Who then – in Law – is my Neighbour?

Lord Atkin’s ‘Neighbour Principle’ as an Aid for the Principled Delineation of the Boundaries of Negligent Liability

By

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A thesis submitted in conformity with the requirements for the degree of Master of Laws.

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Abstract

In contemporary legal writing and discourse, Lord Atkin’s neighbour principle is unloved. The now dominant view is that the neighbour principle performs no practical function since it is a mere descriptive label of the very different factual circumstances in which a duty to take reasonable care exists. It is the central contention of this paper that the neighbour principle is – in fact – invaluable as aid for the principled development of the tort of negligence. As this paper will show, the neighbour principle furnishes a common perspective that renders possible uniform determinations of analogical similarity and difference between novel categories of relations and established forms of negligent liability. The principle thus works in tandem with analogical reasoning to ensure objectivity in the delineation of the proper ambit of negligence law’s protection. Accordingly, the principle is an essential in ensuring a principled law of negligence whereby like cases are treated alike.
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I. INTRODUCTION

As is oft emphasized by the common law’s most learned expositors, not every conduct that carelessly harms another is subject to liability under the tort of negligence.¹ Because the common law views itself as an exercise of human reason governed by standards of internal consistency rather than a regime of capricious violence in which decisions are decreed in accordance to the length of the Chancellor’s foot, the perennial challenge – within a field of law that attributes legal responsibility to only some forms of careless conduct - has been the judicial identification of an analytical method that both consistently and impartially distinguishes between the specific concrete relations that should properly be designated as duty-bearing from those that ought never to be classified as such even if moral culpability was self-evidently present.²

Within the realm of the tort of negligence, the judicial bench have traditionally sought to conform to the ideal of rendering their decision in a consistent manner by conditioning recovery upon the plaintiff’s ability to prove that the relationship between himself and the defendant is factually identical or – at the very least – analogous to the kinds of empirical relations in which the courts have previously recognized a duty – on the part of the defendant – to take reasonable care. Thus, the great judge - Lord Atkin - noted that it is the practice of the common law to meticulously catalogue the type of relationships – be it landlord and tenant, salesman and customer – that have previously been recognized as necessitating the imposition of a legal duty to reasonably avoid injuring another.³

Yet in his classic speech in *Donoghue v. Stevenson*\(^4\), Lord Atkin famously argued that while the above casuistic approach to the determination of negligent liability is of venerable pedigree and has been unquestionably applied by generations of England’s finest jurists, the approach itself is nonetheless flawed as a consequence of a particular shortcoming. While Lord Atkin was admittedly cryptic in explaining what he meant by this assertion, it is submitted that his Lordship’s reasoning may be fairly stated as follows; Without an understanding of the broad and general rationale that must be assumed to underpin the otherwise disparate factual instances in which a duty to take reasonable care has been judicially held to exist, adjudication in a normatively consistent manner would be an empirical impossibility. Since – by their very nature - all systems of reason necessarily adhere to a standard of internal consistency dictating that like cases should be treated alike and since the common law understands itself as a system amenable to *reasoned* justification, there must – in Lord Atkin’s immortal words – ‘be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances’\(^5\).

Lord Atkin’s defining achievement in *Donoghue v. Stevenson*\(^6\) was to elucidate the ‘element common to the cases where [a duty of care] is found to exist’\(^7\). In Lord Atkin’s view, this common element is neatly encapsulated in - what later came to be known – as the ‘neighbour principle’. Essentially, the ‘neighbour principle’ stipulates that in every circumstance in which the courts have held that the plaintiff had owed the defendant a duty to take reasonable care, there existed a ‘close and direct’ relation between the litigating parties.\(^8\) The law – Lord Atkin claimed – would view individuals to

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\(^4\) Ibid.  
\(^5\) Ibid. at 580.  
\(^6\) Ibid.  
\(^7\) Ibid. at 580.  
\(^8\) Ibid. at 581.
be in a close and direct relation in situations whereby an individual is capable of foreseeably injuring the person or property of another if due care is not responsibly exercised.⁹

In spite of Lord Atkin’s expressed assurance that his ‘neighbour principle’ possesses the conceptual resources necessary to aid in the task of rationally delineating negligence law’s protective ambit, the current judicial and academic orthodoxy in the English Isles disparages Lord Atkin’s confidence as nothing more than a flight of fancy of a judge steeped in naïve idealism.¹⁰ While acknowledging Lord Atkin’s positive contribution in re-emphasizing to his - then - conservative minded peers that the contours of tort liability are inherently capable of expansion because ‘the categories of negligence are never closed’¹¹, the current orthodoxy asserts that that the judicial employment of the ‘neighbour principle’ is undesirable because its use – in reality – precludes the possibility that the law of negligence can ever be principled because the neighbour principle sanctions a mode of liability determination that the ultimately leaves the ascription of legal responsibility to the arbitrary whims of individual judges.

Orthodoxy justifies the above conclusion on the following basis. Judicial experience has shown that because of the vast variety of empirical situations subject to negligence law’s governance, it is - in practice - impossible to identify a factual attribute that is both uniquely present in all instances of duty-bearing relationships and yet – at the same time - necessarily absent in non duty-bearing ones.¹² As the long history of negligence law has shown, attempts to utilize a single empirical attribute as a criterion for objectively identifying whether a given relation should be classed together with other

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⁹ Ibid. at 580-581.
¹¹ Supra note 3 at 619.
duty-bearing relationships - such as Lord Atkin’s neighbour principle is purportedly to have done through its supposed emphasis on the factual attribute of ‘reasonable foreseeability of harm’ – is generally an abject failure because an empirical attribute – in order that it be common to all duty-bearing relationships – must be defined at a level of abstraction so high that the attribute will not just be uniquely present in all instances in which the common law has traditionally held to be duty-bearing but in situations where the common law has denied liability as well. Hence, since Lord Atkin’s neighbour principle is assumed to be an abstract test for liability and since abstract tests – by their very nature – are incapable of providing a conclusive determination of whether a particular relation is duty-bearing or not, the neighbour principle – in reality – requires that liability determination be ultimately based on the whims of the individual judge that ultimately decides whether liability is appropriate. Thus, use of the neighbour principle direct opposes the ideal that negligence law should treat like cases alike since the determination of liability in any concrete situation is ultimately decided on arbitrary preference that varies from judge to judge.

As a direct consequence of the perceived deficiency of the ‘neighbour principle’, the English judiciary has – in recent years – disavowed the idea that abstract principle has any place in the development of an internally coherent system of negligence law.\textsuperscript{13} The dominant view within the highest rungs of the English judiciary now advocates a return to the pre-\emph{Donoghue v. Stevenson} practice where the courts develops novel categories of negligence ‘incrementally and by [factual] analogy with established categories’\textsuperscript{14} unhindered by a concern with abstract principle.\textsuperscript{15} The tenor of this current mindset is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} \textit{Ibid.} at 628.
\item \textsuperscript{14} \textit{Ibid.} at 618.
\item \textsuperscript{15} \textit{Ibid.}
\end{itemize}
\end{footnotesize}
excellently illustrated by Lord Oliver’s speech in *Caparo Industries PLC v. Dickman*\(^\text{16}\),

where his Lordship stated that:

> [O]nce one discards, as it is … clear that [owing to the documented deficiencies in the neighbour principle] one must, the concept of foreseeability of harm as the single exclusive test – even a prima facie test – of the existence of the duty of care, the attempt to state some general principle which will determine liability in an infinite variety of circumstances serve not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense.\(^\text{17}\) [emphasis mine]

In this paper, I argue that the current disillusionment over the neighbour principle’s utility as an aid in fashioning a *principled* law of negligence stems from a misconception as to the *manner* by which the principle renders its assistance. Specifically, I contend that while the House of Lords in *Caparo Industries PLC v. Dickman*\(^\text{18}\) were correct to be sceptical over claims that any general principle could – via the role of an abstract test – be capable of objectively determining the multifarious instances in which a duty to take reasonable care should be imposed, a close reading of Lord Atkin’s speech in *Donoghue v. Stevenson*\(^\text{19}\) indicates that his Lordship never intended the ‘neighbour principle’ to be employed in such a cavalier fashion. Rather than supplanting the common law’s traditional approach of developing new categories of duty-bearing relations by an analogy with a ‘magical’ formula that provides a set of criteria for determining the ambit of negligent liability, it is the central thesis of this paper that Lord Atkin’s ‘neighbour principle’ merely remedies a *specific* shortcoming of the analogical approach rather than constitute a distinct mode of legal reasoning itself and is thus more properly seen as a *complement*. As this paper will show, the analogical

\(^{16}\) *Ibid.*

\(^{17}\) *Ibid.* at 633.


\(^{19}\) *Supra* note 3.
The approach is only capable of achieving its intended purpose of ensuring a principled law of negligence by which like instances are treated alike if there exists - independent of the application of the analogical approach itself – a common standpoint for identifying the specific relational characteristics relevant to the assessment of analogical similarity and difference. Without such a common standpoint, it would be impossible for the analogical approach to ensure consistency in the determinations of likeness and difference since the conclusion of likeness and difference would differ depending on what characteristics each individual judge subjectively deems to be important in the process of comparison. Thus, it is submitted that the ‘neighbour principle’ aids in the principled identification of new categories of duty because it provides such a common standpoint.

II. METHODS HISTORICALLY UTILIZED BY ENGLISH LAW FOR DETERMINING THE PROTECTIVE AMBIT OF NEGLIGENCE LAW

As noted by Justice of the Australian High Court Michael McHugh, the perennial problem within the law of negligence that has yet to be satisfactory resolve has been the specification of an appropriate method that capably distinguishes – in a principled fashion - between those forms of conduct that properly fall within the proper ambit of the tort of negligence’s protective reach and the types of conduct which that never give rise to liability no matter how morally blameworthy it is perceived to be. As his Honour astutely observed, the commentator Leon Green had - as far back as 1928 - raised this very concern in asking:

How does the stating of the problem in terms of duties enable a judge to pass judgment? Where shall he find the source of duties [in which to guide his determination in novel circumstances]? Do judges find them ready made; do they assume them: do they create them and if so, do they create them wholesale or must each court create a particular duty which fits the particular case before it? So far as I have been able to discover, the common

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20 Supra note 2 at 8.
law courts have stumbled through the whole period of their existence without committing themselves on this inquiry.\textsuperscript{21}

Lord Atkin’s judgment in *Donoghue v. Stevenson*\textsuperscript{22} is largely considered to be a judicial watershed because in it – for the first time – an English judge of the highest calibre sought to identify and evaluate the different methodological approaches that conceivably could be used as *objective* guides in the determination of negligence law’s protective ambit. As brilliant as Lord Atkin’s searching analysis was, it has been the victim of gross misinterpretation by subsequent judges and academics. In essence, the sad legacy of Lord Atkin’s speech was the spawning of two mutually exclusive methods – adopted by the modern courts - for dealing with the perennial problem of delineating negligence law’s boundaries in a sensible and principled manner. The first approach – that is usually wrongly identified as the intellectual manifestation of Lord Atkin’s famous neighbour principle – involves the use of a general formula to provide an abstract test for ascertaining the concrete circumstances in which a duty of care should be found to exist.\textsuperscript{23} In the remainder of this paper, I shall term this as the ‘abstract formula approach’.

The second approach - that is again wrongly taken to be the antagonist of Lord Atkin’s neighbour principle – is identified as the common law’s traditional method of identifying new categories of duty-bearing relations incrementally and by analogy with categories already the subject of common law decisions.\textsuperscript{24} Subsequent references to this later approach will refer to it by the label, “incremental reasoning by analogy”.

The inherent inadequacies of both (i) the abstract formula approach and (ii) the incremental reasoning by analogy approach is demonstrated by a historical oscillation that have seen the English courts and academic elites identify with either of the two

\textsuperscript{22} Supra note 3.
\textsuperscript{23} Supra note 12 at 628.
\textsuperscript{24} Ibid. at 618.
approaches only to argue that the approach currently in vogue is irredeemable as conceptually flawed. In this section, I will outline the attractions of each as well as the characteristics that led to the subsequent disillusionment with both approaches. As I will demonstrate, the attractions of both approaches are ironically premised on a similar concern, namely the need to ensure equal treatment in like cases. Further, in highlighting the reasons behind the inability of each to attain this lofty goal, I hope to suggest – which at this stage can only be done implicitly - that the only approach that can capably function as a guide for the principled delineation of the boundaries of negligent law’s protective ambit is an approach that – seemingly contradictory - acknowledges the conceptual necessity of both abstract principle as well as the limited rule of the traditional casuistic approach to legal reasoning. As I will show more definitively in Part III of this paper, there is no basis for the modern assumption that both abstract principle and reasoning by analogy cannot exist in harmonious relationship with each other. In truth, both respectively require the other to perform their shared intended function. It is as the German Philosopher G.W.F Hegel famously put it, the ‘I that is We and the We that is an I’ (Ich, das Wir, und Wir, das Ich ist)\textsuperscript{25}.

