Back to Basics? Recent Developments in the UK Supreme Court

Robert Reed [1]

I am very grateful to the Hong Kong Judicial Institute for kindly inviting me to deliver this lecture.

I have the great honour of sitting on the Court of Final Appeal as a Non-Permanent Judge. I do so as a senior judge from another common law system. But I am well aware that the law of Hong Kong is not in all respects the same as the law of England and Wales. The different versions of the common law are like the members of a family: they have a strong family likeness, but each is an individual with its own personality. Nevertheless, we have a shared interest in maintaining what we have in common so far as we reasonably can. It may be an accident of history that a third of the world's population live in common law jurisdictions, but it is culturally and economically valuable to our societies, facilitating exchanges of many different kinds. So I hope that it may be of interest to you to know what has been happening recently in the common law as it is applied in the UK.

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The Supreme Court has recently decided a number of cases raising basic issues in the common law, and we have recently heard, but not yet decided, some other cases raising equally fundamental questions. So I thought I might tell you about some of these developments this evening.

My general theme is that in areas of confusion, generally resulting from the well-intentioned efforts of our predecessors to simplify the law, the Supreme Court is trying to clear things up by going back to first principles, while also developing the law by building incrementally on established principles.

Robinson v Chief Constable of West Yorkshire Police [2]

I shall begin with a case in tort. Mrs Robinson, an elderly woman, was walking along the street when she was knocked over and injured. She passed a man just before two other men seized hold of him. She was knocked over as the men struggled with one another and bumped into her. They then fell on top of her. You might think that she had a straightforward claim against them.

The complicating feature is that the man she had walked past was a suspected drug dealer, and the two other men were police officers attempting to arrest him. The officer in charge foresaw that the suspect would attempt to escape, and posted other officers further up the street to cut off his escape. He also

[2] [2018] UKSC 4.

foresaw that if the suspect attempted to escape, anyone in the vicinity might be injured. He gave evidence that he would not have attempted to make the arrest if he had realised that a member of the public was in harm's way, and that this was in accordance with the guidance given to officers. But, he said, he had failed to notice that Mrs Robinson was close to the suspect, although she was in plain view.

At first instance, the judge found that the police had been negligent but that they were immune from liability. He understood that the decision of the House of Lords in *Hill v Chief Constable of West Yorkshire* [3] had conferred that immunity. The Court of Appeal dismissed the appeal on immunity and allowed the police's cross-appeal against the finding that the officers were negligent. It held that what it termed the *Caparo*[4] test "applies to all claims in the modern law of negligence".[5] In consequence, it said, "[t]he court will only impose a duty where it considers it right to do so on the facts".[6] The general principle was that "most claims against the police in negligence for their acts and omissions in the course of investigating and suppressing crime and apprehending offenders will fail the third stage of the *Caparo* test".[7] That is to say, "[i]t will not be fair, just and reasonable to impose a duty".[8]

[3] [1989] AC 53.
[4] *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618.
[5] Para 40.
[6] Ibid.
[7] Para 46.
[8] Ibid.

When the case reached the Supreme Court, it seemed to us to be rather surprising that police officers should owe no duty of care to avoid injuring members of the public by knocking them over in the street. We all owe a duty to other people to take reasonable care to avoid physically injuring them when such injury is reasonably foreseeable. Why should the position of police officers under the common law be any different? Of course, police officers will sometimes quite properly take actions which involve a risk to the safety of others, for example when they drive at speed to respond to an emergency, and courts have to recognise that police officers sometimes have to take decisions in stressful and dangerous circumstances. But those considerations go to the assessment of what constitutes reasonable care in the circumstances, rather than implying that no duty of care is owed in the first place. Where did the idea that there was no duty of care come from?

The decision of the Court of Appeal exhibited three factors which are characteristic of a wider issue in the common law, as it is currently applied in the UK. First, it was an example of a tendency to formulate legal principles in a way that allows for a flexible approach which is seen as having the advantage of enabling the court to achieve what it regards as a just outcome in the particular case before it. For example, on the approach adopted by the Court of Appeal, every claim in negligence was to be decided on the basis of whether, on the particular facts, the court considered that it would be fair, just and reasonable to

impose a duty of care. That sort of approach can be justified in an area of the law, such as the law relating to children, where the paramount consideration is the best interests of the particular child involved, and there is therefore a very strong interest in making the best possible decision in the individual case. But individuated justice, rather than the application of general principles, is not a characteristic of the law in general, or of the law of tort in particular. People, and their insurers, need to know what duties they owe to others.

