phelps v Hillingdon* [2001] 2 AC 619.
[74] [1990] 1 WLR 821.

bank's business in the Isle of Man, not merely upon the customers and creditors of the bank, but indeed upon the future of financial services in the island. In circumstances such as these, competing considerations have to be carefully weighed and balanced in the public interest".[75] The imposition of a duty of care sounding in damages would cut across this scheme and distort the decision-making flexibility the regulator was intended to enjoy.

But a discretion does not of itself rule out the possibility of a finding of an assumption of responsibility. If, for example, in the exercise of its discretion, the public authority decides that it should be doing something to benefit or protect a person, so it has itself decided to focus directly on their protection in some way, it may be possible to say that the responsibility of the public authority has been crystallised such that it creates a sufficient relationship of proximity to impose a duty of care. This proximity is generally described as an assumption of responsibility by the public authority. But since the language of assumption of responsibility is liable to be somewhat misleading in this area, it may be better to say that, through the exercise of its statutory functions, the public authority has itself brought about a focus of concern for and hence of responsibility for the individual.

In public law family cases, the analogy between public and private defendants becomes very attenuated. No private individual would intrude on another family's affairs over a period of years, as local authority social workers are frequently required to do. A private individual also lacks the extraordinary legal powers enjoyed by local authorities, ultimately permitting removal of children from their parents.[76]

One difficult question the courts have sought to grapple with is why positive duties readily inhere in some "general" relationships but not others.[77] In the final analysis, it is perhaps public policy considerations that explain the categories and dividing lines in determining whether assumption of responsibility has been established. In *X v Bedfordshire* a number of reasons were given to support the conclusion that it was not just and reasonable to superimpose a common law duty of care on the local authority in relation to the performance of its statutory duties to protect children. One factor which weighed heavily with the court was that the existence of a common law duty of care in relation to the statutory functions of the authority in question might have an adverse effect on the way in which it discharged those functions. The local authority might adopt an unduly defensive approach to its duties in relation to children at risk.[78]

This reasoning soon came to be questioned. In *Barrett v Enfield BC*,[79] *X v Bedfordshire* was distinguished on the grounds that in *Barrett* the authority had already taken the decision to take the child from his home, and the statutory powers exercised by the local authority once he was in care did not necessarily involve the exercise of the kind of discretion that was involved in taking the child from his family into care in the first place. Furthermore, following the HRA, the Court of Appeal held in *D v East Berkshire NHS Trust* that so far as the position of a child is concerned, the decision in *Bedfordshire* cannot survive;[80] in light of the Strasbourg jurisprudence,[81] breaches of Article 8 in child abuse cases may give rise to claims in negligence.

[75] Ibid., 827.
[76] J. Morgan, "A riddle wrapped in an enigma: assumption of responsibility, again" [2022] CLJ 449, 451.
[77] See *Michael* (n 61), [179] (Lord Kerr); see also *Robinson* (n [18]), [115] (Lord Hughes).
[78] *X (Minors)* (n 35), 681.
[79] [2001] 2 AC 550.
[80] *Berkshire* (n 71), [83].
[81] *Z v UK* [2001] 2 FCR 246; *TP v UK* [2001] 2 FCR 289; *P, C and S v UK* [2002] 3 FCR 1.

But public policy still looms large in denying many duties at common law. The *Capital and Counties* case[82] suggests, for example, that because fire brigades act for the benefit of the public generally they do not assume responsibility to particular property-owners, especially as the public interest and individuals' interests could conflict (for example, property sacrificed to form a fire-break). The "conflicting duties" argument is a particular powerful instance of the wider policy concern that liability could incentivise undesirable behaviour.[83] As Lord Keith put it, "the cure may be worse than the disease".[84]

More recently, the courts have sought to re-frame the discussion as one involving a distinction between acts and omissions of public authorities. Defendants are not usually liable for failing to assist, protect or otherwise make claimants better off. This usually entails that public authorities will not be liable in negligence. Lord Reed in *Robinson* explained that many of the leading cases denying public authority liability should now be recognised as applications of the nonfeasance principle. Policy consideration in such cases is unnecessary. This approach was followed in the *Tindall* case, in which the concept of "ineffectual interventions"[85] was placed within the omissions category. They do not make the claimant's situation worse, but merely fail to improve it. It was "far too wide" to suggest that whenever a public authority has power to prevent harm, a duty arises to do so.[86] This reasoning is in keeping with the *Stovin* and *Gorringe* line of authorities. But the non-feasance / misfeasance dividing line may be problematic in the case of a public authority subject to public law duties to act. As Lord Hughes explained in *Robinson*: "The law readily finds [an assumption of responsibility to act] in many common situations, such as employment, teaching, healthcare and the care of children, and imposes liability for omitting to protect others. It could equally readily do so in the case of police officers with a general public duty to protect the peace, but it does not."[87]

In *Poole Borough Council* case, the Supreme Court reiterated the point it had made in *Robinson* that the *Caparo* approach, which allows for the adjustment of the scope of a duty of care on grounds of policy (under the "fair, just and reasonable" rubric), has no application in established categories of case. It acknowledged that there may be circumstances, not present on the facts of that case, where the local authority may assume a responsibility towards a particular child but did not give details. But what is now clear is that a public authority does not assume responsibility for the claimants' safety merely by virtue of "investigating and monitoring the claimants' position", while the mother's "anxiety" to be rehoused did not "amount to reliance".[88] Even if sufficient proximity can be established on the facts of a particular case where there has been a positive act (rather than a mere omission), it remains necessary to examine whether, in such a novel case, there are policy reasons for not imposing a duty of care.

7. Interface of tort and statute beyond the duty of care

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[82] *Capital and Counties plc v Hampshire CC* [1997] QB 1004, 1036.
[83] See H. Wilberg, "Defensive practice or conflict of duties? Policy concerns in public authority negligence claims" (2010) 126 LQR 420.
[84] *Rowling v Takaro Properties Ltd* [1988] AC 473, 502. Similarly, the European Court of Human Rights seems to have accepted the "defensive policing" argument: see *Osman v United Kingdom* [1998] ECHR 101.
[85] *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25, [64].
[86] Ibid., [71] (Stuart-Smith LJ).
[87] *Robinson* (n 18), [115] (per Lord Hughes).
[88] *Poole* (n 34), [81] (Lord Reed).

One final point to mention is that there are, of course, other areas of interface between statute and tort. A classic example is false imprisonment which, as a form of trespass to the person, is a strict liability tort. There is an interface between statute and tort in this area, because statute may give an authority to detain someone and where it does, the detainer has a defence to the tort. However, strict compliance with the statutory conditions is required in order to create the authority to detain. Failing that, the defence does not arise. The *Lumba* case,[89] in which there were public law failures by the Secretary of State in deciding to detain the claimants, makes this clear. This was so even though it was accepted that it would have been inevitable that the claimants would have been detained if the correct procedures had been followed. However, this was held to be relevant to the quantum of damages.[90]

Conclusion

It can be observed that the imposition or denial of the duty of care in the common law of tort has been guided, to a significant degree, by judicial consideration of public policy in both the private and public law contexts. Statutes play an important role in this regard. In the duty of care context, judges have looked to statute as a helpful guide regarding public policy. Emphasis is given to maintaining a harmonious and principled co-existence between statute and tort law. An appreciation of the complex and nuanced interface between them serves to enrich the law of tort and shows the importance for the judiciary of aiming to achieve coherence across the whole of the law.

[89] R *(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.
[90] Ibid., [70] (Lord Dyson).