A. ABSTRACT FORMULA AS A GENERAL TEST

To modern parlance, Lord Atkin is often regarded as endorsing the use of a general formula that determines the appropriate limitations of the extent of liability for carelessly inflicted harm.\textsuperscript{26} Lord Atkin’s approval of such a method is allegedly thought to derive from his speech in \textit{Donoghue v. Stevenson}\textsuperscript{27}. Strictly speaking, the \textit{ratio decidendi} of that case was that an individual manufacturer owes a duty not to cause

\textsuperscript{25} Federick Beiser, \textit{Hegel}, (New York:Routledge, 2005) at 184.
\textsuperscript{26} Supra note 12 at 633.
\textsuperscript{27} Supra note 3.
physical damage to ultimate consumers of his wares.\textsuperscript{28} Yet, in the course of coming to that conclusion, Lord Atkin noted that:

In English Law there must be, and is, some general conceptions of relations giving rise to a duty of care, of which the particular cases found in the books are instances. The liability for negligence whether you style it such or treat it as in other systems as a species of ‘culpa,’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or missions [that] any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.\textsuperscript{29}

Lord Atkin then proceeded to state what became known as the neighbour principle. His Lordship asserted that:

The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour. Who is my neighbour? [R]ecieves a restricted reply. You must take reasonable care to avoid acts or omissions [that] you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions [that] are called in question.\textsuperscript{30}

\textbf{i. The attractive qualities that led to the historical adoption of the ‘abstract principle as formula’ approach}

The abstract formula interpretation of Lord Atkin’s neighbour principle finds its genesis in Lord Reid’s 1970 decision of \textit{Home Office v. Dorset Yacht Co. Ltd.}\textsuperscript{31} In \textit{Dorset Yacht}, Lord Reid suggested that the time has come to regard the neighbour principle of \textit{Donoghue v. Stevenson}\textsuperscript{32} as applicable in all cases where there was no justification or valid explanation for its exclusion.\textsuperscript{33} Lord Wilberforce elaborated on Lord Reid’s suggestion in \textit{Anns v. Merton London Borough}\textsuperscript{34}. In \textit{Anns}, Lord Wilberforce’s interpreted

\begin{itemize}
  \item \textsuperscript{28} See Robert Heuston, “Donoghue v. Stevenson in Retrospect”, 20 M.L.R. 1 at 9.
  \item \textsuperscript{29} Supra note 3 at 580.
  \item \textsuperscript{30} Ibid.
  \item \textsuperscript{31} [1970] 2 All ER 294.
  \item \textsuperscript{32} Ibid. at 297.
  \item \textsuperscript{33} Supra note 3.
  \item \textsuperscript{34} [1978] A.C. 728.
\end{itemize}
Lord Atkin’s neighbour principle as essentially a two-stage formula for determining the proper boundaries of negligent liability. The two stages are as follows:\(^{35}\):

First, because the neighbour principle specifies an attribute – the defendant’s capacity to foresee that his actions might befell harm on the plaintiff – that characterizes all duty-bearing relationships, the principle in effect furnishes a preliminary criterion that can identify new instances of actionable conduct without the need to resort to analogical reasoning.\(^{36}\) Thus, it was Lord Wilberforce’s claim that ‘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.’\(^{37}\) Rather - at the first stage of the abstract formula approach, a prima facie case for the imposition of a duty of care arises whenever ‘there was a sufficient relationship of ‘proximity or neighbourhood’ between plaintiff and defendant such that in the defendant’s reasonable contemplation carelessness on his part might cause damage to the plaintiff.’\(^{38}\)

Second, Lord Wilberforce recognized that the neighbour principle’s identification of ‘foreseeability of harm’ as the element common to all duty-bearing relationships is only persuasive if there was some way to account for the fact that the case law is replete with instances in which the courts have refused to identify a duty of care despite proof that the plaintiff’s injury was a foreseeable consequence of the defendant’s actions. For example, it is settled law that a plaintiff cannot recover for economic loss suffered as a consequence of defendant inflicting damage to property of a third party even though the plaintiff’s harm was a foreseeable consequence of the defendant’s carelessness.\(^{39}\)

\(^{35}\) Ibid. at 751-752.  
\(^{36}\) Ibid.  
\(^{37}\) Ibid.  
\(^{38}\) Ibid.  
Wilberforce, the solution to this conundrum lay in the recognition that because the neighbour principle provides a *general* criterion for identifying duty-bearing relations, the criterion is - of necessity – defined at a level of abstraction that glosses over the exceptions to its prescriptive ambit. As Lord Wilberforce noted, while foreseeably of harm – being a common element to all instances of duty-bearing relationships - constituted a general consideration for imposing liability on a careless defendant on the basis of that like cases should be treated alike, competing considerations of social policy might - *in limited and specific instances* - be sufficiently morally weighty enough as to justify an ad hoc override of the conclusion derived by application of the general criterion.\(^{40}\) Thus, the second stage of abstract formula approach required the court to consider whether there were any considerations which ought to ‘negative, or to reduce or to limit’\(^ {41}\), an initial finding of the existence of a duty of care that was arrived at the first stage of the formula.

Thus – as seen from the above – the legacy of Lord Wilberforce’s interpretation of Lord Atkin’s neighbour principle has been the modern tendency to equate the neighbour principle as an abstract formula in which the proper boundaries of negligent liability is to be determined *via* a two-stage test. Further since Lord Wilberforce’s task was merely to render explicit what was implicitly entailed in Lord Atkin’s initial elaboration of the ‘neighbour principle’, the two-stage test – or as this paper calls it the ‘abstract formula’ approach – is taken – in modern parlance - to be merely a more refined version of Lord Atkin’s ‘neighbour principle’

The view that the boundaries of negligent liability should be delineated *via* an abstract two-stage formula was initially greeted with much enthusiasm in both the House

\(^{40}\) *Supra* note 34 at 751-752.

\(^{41}\) *Ibid.*
of Lords as well as its Commonwealth siblings. In *The Foundation of the Duty of Care in Negligence*, Professor John Smillie argued that chief reason for the popularity the ‘abstract formula’ approach lay in the fact that the method gave the courts of last resort – such as the House of Lords - latitude to impose its own conceptions of social policy by permitting the legitimate circumvention of established precedent. The ‘abstract formula’ approach permitted such an outcome because – under it - the House of Lords no longer had to justify their conclusions of liability in a particular instance on the basis of a factual analogy with an established category of negligence liability. Instead, because the approach interprets all precedent as mere conclusions derived from the application of an abstract two-stage formula that *inter alia* stipulates current social conditions to be a relevant consideration for the negating the existence of any duty of care, the approach permits a court faced by a precedent it does not agree with to justify a departure on the basis that the previous precedent took into account social conditions that no longer relevant. Thus, the presence of changed circumstances provides legitimates a court to alter the law to its own liking since all the court is supposedly doing is applying the two-stage formula to a set of fresh – rather than stale - data, i.e. to fresh social conditions as opposed to outmoded ones.

With due respect to Professor Smillie, I submit that there is little evidence to corroborate his thesis, at least in the English courts. Instead a close reading of the decided cases reveal that the English courts considered the primary attraction of the ‘abstract formula’ approach not to lie in an increased latitude to advance social policy but in the approach’s capacity to guide in the principled development of the law of negligence by

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43 15 Monash U. L. Rev. 302
44 Ibid. at 303-304.
45 Ibid.
46 Ibid.
47 Ibid.
ensuring that like cases will be treated alike. The ‘abstract formula’ approach was considered superior to the traditional analogical approach to legal reasoning because it theoretically could – while the analogical reasoning approach could not – identify the common thread that was implicit across all particular determinations of liability. Thus, in Lord Reid’s initial elaboration of the ‘abstract formula’ approach in *Home Office v. Dorset Yacht Co Ltd*\(^{48}\), his Lordship emphasized that the approach should be adopted because law should be based on *principle*.\(^{49}\) Further in *Anns v. Merton London Borough Council*\(^{50}\), Lord Wilberforce in the course of elucidating his two-stage interpretation of the abstract formula approach expressly approved Lord Reid’s remarks.\(^{51}\)

Perhaps, the clearest indication that the main attraction stemmed from the belief in the approach’s capacity to ensure equality of treatment in like cases as opposed to the approach’s utility as a tool for the advancement of judicial policy comes from the case of *Junior Books v. Veitchi Co Ltd*\(^{52}\). In that case, the House of Lords applied the two-stage formula to expand negligent liability to a circumstance in which authority had long held that no action could lie, namely the situation in which a plaintiff suffers economic loss as a result of acquiring goods that are defective owing to the negligence of the defendant.\(^{53}\) The important characteristic of that decision was that even though the House of Lords knew that they were advocating a radical extension of the boundaries of negligent liability, the Law Lords adopted the view that such a step was justified on the basis of the need to ensure conformity with negligence law’s governing *principle* as required by the first stage of Lord Wilberforce’s test.\(^{54}\) Throughout the judgement, emphasis was placed

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\(^{48}\) Supra note 31.
\(^{49}\) Ibid at 297.
\(^{50}\) Supra note 34.
\(^{51}\) Ibid at 751.
\(^{52}\) [1983] 1 A.C 520.
\(^{53}\) Supra note 1 at 145.
\(^{54}\) Supra note 52 at 539.
foremost on the utter inconsistency of the current law in precluding recovery for economic loss that arises as a consequence of the plaintiff acquiring defective property while - at the same time - permitting recovery if the plaintiff’s acquisition of the same defective product poses such danger to his other property that the plaintiff avoidably has to incur financial expense in order to insulate the latter from the threat of harm. On the basis of principle, both instances - as the House of Lords repeatedly emphasized – should give rise to liability because both possessed the common element that is present in all instances of negligent liability, namely the fact that the defendant could reasonably foresee that carelessness in manufacturing his product would cause financial harm to the plaintiff.

In sharp contradistinction to the praise that the House of Lords in *Junior Book* lauded upon the first stage of the two-stage formula, a dismissive attitude was displayed towards the second limb of the formula that dealt mainly with policy considerations. Several Law Lords adopted the view that only in exceedingly rare instances would the courts be called upon to apply the second limb of the two-stage formula since not even considerations such as the infamous floodgates argument is sufficiently morally weighty as to justify overriding the conclusions that have been derived from the first limb of the two-stage formula. Thus - in the court’s view – the policy aspect of the ‘abstract formula’ approach is relatively unimportant and can safely be ignored in most instances. That the House of Lords in *Junior Books* believed that the utility of Lord Wilberforce’s interpretation of the neighbour principle laid in its ability to ensure consistency rather than as a tool for advancing social policy is nicely summed up by Lord Roskill’s

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57 *Ibid.* at 532, 539.
emphatic justification for utilizing the formula. His Lordship emphasized that the two-stage test was ‘a statement of principle’ and also reiterated preference is accorded to the two-stage test because:

although it cannot be denied that policy considerations have from time to time been allowed to play their part in the tort of negligence since it first developed as it were in its own right in the course of the last century, yet today I think its scope is best determined by considerations of principle rather than policy. 59 [emphasis mined]

A sceptic might assert that – in all the instances – outlined above, the courts were merely paying lip service to the value of consistency within negligence law in order to conceal the true value that they placed on the ‘abstract formula’ approach, namely the ease at which the approach permitted them to advance their own ideals of social policy. However, as the next section will suggest, this is unlikely because it was the very recognition that the ‘abstract formula’ approach could not ensure consistency of result that finally led to its abandonment in English law.

ii. The disadvantages that led to the historical abandonment of the ‘abstract principle as formula’ approach

In spite of the supposed attractive qualities of the ‘abstract formula’ approach, it is little secret that the approach gradually lost its lustre amongst the upper echelons of the English judiciary. 60 English commentators have often noted that since two differing interpretations existed as to how Lord Wilberforce intended the abstract formula approach to be used, no single reason is capable of explaining the House of Lords’ disillusionment with the abstract formula approach. 61 More specifically, it is the contention of conventional academic wisdom that because of the drastic differences between the two competing interpretations of the abstract formula approach, the House of

59 Ibid. at 539.
60 Supra note 42 at 305.
61 Ibid.
Lords’ could have only rejected either of the two on the basis of grounds uniquely relevant to each.\footnote{Ibid.} Thus, the current academic fashion holds that the House of Lords’ dissatisfaction with the abstract formula approach is only explicable by reference to a hodgepodge of reasons that bear no obvious relation with one another.\footnote{Ibid.}

In what follows, I will assert that while it is true that there have been two competing interpretations of the abstract formula approach – namely what I term as a ‘legal realist’ interpretation and a ‘legal formalist’ interpretation -, a close reading of the case law reveals that the House of Lord did – in fact – premise its dismissive attitude towards both interpretations on an identical footing. By process of a natural interpretation of the case law, I will attempt to show that the House of Lords’ discomfort with both interpretations – and thus with the abstract formula approach in general – stems from the realization that neither interpretation of the abstract formula approach provides a method that aids in the delineation of a principled law of negligence whereby like cares are afforded similar treatment. On the contrary, it will be seen that, adoption of either of the two interpretations – and by extension adoption of the abstract formula approach in general – renders impossible a scheme of adjudication in which like cases are treated in a consistent fashion because under both interpretations determinations of negligent liability are made on the basis of the subjective whims of the adjudicating judge rather than by adherence to a general procedure.

a. The inadequacies inherent in a legal realist interpretation

In \textit{Yuen Kun Yen v. Attorney General of Hong Kong}\footnote{[1988] 1 A.C. 175}, the Lord Keith – giving judgment on behalf of all the members of the Privy Council - overtly expressed the court’s disapproval over – what I term to be – the legal realist interpretation of the
abstract formula approach. Under this interpretation, Lord Wilberforce’s two-stage formula is taken to be the blueprint of a scheme of adjudication by which disputes as to the proper boundaries of negligent liability are decided by process of an ad hoc assessment as to the outcome that best promotes public welfare.