Secondly, the decision was also an example of the tendency to see courts as bodies which make policy judgments. The question whether a duty of care should be imposed in particular circumstances was seen as a policy judgment, depending on an assessment of the desirability of allowing recovery by individuals injured in the course of police operations, balanced against the consequent impact on methods of policing and the allocation of public resources. Of course, some courts, in some cases, have to consider whether and how the law should be developed, and that involves considering whether its development in a particular way would be a good idea. But even the highest courts are not policy makers in the same sense as a Law Commission or a government department, and litigation is not a good method of deciding policy questions. If the highest courts were going to adopt the policy-making role of government departments, they would need to be staffed by judges with appropriate expertise, with appropriate mechanisms for political accountability for the choices they made, and

appropriate procedures for public involvement in the policy-making process. When it comes to the lower courts, policy-making scarcely enters the picture.

Thirdly, the reasoning reflected confusion about the law, ultimately stemming from an attempt at simplification by the House of Lords. The case where they did this was *Anns v Merton London Borough Council*.[9] According to Lord Wilberforce's speech in that case, the existence of a duty of care could in principle be determined in every case by applying a two stage approach. First, it was necessary to decide whether there was a *prima facie* duty of care, based on the foreseeability of harm, and secondly, in order to place limits on the breadth of the first stage, it was necessary to consider whether there were reasons of public policy for excluding or restricting any such *prima facie* duty.

That approach greatly expanded the scope for liability, especially in relation to purely economic loss, and it also had major implications for public authorities, as they have a multitude of functions designed to protect members of the public from harm of one kind or another, with the consequence that the first stage enquiry was readily satisfied, and the only limit to liability became public policy. Lord Wilberforce's speech added to the confusion, in relation to the tortious liabilities of public authorities, by drawing a distinction, taken from American law, between operational and policy matters, and by suggesting that

[9] [1978] AC 728.

matters falling into the category of policy would be actionable only if the body had acted *ultra vires*.

The approach adopted in the case of *Anns* caused a great deal of trouble. It was during the retreat from *Anns,* as it came to be known, that emphasis was placed in a number of cases on the concept of "proximity", and on the idea that it must be fair to impose a duty of care on the defendant.

The "Caparo test"

In *Caparo,* Lord Bridge noted that decisions since *Anns* had emphasised, in his words, "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".[10] It is ironic that the next sentence in his speech came to be treated as laying down such a test. What he said was this:

> "What emerges [from the post-*Anns* decisions] 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

[10] At p 617.

should impose a duty of a given scope upon the one party for the benefit of the other."

That is what came to be treated as the *Caparo* test. But Lord Bridge had not only in the immediately preceding sentence said that no single principle could provide a practical test to be applied to every situation. In the very next sentence he repeated the point, saying that "the concepts of proximity and fairness … are not susceptible of any such precise definition as would be necessary to give them utility as practical tests".[11] Instead, Lord Bridge immediately went on to adopt an incremental approach, based on the use of established authorities to provide guidance as to how novel questions should be decided. It was that approach, and not a supposed tripartite test, which Lord Bridge then applied to the facts before him.

In *Robinson*, the Supreme Court rejected the idea that the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts. It explained that in the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where established legal principles do not provide a clear answer, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law. In such cases, they will also weigh up the reasons for and

[11] At pp 617-618.

against imposing liability, in order to decide whether a duty of the scope contended for would be a reasonable development of the law, and consistent with established principles – in other words fair, just and reasonable. Mrs Robinson's case, on the other hand, involved the application of well-established principles of the law of negligence, and did not require the court to consider any development of the law.

Police immunity?

The *Robinson* case also provided an opportunity to clarify another area of confusion, namely the effect of the House of Lords case of *Hill v Chief Constable of West Yorkshire*, which held that the police were not liable in damages to the mother of one of the victims of the Yorkshire Ripper for failing to catch him before he murdered her daughter.

The court began by reminding judges of the point established in *Entick v Carrington*,[12] that the law of tort generally applies to public authorities in the same way that it applies to private individuals and bodies, unless statute provides otherwise.

The important difference between Mrs Robinson's case and Mrs Hill's was that the case of *Hill* was not concerned with the police themselves causing injury,

[12] (1765) 2 Wils KB 275.

but with their failing to prevent harm caused by a third party. *Hill* is not authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. The effect of *Hill* is more limited: that the police do not normally owe a duty of care to protect the public from harm caused by third parties, through the performance of their function of investigating crime. On the other hand, in accordance with the general law of tort, the police are generally under a duty to take reasonable care to avoid causing injury to persons whom it is reasonably foreseeable will be injured if such care is not taken. In Mrs Robinson's case, the arresting officer realised that, when he arrested the suspect, anyone in the immediate vicinity might be injured. He accepted that there was no need to arrest the suspect while there was someone next to him. He simply failed to notice that Mrs Robinson was there, although she was in plain sight. In those circumstances, the officers owed a duty of care to Mrs Robinson and breached that duty.

