

LAWS 520: Private Law: Shifting Boundaries

**Civil Liability of the Police Service under the Tort of Negligence: A
Comparison between England, New Zealand and Switzerland**

Daniel Hulmann

Abstract

This paper analyses the liability of the police service under the tort of negligence in England and New Zealand as well as the public law liability of police officers in Switzerland, specifically in the canton of Zurich. It provides some background on the approach taken by courts in England and New Zealand when analysing novel duties of care as well as briefly setting out certain particularities of Switzerland that make it distinct. It further analyses the elements of the tort of negligence, with a particular focus on omissions, and compares them to the corresponding elements in Swiss public liability law. It concludes by setting out a number of lessons that the common law courts may learn from the Swiss approach and vice versa when next deciding a case of police liability.

Word Count (without title page, abstract, footnotes and bibliography): 11,367.

I Introduction

“Principled, effective and efficient policing services are a cornerstone of a free and democratic society under the rule of law”.¹ The police service’s functions include keeping the peace, maintaining public safety, enforcing the law, preventing crime and community support and reassurance.² Without a functioning police service, a modern state cannot exist. Without a police service having the support of the community, it cannot be effective. Maintaining such support requires that the police service (and/or individual police officers) is seen to be held responsible if errors are committed. The police service must never be above the law. While a variety of avenues exist under which the police service may be held to account, and are briefly explored for New Zealand later in this paper, the main focus lies on the tort of negligence. It does not address other torts such as false imprisonment or misfeasance in public office nor liability under human rights legislation such as the New Zealand Bill of Rights Act 1990 or the Human Rights Act 2008 (UK) that may also be relevant when actions of police officers are analysed.

The paper seeks an answer to two questions: First, what is the police service’s liability under the tort of negligence in England, New Zealand and Switzerland, which includes an analysis of the parallels and differences found. Second, what lessons can the common law courts in England and New Zealand and the civil law courts in Switzerland learn from each other when they next have to decide whether the police service should be held liable.

The paper takes a comparative approach. It reviews how New Zealand and England treat the liability of the police service under the tort of negligence, with the focus being on under which circumstances a duty of care arises, in particular in cases of omissions, i.e., scenarios where the police officers did not themselves cause a damage but failed to prevent one. In parallel, it also analyses the situation in Switzerland. As discussed in more detail below, due to Switzerland being a federal country and the police service being in the competence of the 26 cantons (states) making up Switzerland, with further subdivisions where communal police services exist, it limits itself to the cantonal police of the canton of Zurich. References to Switzerland in this paper should thus be construed as references to the law as it applies to the cantonal police of the canton of Zurich where applicable. Furthermore, due to Switzerland and the canton of Zurich being civil law jurisdictions, the common law tort of negligence does not have an exact equivalent. Instead, the paper analyses the comparable concept that is found in the public law liability provisions applying to employees of the canton of Zurich.

The paper consists of three parts. The first part endeavours to give some background on the constitutional setup of Switzerland and the general principles of Swiss tort law. It also briefly addresses the *tests* developed by courts in England and New Zealand when determining

¹ Policing Act 2008, s 8(a).

² Section 9.

whether novel duties of care under the tort of negligence should be introduced. The second part analyses the current state of the law, with the focus on when a duty of care exists. While the necessary elements for liability under the Swiss approach do not fully correspond to those under the common law tort of negligence, the paper analyses them under the ones that come the closest. This part also identifies parallels and differences in the approaches taken. In the third part, based on the previous analysis of the approaches, the paper aims to set out certain lessons that the courts can learn from each other.

II Background

A Constitutional Setup of Switzerland

Switzerland is a federal country. Inherent sovereignty does not lie with the federal state which delegates parts of it to the cantons but with the cantons which have transferred some of their sovereignty to the federal state. It is a bottom up and not a top down approach. Accordingly, art 3 of the Federal Constitution of the Swiss Confederation 1999 (CH) provides that “The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation.” The Federal Constitution does not mention policing as being in the power of the confederation. The cantons thus are entitled to legislate in such area.