Such an interpretation was especially prevalent among members of the legal profession - during the time of *Yuen Kun Yen v. Attorney General of Hong Kong*\(^{65}\) - owing to their propensity to adopt a literal reading of the first limb of Lord Wilberforce’s two-stage formula.\(^{66}\) As helpfully traced out by Australian High Court Justice Brennan in *Sutherland Shire Council v. Heyman*\(^{67}\), the genesis of the legal realist interpretation laid in the fact that a literal reading of the first limb of Lord Wilberforce’s two-stage formula necessarily leads to the conclusion that the relationship of neighbourhood that gives rise to a prima facie duty of care is a mere synonym to a relation in which a defendant possess the reasonable capacity to foresee that his actions might conceivably harm the plaintiff.\(^{68}\) When this literal reading is coupled with the fact that the benefit of hindsight renders almost any actual sequence of events foreseeable,\(^{69}\) the inevitable conclusion is that any limitation on liability in particular instances is to be justified - as stipulated by Lord Wilberforce in the second limb of his formula - on the basis of the current demands of public policy.\(^{70}\) Thus, the view arose that when a court is called to adjudicate upon whether a particular careless action falls within the scope of actionable conduct under the law of negligence, it was Lord Wilberforce’s intention that such a determination be made on the basis of a balancing between the contention that reasonable foreseeability of harm

\(^{65}\) Ibid.

\(^{66}\) Supra note 43 at 305.

\(^{67}\) 60 A.L.R. 1

\(^{68}\) Ibid. at 40

\(^{69}\) Supra note 43 at 305.

\(^{70}\) Supra note 67 at 40
should result in a duty of care and the contention that considerations of social policy justify some sort of limitation of liability.

In the eyes of many English commentators, the source of the Privy Council’s – and by extension the House of Lords’ - displeasure over the legal realist interpretation of Lord Wilberforce’s two-stage formula laid in the potential threat that the school of thought posed to their Lordships’ position as sole judicial arbiters on matters of social policy.\textsuperscript{71} As many commentators have noted, widespread adoption of the legal realist interpretation by the lower courts would have threatened the House of Lords’ political power in two ways.

First, because the legal realist interpretation holds that – in disputes concerning the boundaries of negligent liability – judicial outcomes can only be legitimately derived from a balancing of the competing considerations of (i) legal uniformity – that takes the form of a uniform directive to impose a duty to take reasonable care is imposed in all instances where the defendant possesses the capacity to foresee the possibility of harm to the plaintiff’- and (ii) social policy – which embodies itself as moral directives urging the need to limit or negate the scope and/or existence of a duty of care –, all forms of established precedent – especially the House of Lords’ – would be subject to constant re-examination by the trial courts on grounds that changed social conditions have rendered obsolete the balance that was previously struck by precedent.\textsuperscript{72} Thus, since a widespread adoption of the legal realist interpretation within the judicial hierarchy would entail the abolition of the doctrine of \textit{stare decisis} which stipulates that trial courts are \textit{required} to follow precedent laid down by appellate courts, its effect would be a significant loss of political influence and prestige on the part of the House of Lords as the court would no

\textsuperscript{71} Ibid. at 306
\textsuperscript{72} Ibid.
longer be able to dictate – via the judicial fiat of its precedent – the important social issue of affixing the boundaries of negligent liability.

Second, because the legal realist interpretation advocates the determination of negligence disputes via a process of openly weighing and balancing competing policy arguments, commentators argue that widespread adoption of the legal realist interpretation within the judicial hierarchy would have the effect of curtailing the House of Lords’ power to impose its own value judgments upon the litigating parties and – provided its precedents are followed by the lower courts - society in general. In essence, the argument is that the House of Lords currently relies on an overt fiction - that adjudication is merely the application of politically neutral rules - in order to legitimize the current arrangement whereby it legislates on important issues of social policy unchecked by political constrains. Thus, commentators assert that if – as the legal realist interpretation purports to do – it is made publicly known that the judiciary in truth adjudicates by process of making highly controversial value judgments as to the priority that should be afforded to competing moral claims and social goals, it is highly likely that the House of Lords would be subject to the same level of public scrutiny that currently keeps the political branches in check. Thus, a loss of political power on the part of the House of Lords would result.\(^\text{73}\)

While it is the dominant view among legal academics that political considerations – as have been outlined above - were the primary reasons driving the House of Lords’ rejection of the legal realist interpretation, the fact remains that there is no evidence to corroborate this view. The best that contemporary academics can do is posit as mere conjecture that since widespread adherence to the legal realist interpretation within the

\(^{73}\text{Ibid.}\)
judicial hierarchy would likely result in a diminishment of the House of Lords’ political influence, the possibility exists that the prospect of such an occurrence was a primary motivating force behind the House of Lords’ eventual decision to preclude the judiciary from adjudicating according to the dictates of the realist interpretation.

In contrast to the unsatisfactory conjectures given by contemporary academics, it is submitted that it is possible to glean an alternative explanation for the Privy Council/House of Lord’s dissatisfaction with the legal realist interpretation from the expressed opinions in case law, particularly Lord Keith’s judgment in Yuen Kun Yen v. Attorney General of Hong Kong.74 In that case, a statutory officer, the Commissioner of Deposit-taking Companies registered as deposit-taker a company that subsequently went into liquidation with the result that the claimants lost the money they had deposited with it. They alleged that the Commissioner knew or ought to have known that the affairs of the company were being conducted fraudulently and speculatively, that he failed to exercise his statutory powers of supervision so as to ensure that the company complied with its obligations and that he should either never have registered the company or have revoked its registration. On a preliminary issue of law and assuming the allegation to be well founded, the Privy Council upheld the judgment of the Hong Kong Court of Appeal that no duty of care existed between the Commissioner and the plaintiff.

For present purposes, the essential part of the judgment concerns the manner in which Lord Keith sought to support the Privy Council’s disapproval of the ‘legal realist’ interpretation. In a particular telling series of passages, Lord Keith cited dicta from Justice Brennan in Shire of Sutherland v. Heyman75 as support for his contention that it would be a monumental mistake for the judiciary to ascertain the scope of negligent

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74 Supra note 64.
75 Supra note 67
liability by means of a balancing of competing factors.\textsuperscript{76} The relevant \textit{dicta} referred to by Lord Keith states:

Of course, if foreseeability of injury to another were the exhaustive criterion of a prima facie duty of care to act to prevent occurrence of that injury, it would be essential to introduce some kind of restrictive qualification – perhaps a qualification of the kind stated in the second stage in \textit{Anns}. I am unable to accept the approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative or to reduce or limit the scope of the duty or the class of person to whom it is owed’\textsuperscript{77} \cite{emphasis mine}.

The key to identifying the flaw that Lord Keith asserts to be present in any approach that determines the scope of negligent liability \textit{via} a balancing of competing factors lies in understanding what Justice Brennan meant when he asserted that the social policy considerations that serve as restraints to a massive extension of prima facie liability are ‘indefinable’. By ‘indefinable’, Justice Brennan could not have possibly meant that it would be impossible to identify these considerations. Such an interpretation would be ludicrous given the fact that the courts have regularly identified – with razor precision – a host of considerations – such as the unfairness of imposing indeterminate liability upon an individual\textsuperscript{78} – which ought to limit a prima facie duty of care. An alternative interpretation of ‘indefinable considerations’ that fits with both Lord Keith’s and Justice Brennan’s critiques of the ‘legal realist’ interpretation is as follows.

Although the legal realist interpretation of Lord Wilberforce’s abstract formula approach dictates that determinations as to the circumstances in which a relation can properly be imputed as duty-bearing are to be made by reference to a balancing of the considerations of (i) legal consistency - that advocates a uniform imposition of a duty of

\textsuperscript{76} \textit{Supra} note 64 at 191.
\textsuperscript{77} \textit{Ibid}.
\textsuperscript{78} See e.g. \textit{Supra} note 52.
care in all instances where the defendant could foresee harm to the plaintiff - and (ii) social policy - that calls for limits to a massive extension of a duty of care in almost every conceivable instance -, the ascertainment as to when considerations of social policy should override the need for legal consistency is ‘indefinable’ because the two are categorically distinct kinds of considerations.\(^{79}\) Being different in kind, there exists no common metric by which to adjudge when the moral demands of one set of considerations outweighs the moral force of the other. It thus follows that since no objective metric exists, the scope of negligent liability can only be determined \(\text{via}\) recourse to the subjective preferences of the adjudicating judge.

Accordingly, it was Lord Keith’s view that the flaw that with the legal realist interpretation of Lord Wilberforce’s abstract formula approach is that while - on the one hand – the interpretation claims to lay down an impartial \textit{method} – i.e. an approach that provides an impersonal and transparent basis for identifying whether a particular relation falls within the category of duty-bearing relation or non duty-bearing relation -, the reality is that it provides no objective guidance but instead abdicates the task of delineating the scope of negligent liability to the subjective whims of individual judges. Thus, \textit{Yuen Kun Yen v. Attorney General of Hong Kong}\(^{80}\) suggests that the true rationale for the Privy Council’s/House of Lords’ discomfort with the realist interpretation is that the interpretation provides no \textit{generalized standard or procedure} that permits adjudication to be conducted in a \textit{consistent} fashion.

That the above accurately depicts Lord Keith’s reasons for rejecting the legal realist interpretation is confirmed by the fact that his Lordship sought to harness additional support for his stance by citing Lord Brandon’s speech in \textit{Leigh and Sullivan}

\(^{79}\) See Ernest Weinrib, “The Disintegration of Duty”, 31 Advoc. Q. 212 at 236.  
\(^{80}\) \textit{Supra} note 64.
In the *Aliakmon*, Lord Brandon asserted that Lord Wilberforce could not possibly have advocated a scheme of adjudication in which the boundaries of the law of negligent is determined *via* a balancing of competing considerations because such an approach undermines the cardinal value that underpins law’s very legitimacy, namely the value of legal certainty.\(^{82}\) Since – as Lord Nicholls has noted in *Fairchild v. Glenhaven Funeral Services*\(^{83}\) - a *principled* system of law is one that posits liability on a basis that is transparent and *capable of identification*\(^{84}\) and since to have legal certainty is to have a system of law whose rules are clear and precise – or in other words, to have rules that are capable of identification -, law is *principled* when it displays the value of legal certainty. Thus, Lord Keith in citing Lord Brandon was merely emphasizing the point that the realist interpretation is flawed because it posits an *unprincipled* system of negligence law.

**b. The inadequacies inherent in a legal formalist interpretation**

The second mode of interpreting Lord Wilberforce’s abstract formula approach holds that – properly understood – the approach is not a formula for the *balancing of* categorically different considerations. Instead, the approach – in reality - insists that a court derive the conclusion that a duty of care exists in a specific instance by logically deducing such an outcome from a set of premises that are generally assumed to be uncontroversial\(^{85}\). Thus, because the abstract formula approach posits a mechanical process by which one can objectively ascertain whether liability logically ensures given the existence of a particular set of premises, the approach – in essence – functions as a test for the determining the appropriate scope of liability for carelessly inflicted harm.

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\(^{82}\) *Ibid.* at 817.

\(^{83}\) [2003] 1 A.C. 32.