R (on the application of UNISON) v Lord Chancellor [13]

I am going to turn next to a case in the field of public law. I appreciate that an equivalent case in Hong Kong might have been argued by reference to article 10 of the Bill of Rights, entrenched by article 39 of the Basic Law, just as we might have decided the case before us on the basis of the ECHR and the EU Charter of

[13] [2017] UKSC 51; [2017] 3 WLR 409.

Fundamental Rights, but I hope that our decision on the common law may nevertheless be of interest to you.

Employees in the UK have many statutory rights, often derived from EU law. Many of them are designed to protect the vulnerable and low paid, and entitle them to bring claims in the Employment Tribunal for what are often modest amounts of money. Until the entry into force of delegated legislation which I shall call "the Fees Order" in July 2013, a claimant could bring proceedings in an Employment Tribunal and appeal to the Employment Appeal Tribunal without paying any fees. The effect of the Fees Order was to require most people who wished to make use of the Employment Tribunals to pay substantial fees, of the order of HK$12,000. There was a scheme for the remission of the fees, but it only applied to people whose income and capital, taken together with those of their spouse or partner, were extremely low.

The aims of the Fees Order were to transfer part of the cost burden of the tribunals from taxpayers to users of their services, to deter unmeritorious claims, and to encourage earlier settlement. In fact, evidence showed that although the introduction of the fees had resulted in a drastic drop in the number of claims, the proportion of unsuccessful claims had risen, and the proportion of claims being settled had diminished. The Supreme Court was also struck by statements in the Government documents justifying the fees to the effect that the services provided

by the tribunals to consumers had no positive externalities: in other words, proceedings in the tribunals were of no public benefit.

The legality of the Fees Order was challenged by judicial review, but was upheld both in the High Court and in the Court of Appeal. They based their analysis on EU law and the ECHR. The Supreme Court reversed those decisions, and held that the Fees Order was unlawful under both domestic and EU law. As to domestic law, the starting point was that delegated legislation must be authorised by the statutory power under which it is made, otherwise it is *ultra vires*. So, as is often the case, the protection of constitutional rights in the UK took the form of statutory interpretation. The court explained how, starting with Magna Carta, there was a common law right of access to the courts, which applied equally to tribunals carrying out judicial functions. It was well established that statutes were not to be interpreted as taking away that right unless they did so expressly or by necessary implication. There was nothing in the statute under which the Fees Order was made which took away the right. The statute did not, therefore, confer any power to make delegated legislation which took away the right of access to justice. The remaining question was whether the Fees Order had that effect. We held, after a close examination of evidence about its impact, that it did.

In the course of the judgment, the Supreme Court emphasised that the constitutional right of access to the courts is inherent in the rule of law: it is

needed to ensure that the laws created by Parliament and the courts are applied and enforced. The service provided by tribunals are not only of value to those who bring claims before them. The Fees Order was unlawful as there was a real risk that persons would effectively be prevented from having access to justice. The fees could not be regarded as reasonably affordable by many of those who were entitled to bring employment claims. Even for people who could afford to pay the fees, they prevented access to justice, since the size of the fees made it irrational to bring small claims.

Common law primacy

As I have explained, before the courts below, the issues were argued and decided primarily on the basis of EU law. In the Supreme Court, however, it was recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law.

This can be seen as part of a renewed emphasis in the Supreme Court on the common law as a source of fundamental rights.[14] As Lord Toulson observed in the case of *Kennedy v Charity Commission*,[15] since the introduction of the Human Rights Act 1998, there has been a "baleful and unnecessary tendency to

[14] This trend has been much discussed by academics in the UK. See, for example, Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 *Current Legal Problems* 85.
[15] [2014] UKSC 20, [2015] AC 455, para 133.

overlook the common law". As Lord Mance said, also in *Kennedy*, "the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene".[16] *UNISON* is the latest reminder to lawyers and judges that the common law is a rich source of fundamental rights, not merely a sideshow to fundamental rights in EU law and the ECHR.

Investment Trust Companies v Revenue and Customs Comrs [17] **and** ***Revenue and Customs Comrs v Prudential Assurance Company Limited*** [18]

I would like to turn next to unjust enrichment. This is a subject which did not exist when I was a law student. There was something called quasi-contract, which covered certain types of situation giving rise to a claim for restitution, for example where money was paid under a mistake of fact. There were also a variety of situations in which restitutionary remedies were available in equity. The law in England changed greatly about twenty years ago, when the Law Lords included Lord Goff, who was a scholar of the law of restitution.