\(^{84}\) *Ibid.*

\(^{85}\) Richard Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution", 37 Case W. Res. L. Rev. 179 at 181.
While the origins of this formalist interpretation to the abstract formula approach
has never been catalogued, the fact that it attracted a significant following is
acknowledged by Lords Bridge, Roskill and Oliver in *Caparo Industries PLC v. Dickman*86. It is possible that this mode of interpretation could be derived from Lord
Keith’s speech in *Yuen Kun Yen v. Attorney General of Hong Kong*87 where his Lordship
suggested an alternative to the discredited legal realist mode of interpreting Lord
Wilberforce’s two-stage formula. According to his Lord Keith, Lord Wilberforce always
intended resort to the second limb of the *Anns* two-stage formula - which advocates the
possibility of limiting the conclusions of the first limb on the basis of social policy factors
– be limited to only the most exceptional of the circumstances.88 Instead, a correct
application of Lord Wilberforce’s two-stage test would resolve the issue of whether a
specific factual relation gives rise to a duty of care by ascertaining whether the factual
relation at issue falls within - as the first limb of Lord Wilberforce’s test dictates - the
conceptual category of ‘relation of neighbourhood’.89 The determination of the
boundaries of negligent liability in such a manner would not – as the legal realist
interpretation suggested – result in a massive extension of prima facie liability because it
was always Lord Wilberforce’s intention that the establishment of a relation of
neighbourhood requires more than just proof that the harm the plaintiff suffered was
within the reasonable contemplation of the defendant but instead requires proof of all the
factual elements necessary for the relation between plaintiff and defendant to be
considered as close and direct.90

86 *Supra* note 12 at 628,633.
87 *Supra* note 64.
Lord Keith could thus be taken as advocating that – under Lord Wilberforce’s abstract principle approach - the existence of a duty of care in a specific instance is to be derived from a deductive syllogism that takes the following form:

(Major Premise) In circumstances where there is a relation of neighbourhood, a duty of care should arise (i.e. the neighbour principle)

(Minor Premise) The specific factual relation at issue is a relation of neighbourhood

(Conclusion) The factual relation should give rise to a duty of care

At first sight, the derivation of an outcome of liability from a set of uncontroversial premises might be thought to be appealing to the conservative-minded House of Lords because it seems to offer an objective method for determining the boundaries of negligent liability. The outcome is an objective determination because – as the example above shows – it would be logically inconsistent to hold to be false the conclusion of the existence of a duty of care while at the same time assume the truth of both the major and minor premises. Yet, in Caparo Industries PLC v. Dickman91, the House of Lords criticised this formalist interpretation as deficit precisely because it is incapable of positing an objective test for assisting the court in determining the circumstances of negligent liability.92 The deficiency that the House of Lords identified with the formalist interpretation is that while the interpretation does posit a method for mechanically deriving a conclusion out of a set of premises, it nonetheless does not rule out the fact that the outcome could nonetheless be merely expressive of subjective judge’s subjective inclinations because the interpretation does not preclude arbitrary preference as a means of ascertaining the validity of the minor premise (i.e. whether a

91 Supra note 12
92 Ibid. at 628,633.
specific factual relation in dispute is an instance of the general category of ‘neighbourhood’).

As Lord Oliver noted in *Caparo Industries PLC v. Dickman*93, once one discards the notion that Lord Wilberforce intended to equate the factual existence of a relation in which the defendant could foresee that his actions might harm the plaintiff with the concept of ‘relation of neighbourhood’ as encapsulated in the first-limb of the Ann’s two-stage formula, all one is left with is the vague and open-ended that negligence liability would be imposed in situations where the relation between plaintiff and defendant is that of a neighbourhood or in other words ‘close and direct’. Because the major premise of the syllogism – i.e. the concept of neighbourhood – is pitched at such an abstract level of generality, it becomes impossible to ascertain whether a particular factual relation falls under its purview except via an exercise of individual judgment.94 Yet if this is the case, it follows that even with when the outcome of a dispute concerning the existence of a duty of care is to be resolved by employment of a deductive syllogism, the outcome is still not one freed of the subjective preferences of the adjudicating judge because (i) the outcome depends on the validity of the minor premise of the syllogism and (ii) the validity of the minor premise (i.e. whether a specific relation falls within the category of ‘relation of neighbourhood) is dependent upon the individual judgment of a particular adjudicator. Thus, the problem with the formalist interpretation is identical to the problem that plagued the realist interpretation. It posits no standard or procedure by which to classify – both impersonally and consistently - whether a particular relation falls under the classification of duty-bearing or non duty-bearing relation. Instead because all outcomes are – in truth - decided by subjective preference, determinations as to the

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93 Ibid. at 633.
94 Ibid.
existence of a duty of care may differ even on the same set of facts because no two judges share the same inclinations.

**B. INCREMENTAL REASONING BY PROCESS OF FACTUAL ANALOGY**

The deficiencies previously mentioned provided the impetus for the House of Lords’ abandonment of the ‘abstract formula’ approach in favour of a return to the traditional practice of identifying the categories of negligent liability *via* a process of factual analogy. The House of Lords’/Supreme Court of the United Kingdom’s current position is that faith in the utility of the ‘neighbour principle’ as an aid for the principled development of the law of negligence is misplaced because the principle is unable to furnish a formula that discriminates – in a consistent fashion – the forms of factual relations that give rise to a duty of care from the forms which do not.

As it will be seen, it is by an acute observation of the deficiencies of the legal formalist interpretation of the abstract formula approach that *led* the House of Lords back to the traditional practice of identifying categories of negligence by factual analogy. The historical shift from the abstract formula approach to the reasoning by factual analogy approach has the form of – what Hegel terms as – a dialectic95, a process whereby ‘concepts and phenomena turn of t

95 See G.W.F. Hegel, Outlines of the Philosophy of Right, trans by T.M. Knox; revised by Stephen Houlgate, (New York : Oxford University Press, 2008), xxii

96 Ibid.

97 [1984] 3 All ER 529

i. The attractive qualities that led to the historical adoption of the reasoning by factual analogy approach

Since *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson Ltd*97, there have been rumblings of discontent among the highest levels of England’s judiciary over the flaws of the abstract formula approach. It wasn’t until the House of Lords’
decision in *Caparo Industries PLC v. Dickman*\(^98\) however that Lord Wilberforce’s two-stage formula was expressly overruled. In *Caparo Industries PLC v. Dickman*\(^99\), it was claimed by the plaintiffs that the defendant auditors were negligent in bashing their audit on what was allegedly fraudulent misrepresentations on the part of the directors of a company. The plaintiffs were already shareholders of the company and were therefore entitled to a copy of the auditors report, relied on the audited accounts in purchasing further shares. Profits were not as high as projected, the company’s share price fell significantly, and the plaintiffs suffered economic loss. The House of Lords – on appeal – ruled that there was no actionable negligence on the part of the defendant auditors because they did not owe the plaintiffs a duty of care.

What is important for the present purposes is the *manner* by which the House of Lords reached the conclusion that no duty of care was owed. In this regard, Lord Roskill’s speech is particularly instructive. In his speech, Lord Roskill criticized the idea that the existence of a duty of care in particular instances is to be ascertained via a process of applying the factual circumstances to the concept of ‘relation of neighbourhood’\(^100\), i.e. the legal formalist interpretation of the abstract formula approach. As was seen previously, the flaw with the legal formalist interpretation is that the interpretation made outcomes as to the existence of a duty of care dependent on an adjudicator’s subjective judgment as to whether the particular factual relation at issue falls within the category of ‘relation of neighbourhood’ (or in other words the category of ‘close and direct relations’). The reason that subjective judgment is necessarily involved in ascertaining whether a particular – i.e. the factual relation at issue – falls within a general concept – i.e. the concept of ‘relation of neighbourhood’ – is because a concept is

\(^{98}\) *Supra* note 12  
\(^{100}\) *Ibid.* at 628.
by – its inherent nature – pitched at a level of generality that abstracts from all references to specifics.\textsuperscript{101} Thus as Lord Roskill noted, a concept is not a ‘precise definition’\textsuperscript{102} because there is nothing within the content of a general concept that gives guidance to the identity of its specific manifestations.\textsuperscript{103}

Yet while Lord Roskill - along with his judicial brethren Lords Oliver and Bridge - agreed that the outcome as to negligent liability has to be discerned not by an abstract formula but by individual judgment of the adjudicator, he was not of the view that such judgment must necessarily reflect only the arbitrary preferences. As Lord Roskill noted the common law had developed a tried and tested method of objectively guiding individual judgment, namely the traditional practice of reasoning by analogy. According to the traditional practice of reasoning by factual analogy, a particular factual relation is concluded to fall within the category of a ‘relation of neighbourhood’ when the adjudicator discerns that both the factual relation at issue and the relations that have been previously held to fall within the category share similar factual attributes.\textsuperscript{104} While individual judgment is still required in ascertaining the correct normative classification of a factual relation, the attraction of the incremental reasoning by analogy approach is that the approach furnishes an objective procedure for guiding such judgment and thereby functions as an aid in the attainment of consistent judgments even amongst different adjudicators.

A further implication can be discerned from Lord Roskill’s speech and - in largely similar lines - also in the speeches of both Lords Bridge and Oliver in \textit{Caparo}\textsuperscript{105}. Owing

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\item Supra note 12 at 628.
\item Supra note 101 at 168.
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to the fact that Lord Roskill largely agreed with Lord Wilberforce’s view that the
neighbour principle is – in essence – a formula for determining the circumstances of
liability in the abstract, his Lordship felt that it a mistake to utilize the neighbour
principle as an aid for deciding disputes concerning the boundaries of negligent liability
because – as the above has shown – there is no ‘simple test or touchstone to which
recourse can be had in order to provide in every case a ready answer to the questions
whether, given certain facts, the law will or will not impose liability for negligence’\textsuperscript{106}
Since the outcome of a syllogism is dependent on its premises and since the minor
premises – i.e. whether the factual relation in issue falls within the general concept of a
‘relation of neighbourhood’, the outcomes of liability are – in reality – decided by
recourse to individual judgment. Since traditionally the judgment of common law judges
is guided by the practice of reasoning by analogy, it follows that the sole role performed
by the deductive syllogism that – as the formalist interpretation of Lord Wilberforce’s
abstract formula approach asserts – is posited by the neighbour principle is to conceal the
fact that a \textit{conclusion} had already been independently arrived at \textit{via} the practice of
reasoning by analogy itself.\textsuperscript{107} Given that the neighbour principle – in effect – functions
merely as a cloak, it is – as Lord Roskill asserts – preferable to dispel with the principle
altogether and assert that the boundaries of negligent liability should be determined solely
by recourse to incremental reasoning by factual analogy.

\textbf{ii. The disadvantages that have led to current academic criticism of the
reasoning by factual analogy approach}

At present, the English judiciary has univocally thrown its support behind the
incremental reasoning on the basis of factual analogy approach. Yet, this same

\textsuperscript{106} \textit{Ibid.} at 628.
\textsuperscript{107} \textit{Ibid.} at 618.
enthusiasm is not shared by many of the current crop of academics. Within the academic literature, the charge levied against the analogical approach is that the procedure that it lays down is incapable of identifying – in a consistent and impersonal fashion - the circumstances where liability should properly accrue. Hence, just like the abstract formula approach, the analogical approach too relies on the subjective caprice of individuals judges for the purposes of determining whether a specific relation gives rise to a duty of reasonable care. The analogical approach is thus flawed because it is unable to aid in the development of a principled law of negligence.

According to academics such as Professor Jane Stapleton, there are generally two reasons that explain the analogical approach’s inability to impersonally ensure equality of treatment in like circumstances. First, it provides no guidance as to which aspects should be considered relevant in the assessment of similarity between the particular relation at hand and the established categories of relations that have long been held to give rise to a duty of care. Second, it provides no guidance as to whether the categories themselves are differentiated in a rational manner. Specifically, the analogical approach provides no means of identifying whether law’s discrimination between specific categories of relations is premised on a normatively defensible ground.\(^\text{109}\)

**a. Relevant Aspects of Similarity**

A chief criticism of the analogical approach is that it is unable to ensure equality of treatment in like instances because it itself possesses no standard by which to adjudge similarity. As several commentators have noted, any two relations can be alike or different in an infinite number of respects. Thus absent some restriction of what constitutes a relevant similarity, it is impossible to laid down a scheme of classification

\(^{109}\) Ibid. at 85-86.
which classifies disparate human relationship according to their similarity with each other because all relations would be alike in some way. Accordingly, there would be no basis for differentiating between relations.

As Professor Jefferson White notes, the problem is that while relevance and importance of similarities must be restricted in some way in order for the analogical approach to function as an objective scheme of classification, the analogical approach provides no *single correct* way to make the necessary restriction.\textsuperscript{110} Individuation of similarities – in other words – depends upon an *intrinsically relative* judgment.\textsuperscript{111} Thus - to use a non-legal example -, a passenger at an airport check-in may recognize three pieces of luggage as similar – say in design, colour and ownership. To a pilot observing the same pieces, only A and C may be recognized as similar - with respect to weight, for example, they may be too heavy for safety’s sake. Accordingly, Professor White asserts that accurate understanding of similarity must include recognition of the fact that which pieces of luggage are more alike than others is *dependent on the perspective adopted* – which varies from person to person - in making such a determination.\textsuperscript{112}

Thus, the fallacy with the analogical approach is that it provides no objective measure upon which to adjudge whether a specific factual relation is sufficiently similar to an established category of negligent liability thereby warranting the imposition of liability in the former case. The English case of *White v. Jones*\textsuperscript{113} - which some commentators regard as having expanded the scope of the law of negligence to cover cases of economic loss in which there has been no reliance - provides an excellent illustration of this dilemma. In that case, a testator, having made a will disinheriting his

\textsuperscript{110} Supra note 104 at 573.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{113} [1995] 2 AC 207
daughters after a family quarrel, became reconciled with them and instructed the defendant solicitors to prepare a new will. There was a delay by the defendants that amounted to negligence and the testator died before the will could be made resulting in the devolution of the estate proceeding on the basis of the ‘old’ will. The delay was a breach of contract to the testator but since the estate was in no way diminished in size that would have given rise to nominal damages. Hence as far as the law of contract was concerned, the only persons who are entitled to sue (the testator and his estate) has no valid grievances having suffered no loss and the only person who has a valid grievance having suffered a loss of an expectation (the disappointed beneficiary) has no contractual claim.

While a majority of the House of Lords upheld a decision in favour of the beneficiaries based on the tort of negligence, the majority’s reasoning was not uniform. Of particular importance for the purposes of this section is the difference in reasoning between Lord Brown-Wilkinson and Lord Goff. To Lord Brown-Wilkinson\textsuperscript{114}, the decision to award damages to the beneficiaries could be justified on the basis that the relation between beneficiaries and solicitors was analogous to the special relationship – that gave rise to a duty of care - present in the landmark case Hedley Byrne & Company Ltd v. Heller.\textsuperscript{115} In essence, the House of Lords in Hedley Byrne held that there would be a special relationship giving rise to a duty of care, ‘someone of a special skill undertakes … to apply that skill for the assistance of another person who relies upon such skill.’\textsuperscript{116} It was Lord Brown-Wilkinson’s opinion that even though the present case of White v. Jones\textsuperscript{117} was pleaded on the assumption that the beneficiaries did not rely on the solicitor,

\textsuperscript{114} Ibid. at 275.
\textsuperscript{115} [1964] AC 465
\textsuperscript{116} Ibid at 502-503.
\textsuperscript{117} Supra note 113.
the case was nonetheless still sufficiently analogous to the factual matrix in *Hedley Byrne* because both cases involved defendants who have voluntarily undertaken tasks essential to the plaintiff’s well-being. Accordingly, a special relation giving rise to a duty of care will arise, ‘not [because] A knows that B is consciously relying on A, but [for the reason that] A knows that B’s economic well being is dependent upon A’s careful conduct of B’s affairs.’ It was thus Lord Brown-Wilkinson’s conclusion that the element of reliance was at irrelevant considering in adjudging whether a particular factual relation falls within the category of negligent liability established by *Hedley Byrne*.

In the instance case, Lord Goff agreed with Lord Brown-Wilkinson’s conclusion that the solicitors should be held liable to the beneficiaries. Yet he did so on the basis of a radical different reason. Lord Goff held that the requirements of practical justice necessitated the *creation* of a *special* species of negligent liability limited in scope in order to safeguard an important social institution – i.e. the institution of legacies – whose efficacy is dependent upon the confidence of testators that their wishes will be diligently executed. Accordingly, a judicial system which allows solicitors to escape liability on the basis of the fortuitous fact that negligent failure – on their part - in carrying out the testator’s instructions resulted in no loss to the testator would be tantamount to undermining the system of legacies because it would result in a loss of confidence by testators in the system. More significantly however, Lord Goff – in sharp contradistinction – to Lord Brown-Wilkinson held that the imposition of liability in *White v. Jones* could not be justified on the basis of analogy with *Hedley Byrne*. Unlike Lord Brown-Wilkinson, Lord Goff held that the element of reliance was essential to the special

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118 Ibid. at 275.  
119 Ibid.  
120 Ibid. at 272.  
121 Ibid. at 259.  
122 Ibid.  
123 Ibid. at 262.
relationship that was elucidated in *Hedley Byrne*.\textsuperscript{124} Accordingly, since *White v. Jones* was pleaded on the basis that that no reliance was placed by beneficiary upon the solicitor’s carrying out their undertaken task of diligently drafting the testator’s will, it follows that Lord Goff took the opinion that the imposition of liability of White v. Jones could not be justified merely on the basis that the circumstances at the present instance were sufficiently analogous to *Hedley Byrne*.\textsuperscript{125}

Thus, from the example of *White v. Jones*\textsuperscript{126} as described above, it is perfectly possible for two judges to utilize the same analogical approach and yet come to different conclusions. This is because the analogical approach itself does not indicate the relevant factual aspects upon which similarity is to be adjudged.\textsuperscript{127} The conclusions derived from the analogical approach are thus dependent on the perspective adopted by the individual adjudicator. The analogical approach is hence deficient because it is incapable of objectively identifying the circumstances in which liability should properly accrue. Thus, the approach fails as an aid in the development of a principled law of negligence because it does not specify a common perspective that is to be adopted for the purposes of assessing similarity and difference. It is this lack of a common perspective that renders the analogical approach incapably of objectively guiding the process of determining of liability in particular cases and leaves it unable to preclude the practice of liability determination on the basis of the arbitrary preferences of individual judges.

b. **A Normatively Rational Differentiation of Categories**

Other than being unable to proffer a standard of relevant similarity between its objects of comparison, the analogical approach possesses a second flaw that leaves unsuitable as a method for ensuring that negligent law is developed in a *principled*
fashion whereby like cases are treated alike. Negligence law can only be principled, if its own categories of liability and non-liability are delineated on the basis of a coherent scheme of normative justification.\textsuperscript{128} To put it in a less abstract way, if a particular collection of relations is held to give rise to a duty of care on the basis of a certain normative justification and if another relation is unquestionably falls under the purview of the same normative justification, then the cardinal rule of treating like cases alike is only satisfied if the latter relation is treated in the same manner as the former. The problem with the analogical approach – as Professor Jane Stapleton argues – is that it takes for granted the established categories of negligent liability and non-liability without evaluating whether the categories themselves are differentiated in a normatively coherent manner.\textsuperscript{129} Professor Jane Stapleton rather harshly claims that it is this practice of reasoning solely on the basis of factual similarity between cases that has produced some of the silliest rules that now exist within the law of negligence.\textsuperscript{130} To Professor Stapleton, equality of treatment in like instances does not only require that specific relations be classed together according to their similarity in relevant aspects but that the various classificatory categories be also interpreted in a manner that ensures that they embody a coherent scheme of normative justification.\textsuperscript{131}

Professor Stapleton uses the law’s development as regards to negligent infliction of psychiatric damage to secondary victims – i.e. victims who suffered psychiatric illness as a consequence of witnessing injury to others\textsuperscript{132} - as a prime example of such ‘silliness’. The current state of the law is encapsulated in \textit{Alcock v. Chief Constable of the South}

\textsuperscript{128} Supra note 108 at 86. 
\textsuperscript{129} Ibid. 
\textsuperscript{130} Ibid. at 95. 
\textsuperscript{131} Ibid at 86. 
\textsuperscript{132} Supra note 1 at 160.
Yorkshire\textsuperscript{133}. In that case, actions for psychiatric damage were brought against the police arising out of the Hillsborough stadium disaster in April 1989, where 95 people were killed and over 400 injured by crushing when too many people were allowed to crowd into a confined area of the football stadium. The events were shown in a live television broadcast and some scenes were repeated in news broadcasts. The actions were brought by 16 people, some of whom were at the stadium but not in the area where the disaster occurred and some who identified bodies at the mortuary. All the plaintiffs were relatives, or in one case a fiancée, of people who were in the disaster area, but none of them was either a spouse or parent of the victims. The police admitted liability in respect of those who were killed and injured in the disaster, but denied that they owed a duty of care to the plaintiffs.

In determining whether there was a duty of care between the defendants and the plaintiff, the House of Lords in \textit{Alcock}\textsuperscript{134} made reference to the fact that the common law – as clarified by the case of \textit{McLoughlin v. O’Brian}\textsuperscript{135} – drew a distinction between instances in which the defendant had inflicted foreseeable psychiatric trauma upon the plaintiff \textit{via} injuring someone (i) who was close in ties of love and affection to the plaintiff and in a manner by which – (ii) owing to the closeness in space and time between the accident and the plaintiff – (iii) the plaintiff could have perceived with his unaided senses and between other instances whereby the defendant’s infliction of psychiatric injury was perpetuated absent the before-mentioned relational, spatial and temporal, and sensory requirements. Further, the House of Lords noted that while a relation of duty has traditionally be recognized as arising from factual instance in which the relational, spatial and temporal, and sensory requirements are present, it has been

\textsuperscript{133} [1991] 4 All E.R. 907.  
\textsuperscript{134} \textit{Ibid.}  
\textsuperscript{135} [1982] 2 All E.R. 298.
denied in instances where they are absent. It thus follows – according to the House of Lords – that no duty of care arose between plaintiffs and defendants in *Alcock*\(^{136}\) because – on the facts - none of the plaintiffs had demonstrate that their circumstances were sufficient analogous to instance by which the common law had traditionally granted liability.\(^{137}\)

Proceeding on the common assumption that the point of negligence law’s duty of care is to afford recognition to a defendant’s status as a free agent by holding him as author and hence answerable for the consequences of their intended deeds, Professor Stapleton criticises the distinction the common law draws between instances in which recovery is possible for the infliction of psychiatric damage to secondary victims and instances in which it is not as illogical.\(^{138}\) As Professor Stapleton forcibly argues, it is plain even to the man on the Clapham omnibus that psychiatric illness does not only occur to those with tight ties of affection to the victim who see with unaided sense the injured victim at the time of injury or thereafter.\(^{139}\) Psychiatric damage can affect other sorts of people in other circumstances and can do so *foreseeably*.\(^{140}\) Professor Stapleton places the utmost emphasis on foreseeability because foreseeability implies that the defendant could have avoided inflicting psychiatric harm and hence indicates that the defendant had *control* over the consequences that resulted in the harm.\(^{141}\) Given the point of duty is to hold defendants’ to the consequences of deeds under their *control* and given that it is *foreseeable* that one might harm another even in factual instances that do not conform to the McLoughlin requirements of relational, spatial and temporal, and sensory

\(^{136}\) *Supra* note 133.

\(^{137}\) *Ibid.*

\(^{138}\) *Supra* note 108 at 95.

\(^{139}\) *Ibid.*

\(^{140}\) *Ibid.*

proximity, Professor Stapleton argues that courts stubborn insistence on adhering to the analogical approach’s unquestioning acceptable of historical common law categories in relation to psychiatric damage has led the law itself to become normatively arbitrary since it precludes liability on the basis of requirements that have nothing to do with foreseeability.\textsuperscript{142}

If the law of negligence is to be principled by treating like cases alike, then surely – according to Professor Stapleton- it must regard other instances falling outside the McLoughlin requirements as capable of giving rise to a duty because foreseeability – which is the consideration that justifies liability within the instances falling inside the McLoughlin requirements – is not limited to only those instances in which the requirements of relational, temporal and spatial, and sensory proximity are satisfied.\textsuperscript{143}

In essence, Professor Stapleton’s argument is that the application of the analogical approach results in an unprincipled law of negligence – at least with regards to the law on psychiatric damage - because the approach - has no way of evaluating and hence blindly assumes that the common law’s categories of liability and non-liability embody a coherent scheme of justification. Absent any idea of a general rationale for the common law’s apportionment of its categories of liability and non-liability, it is impossible to ensure that like cases are treated alike.

iii. The Academic Call for a Return to Abstract Reasoning

Given that the analogical approach is inadequate as an aid for the principled ascertainment of the boundaries of negligence liability because of its failure to illuminate the general rationale or the common thread that ties together particular impositions of duty, the academic community has called for a return to an emphasis on abstract

\textsuperscript{142} Supra note 108 at 95.
\textsuperscript{143} Ibid.
reasoning; this time under the guise of policy reasons. Thus, numerous academic articles now assert the need for stable and coherent outcomes in the law of negligence requires reference to the overarching reasons that explain the judicial imposition of a duty of care in particular instances. The oscillation between the abstract thought and caustic reasoning has accordingly come full circle.