One major development occurred in 1998, in the case of *Banque Financière de la Cité v Parc (Battersea) Ltd*,[19] when the House of Lords adopted

[16] *Ibid*, para 46.
[17] [2017] UKSC 29; [2018] AC 275.
[18] See now *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2018] 3 WLR 652.
[19] [1999] 1 AC 221, 227.

an approach to unjust enrichment based on asking four very broad questions. First, has the defendant been benefited, in the sense of being enriched? Secondly, was the enrichment at the claimant's expense? Thirdly, was the enrichment unjust? And fourthly, are there any defences? That approach has also been adopted in Hong Kong.[20]

Another major development occurred the following year, when the House of Lords decided in *Kleinwort Benson Ltd v Lincoln County Council* [21] that money paid under a mistake of law was recoverable. Because that change in the law was effected by a judicial decision, rather than by legislation, it was deemed not to be a change in the law at all: under the declaratory theory of the common law, the law was deemed always to have entitled persons who paid money under a mistake in law to recover it. This has had serious consequences for the British tax authorities, unforeseen by the judges when they made this change in the law, as it has emerged that a variety of taxes, paid for several decades, were unlawful under EU law. Furthermore, under EU law, the entitlement to repayment, deemed always to have existed, could not be taken away by legislation imposing a retrospective limitation period.

A third development took place in 2007, in the case of *Sempra Metals Ltd v Inland Revenue Comrs*,[22] where a majority of the House of Lords held that,

[20] *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79.
[21] [1999] 2 AC 349. See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2006] UKHL 49; [2007] 1 AC 558.
[22] [2007] UKHL 34; [2008] AC 561.

where money was paid in circumstances giving rise to a claim to restitution on the basis of unjust enrichment, there was also a separate claim in unjust enrichment for compound interest on the money, on the basis that the recipient had benefited from its time value during the period before he repaid it.

As a result of those judicial developments of the law, the Government has been faced with colossal claims for the repayment of taxes paid decades earlier, resulting in numerous appeals to the Supreme Court. This whole history is a cautionary tale for judges who are thinking about making major changes to the law.

One recent appeal, in the case of *Investment Trust Companies v Revenue and Customs Commissioners*, raised the question of who could recover overpaid tax. The facts were complex, but reducing them to their essentials, suppliers of services had paid the Revenue the VAT chargeable on the services, and had included that amount in the contract price which they charged their customers. It subsequently emerged that VAT was not in fact chargeable. The suppliers recovered from the Revenue the entirety of the VAT which they had paid it, and reimbursed that amount to their customers, but for technical reasons that amount was less than the amount which the customers had paid as part of the contract price. The question then arose whether the customers could recover the difference from the Revenue. The customers' argument was that, answering the second of the House of Lords' questions, the Revenue had benefited from the VAT at their

expense, because although they had not paid anything to the Revenue, and the suppliers had not been acting as their agents, nevertheless the economic reality was that they had borne the VAT unlawfully charged. That argument was accepted by the High Court and the Court of Appeal, applying a rather vague approach developed in earlier cases, where the Court of Appeal had focused on doing justice in the individual case, and had disregarded House of Lords authorities which preceded *Banque Financière*.

The Supreme Court began by stating that "a claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied".[23] It added that "the adoption of the concept of unjust enrichment in the modern law, as a unifying principle underlying a number of different types of claim, does not provide the courts with a tabula rasa, entitling them to disregard or distinguish all authorities pre-dating [its adoption]".[24] Next, the court said that the four questions posed in *Banque Financière* were not legal tests, but signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words "at the expense of" did not express a legal test. The court went on to give detailed guidance, which rejected an economic link between the parties as sufficient, and required as a general rule that the claimant must have

[23] Para 39.
[24] Para 40.

directly provided a benefit to the defendant, subject to exceptions where, for example, the benefit was transmitted via an agent, or by means of co-ordinated transactions. It was where that direct transfer of value from the one to the other was defective that a claim for unjust enrichment would arise.

The implications of that approach have arisen in the case of *Revenue and Customs Commissioners v Prudential Assurance Company Limited*, which we heard a few weeks ago. This is another case concerning the payment of tax over many years, which was later held to be in breach of EU law. One of the issues is whether the tax repayable should bear compound interest. The case is a test case, and this is a matter of very considerable importance. To give you an idea of its importance, we had another case recently[25] where the difference between compound interest and simple interest on the tax repayable amounted to the Sterling equivalent of HK$200 billion. That $200 billion was not the tax, or even the interest on the tax, but the difference between simple and compound interest. That will give you an idea of the potential consequences of judicial law-making for the UK's public finances.