III. RECONCILING GENERAL PRINCIPLE AND ANALOGICAL REASONING

As we have seen in Part II, the goal of any methodological approach is to assist the court in ensuring that it delineates negligent liability in a consistent and impersonal fashion whereby like cases are treated alike. As we saw, neither the abstract formula approach nor the analogical approach is successful in attaining this objective. For the abstract formula approach, the flaw is that its own abstract nature renders it incapable of furnishing concrete objective conclusions in determinate situations. Either in the form of a balancing of competing considerations or as a criterion for ascertaining the circumstances of negligent liability, the abstract formula is an abject failure because its inherently general nature means that the approach necessarily makes no reference to particulars. Yet without a reference to the particular attributes characterizing those instances that – according to the abstract formula approach own criteria - give rise to a duty a care, the individual judge has no means of ascertaining whether a particular instance falls to be classified as duty-bearing.

In the case of the incremental reasoning by analogy approach, we saw that because the approach lacked a conception of a general principle underpinning the various disparate instances of negligence liability, it too was no better at providing an answer that

144 Supra note 108 at 86.
145 Ibid.
146 Supra note 101 at 168.
147 Ibid.
could group together – in a consistent and impersonal fashion – circumstances of negligent liability and non-liability. In contradistinction to the abstract formula approach, the flaw with the analogical approach was that because it lacked a general rationale indicating – however vaguely - the manner in which the various disparate instances giving rise to negligent liability should be regarded as similar, the approach fails to furnish judges with a common perspective for adjudging the empirical characteristics relevant to assessing similarity between a specific relation and an established category of negligent liability. Without any guidance as to the manner in which duty-bearing relations should be similar, it would be impossible for judges to come to a uniform conclusion as to whether a specific relation bears the empirical hallmarks that would legitimize its inclusion within the category of duty-bearing relationships.

By pointing out the difficulties of both the abstract formula approach and the analogical approach, a path towards a superior methodological approach becomes clear. Since the deficiency of both an appeal to ‘general principle’ and the use of analogical reasoning was that each lacked the other, a superior methodological approach must – seemingly contradictory – incorporate elements of both. More specifically, such a superior approach must make room for the independent rule of both abstract principle and caustic reasoning with their respective domains. As we will see in this Part, the common law has long recognized this fact and hence regarded Lord Atkin’s neighbour principle as a necessary component to any methodological approach that seeks to aid in the principled development of the negligence law. More specifically - while it has since been forgotten - the common law has long regarded that the neighbour principle as a complement to the traditional caustic reasoning process via the neighbour principle’s provision of a uniform

148 Supra note 104 at 572.
149 Ibid.
perspective upon which to adjudge similarity and difference within the analogical reasoning process. Thus, Lord Atkin’s neighbour principle aids in the principled development of negligence law not on the basis of its identity as a test or touchstone of liability but rather via its provision of a neutral perspective that all judges can employ when engaging in the traditional practice of analogical reasoning.

A. THE PLACE OF THE NEIGHBOUR PRINCIPLE WITHIN THE TRADITIONAL PROCESS OF CAUSTIC REASONING

As Professor Neil MacCormick noted in *Donoghue v. Stevenson and Legal Reasoning*¹⁵⁰, Lord Atkin’s own speech within *Donoghue* itself provides a basis for inferring that the neighbour principle is compatible – and not as commonly assumed to be in opposition to - the traditional process of caustic reasoning. Specifically, Professor MacCormick argues that such a conclusion is reached by working out the theoretical implications of a specific passage within Lord Atkin’s judgement.¹⁵¹ In that key passage, Lord Atkin states that while the courts have traditionally utilized analogical reasoning for the purposes of classifying particular relations according to their propensity to give rise to duties of care, ‘the duty which is common to all the cases where liability is established must be logically based upon some element common to all the cases where it is found to exist.’¹⁵²

Professor MacCormick interprets Lord Atkin’s above statement to mean the following. An analogical argument operates by asserting that since relation ‘A’ leads to conclusion ‘C’ and since relation ‘B’ is in all relevant aspects similar to relation ‘A’, relation B should also lead to conclusion C. Yet, why is this so? The reason must be that both relation A and relation B both count in principle the same or in other words they are

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¹⁵¹ Ibid. at 201.
¹⁵² Supra note 3 at 580.
specific manifestations of a more general conceptual relation. As Professor MacCormick states it, the reason why a conclusion can be drawn from an analogy is because:

[t]here is already some acknowledge or presently constructible principle that will embrace both limbs of the analogy, either in the sense that the cases count in principle as the very same and should be treated in the same way, or in the sense that they count as similar in significant respects and should be treated in a significantly similar way to take account of the identified similarities.

While Professor McCormick’s achievement is that he has illuminatingly shown the connection between analogical reasoning and general principle, he nonetheless leaves unanswered Lord Atkin’s additional remarks stating that knowledge of the general principle underlying particular impositions of duty is a ‘valuable practical guide’. While it is true that analogical reasoning presupposes the existence of a general principle, there is yet no explanation as to why such reasoning cannot be properly carried out in ignorance of the content of this principle.

The great English judge – Lord Diplock – brilliantly took on the additional task of explaining why knowledge of negligence law’s general principle is essential to the judicial practice of analogical reasoning in Home Office v. Dorset Yacht. In that case, his Lordship embarked on a detailed explanation as to the manner in which the analogical approach is applied for the purposes of ascertaining either the existence or non-existence of a duty of care in a specific instance. His Lordship’s justification of the necessity having knowledge of negligence law’s governing principle is contained within this explanation. To Lord Diplock, a judge determines the scope of negligent liability on the basis of the following steps.

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153 Supra note 150 at 207.
154 Ibid.
155 Supra note 3 at 580.
156 Supra note 31.
First, the judge seeks to identify the relevant characteristics – as informed by the general conception – of the kinds of conduct and relationships that have given rise to a duty; second, the judge embarks on a comparison – again influenced by the general conception – of the characteristics of the situation he is considering with the characteristics of other situations where a duty had been found. Finally, a judge will in a truly novel case - where the characteristics between the relation at issue and established categories of relations are not congruent – evaluate – still under the guidance of the general conception – of the significance of the differences and of the substitutable of a present characteristic for the a missing one.157

Thus – from Lord Diplock’s masterful analysis of the analogical process -, the reason that knowledge of negligence law’s general conception or principle is essential becomes clear. Although vague, the general conception of relations posits a model of interaction that all particular relations giving rise to a duty of care must – owing to their similarity as empirical manifestations of the before-mentioned general conception - necessarily adhere to. Although – owing to its inherent generality – such a model of interaction is clearly inadequate as a test for determining the circumstances of negligent liability in the abstract, knowledge of this interaction form is nonetheless of practical utility because the form gives an indication – no matter how dimly - of the manner in which a specific relation must relate plaintiff and defendant if it is to considered be similar to other established duty-bearing relations, i.e. if the specific relation is to classified as a particular manifestation of negligence law’s general conception of relations. Accordingly, because the general conception indicates the manner by which a particular empirical relation must be structured if that relation is to categorized with other duty-

157 Supra note 79 at 249.
bearing relations, knowledge of negligence law’s basic form - in effect – provides one with an impersonal perspective for identifying the empirical characteristics relevant to the analogical assessment of similarity between a specific relation and an established category of negligent liability. More specifically, because all relations giving rise to duties of care are particular manifestations of negligence law’s general conception of relations, a specific relation would be adjudged to be similar to an established duty-bearing relation if the former shares the same basic characteristics that mark out the latter as a particular empirical manifestation of the general conception’s model of interaction.

In a few short paragraphs, Lord Diplock succinctly explained the role played by Lord Atkin’s neighbour principle. The neighbour principle aids in the judicial task of ensuring consistency of treatment within the law of negligence by providing a fixed perspective – or more colloquially, a map - for adjudging similarity and difference within the analogical process. It thus provides different judges with a means for achieving a measure of uniformity with respect to a given empirical relation’s normative classification. The neighbour principle is accordingly a complement to the traditional practice of analogical reasoning rather than a naked usurper whose goal is to supplant the practice of caustic reasoning.

By conceptualizing the neighbour principle in this manner, Lord Diplock’s view is fully in accord with Lord Atkin astute observation that ‘to seek a complete logical definition … is beyond the function of the judge … for the more general the definition the more likely it is to omit essentials or to introduce non-essentials’¹⁵⁸. As the before-mentioned quotation makes clear, Lord Atkin himself never intended the neighbour

¹⁵⁸ Supra note 3 at 580.
principle to be – as modern jurists have interpreted – a test or touchstone for liability for ascertaining – in a manner that is detached from traditional caustic reasoning - the circumstances of negligence. The adoption of such a view would – in the iconic words of Lord Devlin – represent ‘a misuse of the general conception and is not the way English Law develops’.159 The neighbour principle is rather an addendum that complements caustic reasoning by ensuring that judicial use of the latter results in an impersonal and principled delineation of the categories of negligent and non-negligent liability and - by extension – results in a negligence regime demarcated by law rather than by arbitrary preference.

B. THE NEIGHBOUR PRINCIPLE’S ACTUAL CAPABILITY TO SERVE AS A COMPLEMENT TO ANALOGICAL REASONING

In Section III.A, it was seen that the neighbour principle was created for the purposes of selectively remedying analogical reasoning’s shortcomings. Because the point of the neighbour principle is merely to shore up analogical reasoning’s shortcomings rather displace the practice of analogical reasoning altogether via the introduction of a separate approach for determining the circumstances of negligent liability, the neighbour principle act as a complement – rather than as a usurper – to the traditional practice of caustic reasoning. Yet while the previous section has shown that – theoretically – the point of the neighbour principle is to complement analogical reasoning, there has not – as of yet – been any proof that the neighbour principle is – in actuality – capable of fulfilling this function in practice. Proof of the neighbour principle’s empirical capability requires the satisfaction of two pre-requisites.

First, - as we saw in the previous section – analogical reasoning within negligence law is premised on the notion that a conclusion of a duty of care existing in a specific

159 Supra note 115 at 524.
instance must - of logical necessity - entail a similar conclusion in a separate instance if the circumstances are such that both instances are – in actuality – embodiments of an identical general conception of relations that generically gives rise to a duty of care. As we saw, because analogical similarity can only occur if both limbs of the analogy are manifestations of the same general conception of relations, knowledge – no matter how vague – of the mode of interaction set forth by the general conception that generically gives rise to a duty of care enables one to isolate the empirical attributes that must be present in a novel relation if it is to be considered similar to an established duty-bearing category of relations. Specifically, the attributes relevant for analogical comparison will those that are instrumental in enabling an established category of negligent liability to be conceived as an embodiment of the mode of interaction set forth in the general principle.

From the above, it becomes clear that the neighbour principle can fulfil its task of identifying the aspects of particular relations that rendered them normatively similar as manifestations of the same general conception that generically gives rise to a duty of care, if the neighbour principle is – in fact – the general conception that actually underpins the specific instances in which a duty of care arises. Thus, the neighbour principle is only – in practice – capable of complementing analogical reasoning if it is indeed the general conception that is presupposed in the specific instances giving rise to negligent liability. This however is yet to be proved.

Second, the manner in which the neighbour principle’s complements the analogical approach by selectively remedying its shortcomings must be demonstrated. Without such proof, it will always be open for a sceptic to question the practical utility of the neighbour principle.

160 Supra note 150 at 207.
i. **The Neighbour Principle as the General Conception of Duty-Bearing Relations**

In the current intellectual climate, the claim that the neighbour principle encapsulates the element common to all duty-bearing relations is often the recipient of outright scepticism. In the minds of many legal jurists, the neighbour principle clearly does nothing of the sort because mere ‘foreseeability of harm’ – which the neighbour principle allegedly posits to be the distinguishing mark of duty-bearing relations - *is* self-evidently present even in instances where no negligent liability can possibly accrue such as in the case of a businessman who foreseeably harms another business by lowering the prices of his goods. Accordingly, it is a mistake to hold that the neighbour principle is the abstract representation of the qualities uniquely inherent in duty-bearing relations because its conception of relations evidently encompasses not just instances of duty-bearing relations but instances of non duty-bearing relations as well.

In this section, I argue that the above criticism is misguided because it falsely assumes that the neighbour principle establishes commonality between disparate duty-bearing relations by reference to a shared possession of some distinguishing attribute, specifically the attribute of ‘foreseeability of harm’. As we will see, Lord Atkin clearly was of the view that the neighbour principle is not a list detailing the attribute(s) which all specific relations that give rise to a duty of care must necessarily have. Rather, the neighbour principle is an abstract representation of the manner in which individuals must evidently be related if one is to owe legally enforceable duties to the other. In Lord Atkin’s true view, the fact that the various particular empirical relations that typically give rise to a duty of care may differ markedly as regards to their internal factual attributes is no obstacle towards the identification of a shared commonality. The

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neighbour principle is still able to classify these relations as particular manifestations of a shared general conception because the common element that it posits is a specific manner by which one individual stands in relation to another. Hence because the neighbour principle is merely the structural form that all duty-bearing relations adhere to, it can – as I will shortly demonstrate in part III.i.b – be particularly manifested by a range of relations that empirically no factual similarity to each other.

a. **The Essential Nature of Neighbour Principle**

In the minds of most contemporary academics and jurists, the neighbour principle identifies relations as giving rise to a duty of care on the basis of their possession of a certain empirical attribute, namely the empirical attribute of ‘foreseeability of harm’. In other words, Lord Atkin is alleged to have asserted that all duty bearing relations bear the hallmark of being a transactional arrangement in which at least one of its interacting parties is a being capable of foreseeing that actions on his part might conceivably inflict harm upon another. When seen in this light, the neighbour principle is thought to be a general conception of relations giving rise to a duty of care because it provides an general criterion or test for distinguishing between duty-bearing relations and their non duty-bearing brethren.

Here, I argue that this common understanding of the neighbour principle is at variance with Lord Atkin’s own expressed opinions as to the neighbour principle’s essential nature. A close analysis of *Donoghue v. Stevenson*\(^{163}\) will make evident that - to Lord Atkin - the neighbour principle is - in truth - not a listing that defines a duty-bearing relation’s essential attribute(s) but rather is a generic model of the manner in which individuals must necessarily be associated to each other if they are – *in any factual circumstance* - to stand in the position of recipient and holder of a duty to take reasonable

\(^{163}\) Supra note 3.
care. As will also be seen, the neighbour principle posits that an individual can only owe
another a duty to take reasonable care within the confines of a transactional arrangement
which links two parties as (i) potential inflictor of foreseeable damage to the other’s
person and property on account of carelessness and (ii) potential victim who could suffer
harm to person and property on account of his interacting counterpart’s possible careless
behaviour. To Lord Atkin, this transaction model is the element that is common to all
discrete instances of negligent liability because – notwithstanding their empirical
differences as regards to their individual attributes - every specific duty-bearing relation
does in fact relate individuals in the precise manner dictated by the model itself.

1. **The Neighbour Principle’s Status as a Generic Model of Interaction**

Lord Atkin’s famous speech setting out his neighbour principle has been quoted at
length on page ten of this paper. From that speech, it can be ascertained that – to Lord
Atkin – the neighbour principle encapsulates the view that the general idea underlying all
specific instances of negligent liability is a conception of individuals being in such close
and direct relations to each other that it becomes natural to hold that the defendant ought
to have contemplated the possibility of injury to the plaintiff whilst he was engaging in
his allegedly negligent act.164

Because Lord Atkin emphasizes that the neighbour principle identifies ‘closeness and
directness’ as the element common to all specific relations giving rise to a duty of care
and because Lord Atkin also notes that ‘closeness and directness’ entails that the
defendant ought to have the plaintiff in his contemplation when directing his mind to acts
or omissions that could conceivably result in injury if done negligently, it has become
standard to interpret the neighbour principle as holding that all relations giving rise to a

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164 Ibid at 580.
duty of care are essentially relations in which at least one of the interacting parties is an individual who has the capacity to foresee that carelessness on his part might conceivably harm another. Thus, the neighbour principle’s general conception is essentially thought to be a criterion that identifies specific relations as ‘duty-bearing’ on the basis of the relation’s possession of an essential empirical attribute.

While the above is indeed the established view within contemporary legal discourse and writing, I submit that there are sound reasons to doubt that this view was ever held by Lord Atkin’s himself. Specifically, doubt exists on the basis of two distinct reasons.

First, a close reading of Lord Atkin’s speech in Donoghue v. Stevenson\textsuperscript{165} reveals that his Lordship himself acknowledged that the likelihood of distinguishing duty-bearing and non duty-bearing relations on the basis of some elucidated criterion or criteria is a remote proposition at best. As his Lordship himself observed, “[t]o seek a complete definition of the general principle is probably to go beyond the function of the judge, \textit{for the more general the definition the more likely it is to omit essentials or to introduce non-essentials}”\textsuperscript{166}. Given that Lord Atkin himself was acutely aware that it would be close to impossible to accurately elucidate a criterion or test for the identification of duty-bearing relations, it would surely be out of character for his Lordship to ignore his very own insight by positing a general conception – i.e. his neighbour principle – that identifies relations as duty-bearing on the basis of their possession of a specific a empirical attribute, i.e. on the basis of their ability to satisfy a criterion.

Second, the view of the neighbour principle as a criterion or test is plainly inconsistent with the manner in which Lord Atkin’s defines the neighbour principle in \textit{Donoghue v. Stevenson}. Particularly instructive is the fact that Lord Atkin consistently

\textsuperscript{165} Supra note 3.
\textsuperscript{166} \textit{Ibid.} at 580.
equated the neighbour principle with a representation of individuals associated through a close and direct relationship.\textsuperscript{167} Further, each and every ingredient that makes up the essential content of the neighbour principle is not defined as an attribute specific to an isolated individual but rather in terms of the role that they each play in linking defendant to plaintiff. Thus - to give an example -, the ingredient of foreseeability is itself defined not as the capacity of an individual to anticipate that his actions could cause damage in the abstract but rather foreseeability is defined as one’s ability to conceive that his actions could cause damage to a specified individual or class of individuals. This is readily ascertainable from the fact that Lord Atkin took pains to emphasize that foreseeability is the capacity to ‘contemplat[e] [others] as being so affected’ by one’s actions.\textsuperscript{168} Thus, while the first interpretation of foreseeability merely links individual to outcome, the second – which as we seen is Lord Atkin’s – links individual to another individual. The elucidation of the neighbour principle’s ingredients in terms that necessarily displayed their role in linking individuals to each only makes sense if Lord Atkin was a model arrangement between individuals.

Thus, for both reasons that have been elucidated above, it is submitted that the neighbour principle is – in truth – a model form of interaction appropriate to individuals who stand in the position of beneficiary and holder of a duty to take reasonable care. It is not – as conventional wisdom posits – a test or criterion which adjudges relations to be ‘duty-bearing’ on the basis of the existence of some empirical attribute.

2. The Neighbour Principle’s Content

While it has been ascertain that the neighbour principle is – in truth – a model form of interaction appropriate to individuals who stand in the position of beneficiary and

\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid. at 581.
holder of a duty to take reasonable care. The specific arrangement that is envisioned by the neighbour principle has not been elucidated. Here, I will undertake this task in two stages. First, I will refer to Lord Atkin’s own speech to discern the specific arrangement that he envisioned. Second, I will confirm the correctness of my interpretation by demonstrating how the arrangement posited is indeed the kind of relation that would relate individuals as duty-holder and duty-recipient.

One. The Arrangement Envisioned by Lord Atkin

The specific manner by which the Neighbour Principle holds that individuals should be related to each other if they are to be perceived as duty-holder and duty-recipient is contained within Lord Atkin’s speech in Donoghue v. Stevenson. As we have already seen, Lord Atkin was adamant that such a model of interaction must necessarily entail that the transacting individuals be related to each other in the form of (i) an individual who could foreseeably injures a specified other through his carelessness and (ii) that specified other who is the potential foreseeable victim of the former’s carelessness. Yet while it is indeed true that foreseeability is an essential ingredient with the model of interaction posited by the neighbour principle, it is not the only ingredient. From the relation just specified, another essential ingredient can be identified, namely that the parties must be related in terms of one individual’s potential to injure another person. Thus – in Lord Atkin’s flowing words -, ‘the rule that you are to love your neighbour becomes in law, you must not injure your neighbour’.

There is further a final ingredient that is often glossed over by contemporary commentators. Lord Atkin – during the course his speech – specifically noted that his neighbour principle was merely a qualified version of Brett M.R. oft-maligned general

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169 Ibid. at 580-581.
170 Ibid.
conception of negligent liability. In particular, Lord Atkin expressly approved – in just a paragraph below his famous elucidation of the neighbour principle – Brett M.R.’s view that any general conception of relations must entail the notion that:

If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.¹⁷¹ [emphasis mine]

Lord Atkin thus regarded it as self-evident that a model of interaction between a holder of a duty to take reasonable care and a beneficiary of that duty must relate the two parties as individual who could potentially injure either the person or property of another through his carelessness and a party who is the potential recipient of such harm. Harm to person and property is an essential ingredient to any model of interaction that details the circumstances in which a duty of care can rightfully be said to arise.

Thus, taking all three ingredients together, Lord Atkin posited – via his neighbour principle – that the model of interaction appropriate to individuals who stand in a position of holder and recipient of a generic duty to take reasonable care is a form of relation in which the parties are associated to each other as (i) potential inflicted of foreseeable injury to the person and property of a specific other through carelessness and (ii) potential victim whose person and property could conceivably be injured by the former if careless.

Two.  A Justification of the Ingredients Identified as Essential to the Neighbour Principle’s Model of Interaction

As was seen, under my interpretation of Lord Atkin’s speech, the neighbour principle posits the model of interaction appropriate to individuals related as holder and recipient of a duty to take reasonable care. Further, this model of interaction is essentially a relation between (i) a potential injurer capable of inflicting foreseeable damage to a specific other’s person or property and (ii) a potential victim of the former

¹⁷¹ Ibid. at 581.
who could conceivable suffer injury to his person or property if the former is careless.

To see why a duty-bearing relationship must necessarily conform to the neighbour principle’s posited model of interaction, it is necessary to draw upon the insights of the German Philosopher, Immanuel Kant.

According to Kant, individuals are equally beings of inviolate worth because they each equally possess the capacity for freedom.\textsuperscript{172} Freedom - to Kant – is a relational concept that consists in individuals standing in a position of independence vis-à-vis each other.\textsuperscript{173} Kant rejects the modern view that freedom is a feature of the isolated individual such as in the case of freedom being conceived as the capacity of individuals to achieve their wishes unhindered by the actions of others.\textsuperscript{174} To Kant, to posit such a conception of freedom is akin to positing the impossibility that individuals could be equally beings of inviolate worth on the basis of their identical capacity for freedom because each person’s claim to be free under such a conception is necessarily contradicted by another’s claim to be free by virtue of the fact that the wishes of disparate individuals do inevitably conflict.\textsuperscript{175} Thus, equal freedom would be a mere mythical fantasy unless freedom is itself conceived as a relation between persons.

To Kant, this relational conception of freedom takes the form of the individual capacity for choice, i.e. the individual capacity to not have others dictate one’s purposes.\textsuperscript{176} Following Aristotle, Kant asserts that an individual sets his own purposes when he utilizes his own powers – entities for the setting of purposes - for achieving the ends that he has in mind. Individuals are thus equally free when each maintains control over the use of own powers while – at the same time – is precluded from controlling

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\textsuperscript{172} Supra note 162 at 14.
\textsuperscript{173} Ibid. at 15.
\textsuperscript{174} Ibid. at 33.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid. at 14.
another’s powers for the sake of his subjective purposes. As Professor Arthur Ripstein observes in *Force and Freedom*, because Kantian freedom is defined relationally as independence from the choice of others, there can be only two ways in which the equal freedom of individuals is contradicted. First, an individual can directly exert control over another’s powers – and thereby exert domination over that other - by drawing that other into purposes that he has not chosen. Second, a person may subordinate another’s ability to set his own purposes by dictating to that other which of that other’s own powers is available for his personal use. A person dictates the availability of another’s powers by purposively injuring or destroying his powers.

For Kant, since a power is essentially an entity that can be used for the setting of one’s purposes, the kinds of powers that can be available to individuals who pursue their purposes independently are essentially (i) one’s own body and (ii) the external objects that are at one’s disposal. Thus, since freedom is a relation between individuals who are each immune from having their powers used or destroyed by their opposing counterpart and since one’s powers essentially consist of one’s own body and external objects that are presently at one’s disposal, free and equal individuals are essentially related through their reciprocal duty to avoid using or injuring their respective counterpart’s person or property. The duty is limited to mere non-interference – and not the advancement of another’s ‘well-being’ - because a relation of freedom is contradicted in circumstances where one individual uses the powers of another. Further, freedom only entails a duty to avoid purposively subjugating another’s powers. The subjugation must be purposive

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177 Ibid. at 14-15.
178 Ibid. at 15.
179 Ibid.
180 Ibid.
181 Ibid.
because (i) freedom is only contradicted when one individual sets the purposes of another and (ii) the very concept of setting a purpose implies purposive action.