The critical question, on this aspect of the *Prudential* case, is whether the benefit in unjust enrichment should be regarded as the principal amount of tax overpaid, on which simple interest then runs under statute (since the obligation to repay the tax is a debt), or whether the benefit includes the time value of the

[25] *Littlewoods Ltd v Revenue and Customs Commissioners* [2017] UKSC 70; [2018] AC 869.

overpaid tax, in which event compound interest is arguably payable as restitution of its time value. *Sempra Metals* supports the latter view, but it is argued that *Investment Trust Companies* suggests that the only obligation arising under the principle of unjust enrichment is the obligation to repay the principal, since the overpayment of the tax was the only defective transfer of value: there was not, as it were, a further cause of action in unjust enrichment accruing every month for compound interest, since no further defective transfers of value had taken place. We will give our judgment in the next few months.[26]

Morris-Garner and another v One Step (Support) Ltd [27]

Finally, a case on contract. *Morris-Garner* concerns so-called "Wrotham Park damages". Instead of compensating for the loss actually suffered, Wrotham Park damages represent the hypothetical fee the contract-breaker would reasonably have negotiated with the other party as the price of being released from his obligation. This type of damages is well-established in respect of property rights, although its theoretical justification is unclear. For example, if someone takes my horse without my permission, I am entitled to the hire they would have had to pay me for the use of the horse, even if the horse's absence caused me no loss. The same approach has also been applied in relation to equitable damages under Lord

[26] See now *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2018] 3 WLR 652.
[27] See now *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2019] AC 649.

Cairns' Act. Indeed, the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd,*[28] which gave its name to this approach, was itself a case concerned with damages under Lord Cairns' Act. The application of the same principle to contract law damages was accepted, obiter, by the House of Lords in *Attorney General v Blake,*[29] as part of an attempt to unify principles governing remedies in contract, tort and equity, but has left the law in an unsettled state.

The *Morris-Garner* case concerns whether, and in what circumstances, Wrotham Park damages are available for a breach of contract. The case concerns the sale of a business with non-compete, non-solicitation and confidentiality covenants. The defendants were found to have breached those covenants in setting up a new business in competition with the old one. Rather than awarding damages for lost profits and loss of goodwill, the Court of Appeal decided that the claimants were entitled to Wrotham Park damages calculated as the fee that the defendants would have had to pay to be released from their obligations. The Court of Appeal considered that the test was whether an award of damages on the *Wrotham Park* basis was the just response in the particular case, which was a matter for the judge to decide on a broad brush basis.

In the Supreme Court, the defendants argued that the Court of Appeal's approach was contrary to the established compensatory approach to contractual damages, and that the availability of Wrotham Park damages in contract should

[28] [1974] 1 WLR 798.
[29] [2001] 1 AC 268.

be heavily circumscribed, or abolished altogether. The claimant argued that Wrotham Park damages are consistent with the compensatory principle, and that the Court of Appeal was correct about the conditions for their availability.

So this case presents the Supreme Court with an opportunity to clarify the status and role of Wrotham Park damages. This will require the Supreme Court to consider basic principles about the nature and role of damages in contract, tort and equity.

Conclusion

Time is too short to discuss at length the lessons which might be drawn from these cases, but I will finish by suggesting two points worth considering.

First, as Lord Rodger once remarked, "the unhappy experience with the rule so elegantly formulated by Lord Wilberforce in *Anns* suggests that appellate judges should follow the philosopher's advice to 'Seek simplicity, and distrust it'".[30] Time and again, the attempt to reduce complex areas of the law to simple formulations has resulted in confusion. Nevertheless, in order to clear up the confusion, final courts often have to go back to basic principles and re-state them as clearly and simply as they can.

[30] *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181, 204. The philosopher was A N Whitehead: *The Concept of Nature* (1919), p 143.

Secondly, judges have no option but to develop the common law. Society has not stood still since 1189, the year from which the common law is conventionally dated, and the law has not stood still either. It is constantly evolving. But the judicial development of the law is attended with risk. Even in relatively technical and uncontentious areas of the law, such as contract and unjust enrichment, the greatest judges cannot anticipate all the potential consequences of change. So we need to develop the law, but we also need to be cautious. It is not for nothing that our decisions are called judgments.

Finally, all of these cases, and perhaps especially the *UNISON* case, are a reminder of the continuing strength and vitality of the common law tradition.