Thus, through his brilliant analysis, Immanuel Kant provides the means for explaining why duties are implied – and only implied – within a relation between (i) a potential injurer who could conceivably injure another’s person or property foreseeability and (ii) a party who could be potentially injured as a result of the former’s carelessness. In a nutshell, Kant’s analysis showed that because freedom is essentially a form of interaction in which individuals refrain from purposively subjugating another’s powers, freedom entails that individuals each owe a duty to the other not to purposively injure or use the other’s person or property. Since duties are only legitimate for the purposes of preventing individuals from interacting on terms contradictory to equal freedom, their existence is only justified within a form of relation in which one individual could lord over another by means of injuring or using that other’s powers, i.e. that other’s person or property. Further owing to the fact that foreseeability implies the capacity to avoid a course of action and hence careless action which foreseeably cause damage is a purposive infliction of harm\textsuperscript{182}, a relation involving an individual who could conceivably injure another’s person or property foreseeability and his possible victim is potentially a relation in which one individual exercises domination over another contrary to the dictates of equal freedom. Accordingly, since this same relation is the neighbour principle’s model of interaction and since duties are only legitimately implied only within such a relation, individuals can only be related to each other as holder and beneficiary of a duty in circumstances that conform to the neighbour principle’s model of interaction.

\textsuperscript{182} Supra note 141 at 664.
b. **Traditional Categories of Duty-Bearing Relations as Particular Manifestations of the Neighbour Principle**

Having established that the neighbour principle is – in actuality – a model of interaction and further having specified the model’s stipulated mode of interaction, I will now demonstrate that the neighbour principle is the general conception underlying the usual categories of negligent liability. With regards to the category of physical harm, it is settled law that a duty only arises within a relation between an individual who has the potential to foreseeably inflict physical harm on another and the potential victim of that harm. Thus, since the model of interaction stipulated by the neighbour principle is between (i) a potential injurer who conceivably could injure another’s person or property *foreseeably* and (ii) a party who could be potentially injured as a result of the former’s carelessness, duty-bearing relations within the category of infliction of physical harm clearly conform to the neighbour principle’s model of interaction. Of greater interest are two specific categories of negligent liability which commentators often assert share no commonality whatsoever with the cases of infliction of physical harm, namely negligent liability as regards to the infliction of psychiatric damage on a secondary victim and the category of negligent liability for the infliction of economic loss. It will be seen that both these categories do conform to the neighbour principle’s model of interaction. Thus, it follows that the neighbour principle is the general conception of relations underlying negligence law since its model of interaction is adhere to by the usual categories of negligent liability.

1. **Psychiatric Damage to Secondary Victims**

As is well established under the common law, a relation whereby an individual foreseeably inflicts psychiatric harm upon another through the former’s endangerment of a third party is not a duty-bearing relation unless the endangerment is to someone who
was close in ties of love and affection to the plaintiff and is done in a manner by which – owing to the closeness in space and time between the accident and the plaintiff – the plaintiff could have personally perceived the endangerment with his unaided senses.183

Superficially, this category of negligent liability seems to be based on a different general principle as compared to the category of physical harm. While a duty arises in the latter just on the basis of foreseeability of harm alone, a relation within this category is only ‘duty-bearing’ if – in additional to foreseeability of harm - the relation satisfies the additional requirements of (i) relational, (ii) spatial and temporal and (iii) sensory proximity as outlined above. Yet, it is submitted that both – in truth – adhere to the same model of interaction, i.e. the model of interaction posited by the neighbour principle. As will be recalled, under the neighbour principle, duties are implied within relations that are potentially associations of domination in which one party purposively subjugates another individual’s powers to the former’s own use. Thus, the point of duties is to preclude one individual from lording over another specified individual and not the prevention of harm per se. In a case of physical damage, it is often assumed that if an individual has the capacity to foresee that his actions could cause damage, that individual can also be reasonably assumed to have the capacity to foresee the specific individual or class of individuals who would be put in peril by his actions. This is because the physical harm can only be inflicted within a demarcated spatial ‘zone of danger’ thereby ensuring that foreseeability of damage is also foresight of the imperilment of a certain sub-set of individuals in the empirical world. Thus, the mere fact of foreseeability of harm makes duties appropriate in the case of physical damage, because careless action with foresight

183 Supra note 135.
in this particular instance implies *a purposive subjugation of another* by the alleged wrongdoer to the latter’s will.

In the case of infliction of psychiatric harm upon secondary victims, there is no natural zone of danger that demarcates specific individuals or specific classes of individuals. Thus foreseeability of psychiatric harm to secondary victims does not – as in the case of physical injury – imply that the alleged wrongdoer’s purposively sought to inflict injury to a specified individual. Thus, duties are inappropriate in cases of psychiatric harm on the basis of mere foresight of harm alone because foresight of harm – by itself – does not necessarily imply any injury inflicted by the alleged wrongdoer was a consequence of his attempt to exercise *lordship over another*.

Since the neighbour principle’s model of interaction holds that the only duty-bearing relations are relations in which one party has the capacity to potentially dominate *over another*, relations within the category of psychiatric harm to secondary victims can only be duty bearing if there is an additional requirement – other than foreseeability – which marks out a class of individuals that could reasonably be anticipated to be psychologically imperilled by a wrongdoer’s alleged endangerment of a third party, such as individuals who have close ties of love and affection to the third party endangered. Yet to say this, is just to endorse the common law’s insight that additional requirements are necessary for the purposes of establishing a duty in situations of psychiatric harm to secondary victims.\(^\text{184}\)

Accordingly, when perceived in this light, both the category of negligent infliction of physical harm and the category of negligent infliction of psychiatric damage on

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\(^{184}\) *Supra* note 39 at 231.
secondary victims may be seen as premised on a common element, even though their respective empirical attributes may differ.

2. Economic Loss

Duty-bearing relations within the category of negligent infliction of economic loss also conform to the model of interaction set forth by the neighbour principle. As is well established under the common law, the only form of duty-bearing relation within the category of negligent infliction of economic loss is one which defendant is linked to the plaintiff by virtue of the former having invited the latter to rely upon his special expertise and the latter being at risk of suffering economic loss as a consequence of justifiably relying upon the former’s invitation. This exception is derived from *Hedley Byrne v. Heller.*\(^{\text{185}}\) In all other normal instances, recovery for negligent infliction of economic loss is precluded.

The neighbour principle’s model of interaction provides an explanation for the present state of the law. In normal instances, an individual has economic loss inflicted upon him through his inability to use another’s property as a consequence of the wrongdoer’s negligence.\(^{\text{186}}\) In such a case, the relation formed between wrongdoer and victim is clearly not of a type that conforms with the neighbour principle’s model of interaction. Specifically, the neighbour principle holds that for a relation to be ‘duty-bearing’, the parties must be related in a manner that one is in the position to potentially injure his counterpart’s powers for only then would the former exercise lordship over the latter. Here, the injury is done to a third party’s property and hence is clearly not a relation of subjugation between victim and his alleged wrongdoer. Since there is not issue of domination, the neighbour principle precludes the imposition of duties.

\(^{\text{185}}\) Supra note 115.

\(^{\text{186}}\) Supra note 39 at 191.
With regards to the only exception to the preclusion against recovery for economic loss (i.e. in the case of the Hedley Bryne exception), the relation posited in such a circumstance is duty-bearing because it conforms to the neighbour principle’s model of interaction. As we saw, the point of duties according to the neighbour principle is to preclude one individual from exercising domination over another. Further, it was seen that in additional to purposively injuring another’s person or property, domination is also capable of taking the form of one individual drawing another into purposes that the latter has not chosen. This is exactly what happens in case of Hedley Bryne exception. If a defendant invites a plaintiff to rely upon his special expertise and if – because of the invitation – the plaintiff does in fact rely upon the defendant’s invitation and expends his property as a consequence, then a duty to take reasonable care must be implied on the part of the defendant because negligence would result in the plaintiff being drawn into a purpose which he did not choose (since he only chose to expand his property in circumstances where the defendant carefully utilizes his expertise). Thus, even in the category of negligent infliction of economic loss, the neighbour principle’s model of interaction is adhered to.

ii. The Neighbour Principle as the Remedy to the Ailments of the Analogical Approach

Having established that the neighbour principle is the general conception of relations giving rise to a duty of care, the final task of this paper is to demonstrate that this general conception remedies the shortcomings that prevent uniformity of decision-making through use of the analogical approach. As we saw in Part II, there were two principle shortcomings, namely that the analogical approach (i) itself possesses no standard by which to adjudge the factual aspects relevant to the assessment of similarity and difference between a novel relationship and an established category of negligent liability
and (ii) lacks a standard for ensuring that the common law’s established categories of
negligent liability and non-liability themselves are delineated in a manner that embodies a
coherent normative scheme.

a. Standard Upon Which to Adjudge Similarity

In Part II, the dilemma concerning the lack of a standard to uniformly adjudge
analogical similarity and difference was illustrated using the case of White v. Jones187. It
was seen that because of a lack of a common perspective upon which to adjudge the
identity of empirical characteristics relevant in the assessment of normative similarity
between the relation in White v. Jones188 and the Hedley Byrne category of negligent
liability, the judges in White189 differed as to whether a duty could be justified in that case
on the authority of Hedley Byrne190. The model of interaction proffered by the neighbour
principle offers a solution to this predicament. As we saw - from the perspective of
neighbour principle - a Hedley Byrne relation is ‘duty-bearing’ because it is a relation
between individuals who are linked through one’s potentially ability to draw the other
into pursuing purposes that was not of the latter’s choosing. Since – as seen in the section
on Kant - to set and pursue something is to utilize one’s powers to achieve it, one cannot
be drawn into purpose – regardless of another’s invitation to rely – without utilizing one’s
powers in reliance of the invitation or in other words expending one’s property in reliance
of that invitation. Thus, the element of injurious reliance is a characteristic that is relevant
in the comparison of whether the White v. Jones191 relation falls within the same
normative category as the Hedley Byrne relation.

187 Supra note 113.
188 Ibid.
189 Ibid.
190 Supra note 115.
191 Supra note 113.
The above example thereby shows that because it posits the model of interaction appropriate to all duty-bearing relations, the neighbour principle is capable of objectively identifying the element of injurious reliance as a relevant characteristic for analogical comparison. The principle hence aids in the principled development of the law of negligence by supplying an objective perspective upon which – individual judges may employ - to adjudge analogical similarity and difference; thereby enabling the possibility of deriving uniform conclusions through the analogical approach’s use notwithstanding the existence of disparate arbiters.

b. A Rational Scheme of Classificatory Categories

As was also seen in Part II, even if it is known which aspects of relevant towards the identification of similarity between a novel relation and an established category of negligence liability, such a classification only results in equality of treatment if the established categories of negligent liability and non-liability - which is relied upon the comparison process – do in fact embody a coherent scheme of justification. Absent coherency in the differentiation of the established categories of negligent liability and non-liability, groupings of relations would still be to the criticism that they arbitrary exclude relations which should be included since these latter relations are based on the same basic normative principle as the rest of the relations within the grouping.

Thus, since the neighbour principle is a general conception of relations giving rise to a duty of care, it provides a guide as to whether the common law has differentiated its categories of negligent liability and non-liability in a coherent manner. In the example given in Part II, there was controversy concerning whether the distinction that the common law draws between secondary victims who satisfy the McLoughlin requirements of (i) relational, (ii) temporal and spatial and (iii) sensory proximity and

192 Supra note 135.
secondary victims who do not is defensible. The common law posits a duty of care as regards to the first but denies any possibility of liability with regards the second. As we saw in our discussion of psychiatric damage to secondary victims on page sixty-three of this paper, there is a rational reason why mere foreseeability in a relation involving psychiatric damage to a secondary victim is insufficient to render that relation ‘duty-bearing’. In order for such a relation to be ‘duty-bearing’, the relation must conform to the structure of interaction posited by the neighbour principle. This entailed that there must be additional requirements that delineate a class of individuals who would be imperilled by the wrongdoer’s negligence actions for otherwise the imposition of duty would not serve the intended purpose of precluding an individual from exercising domination over another. Yet while additional requirements are required, the model of interaction furnished by the neighbour principle provides no normative reason that the requirements of (i) relational, (ii) temporal and spatial and (iii) sensory proximity must be insisted upon in unison. It is perfectly conceivable that just the mere requirement of close ties of love and affect would suffice in ensuring the duty to owed to a class of individuals rather than to the entire world. Hence the differentiation that the common law draws in the realm of psychiatric harm to secondary victims is partially arbitrary and should be reformed. Thus, this example shows that the neighbour principle provides (i) not just a means of ascertaining whether the distinctions the common law draws as regards to its categories are normatively arbitrary but (ii) also – because it posits the model of interaction unique to duty-bearing relations and thus provides a map for distinguishing between the former and its non duty-bearing brethren – proffers at least a glimmer of the possible way to rectify a normatively arbitrary distinction. Thus the neighbour principle remedies a noted shortcoming of the analogical approach because it
provides a means of ensuring that the categories which the analogical approach relies upon to conduct its comparison is delineated in accordance to a normatively coherent scheme of justification.

IV. CONCLUSION

In conclusion, I submit that for the reasons that have been elucidated in this paper, the neighbour principle is – in fact – an able aid in ensuring the principled development of negligence law. It assists in ensuring of equality of treatment within negligence law by remedying the shortcomings of the analogical approach, hence complementing it.
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