Given that the tort of negligence is a private (as opposed to public law) concept under English and New Zealand law, the following point is worth noting as well: Article 122 para 1 of the Federal Constitution states that “The Confederation is responsible for legislation in the field of civil law and the law of civil procedure.” A functional equivalent of the tort of negligence might thus be found in the federal legislation. The Confederation has made use of such power, by enacting the Swiss Civil Code 1907 (CH), whose last part is the Federal Act on the Amendment of the Swiss Civil Code 1911 (CH) [Swiss Code of Obligations]. Article 41 para 1 of the Swiss Code of Obligations sets out the statutory basis for tort claims under Swiss law, being “Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.”

However, the Swiss Civil Code specifies that the public law of the cantons is not restricted by federal civil law,³ and art 61 of the Swiss Code of Obligations notes further that “The Confederation and the cantons may by way of legislation enact provisions that deviate from those of this Section [being arts 41 to 60 of the Swiss Code of Obligations] to govern the liability of civil servants and public officials to pay damages or satisfaction for any damage they cause in the exercise of their duties.” Under Swiss law, the functional equivalent of the tort of negligence may thus be found in the public law of a canton if the liability of civil servants and public officials (which include police officers) is concerned.

³ Swiss Civil Code, art 6.

B General Principles of Swiss Tort Law

As discussed above, the general provision for liability in tort under Swiss law is set out in art 41 Swiss Code of Obligations. This general provision provides for four elements that must be fulfilled for liability to arise, being:

- A loss or damage must be caused;
- causing such loss or damage must have been unlawful;
- the loss or damage and the action are linked by an element of causality; and
- the person causing the damage must have acted wilfully or negligently.

The articles following art 41 Swiss Code of Obligations provide further details as well as setting out certain special torts which, however, are not relevant for purposes of this paper. With regard to the liability of police officers, the canton of Zurich has slightly amended the above formula.

Policing in the canton of Zurich is primarily governed by the Police Act 2007 (ZH) which defines the tasks of the cantonal police and the manner in which such tasks are to be achieved. It also addresses the liability of police officers in para 55, which refers to the provisions of the cantonal Liability Act 1969 (ZH). The Liability Act thus governs the liability of public officials (including police officers) and not art 41 Swiss Code of Obligations.⁴ Paragraph 6 first subparagraph sets out the conditions for liability as follows: The canton is liable for the damage that an employee, in the exercise of official functions, illegally causes to a third party. The liability is a vicarious liability, with the canton being the liable entity and not the relevant employee (though the canton may subsequently try to have recourse to the employee if it is found liable) and the injured person being barred from bringing a claim against the injuring employee directly.⁵ Accordingly, regarding the test set out in art 41 Swiss Code of Obligations, one element falls away (that the person causing the damage must have acted wilfully or negligently) while the following two are added:

- The person causing the loss or damage must be an employee of the canton; and
- such employee must have caused the damage in the exercise of public functions.

Notwithstanding these two different sources, it is worth noting that those elements required for liability that exist in both the private law tort under art 41 of the Swiss Code of Obligations and in public liability law (damage, causality and, to a lesser extent, illegality) are in principle analysed in the same manner.⁶

⁴ *BGE 125 IV 161* at [2b].

⁵ Liability Act, para 6 sub-paragraph 4.

⁶ *BGE 123 II 577* at [4d)bb].

C *The English Approach*

Lord Reed, in his speech in *Robinson v Chief Constable of West Yorkshire Police*, noted that the general principles regarding the liability of public authorities under the tort of negligence also affect the liability of the police.⁷ This was particularly relevant in *Hill v Chief Constable of West Yorkshire*,⁸ which serves as the starting point of the analysis of liability for omissions set out further below. It is thus worthwhile to briefly analyse the development from *Anns v Merton London Borough Council* to *Robinson*.⁹

Anns built upon the famous neighbour principle set out by Lord Atkin in *Donoghue v Stevenson*:¹⁰

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which 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 which are called in question.”

Lord Wilberforce, in his speech in *Anns*, first noted 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”.¹¹ He then proceeded by setting out a two-stage test: The first element of such test asks whether there exists a “sufficient relationship of proximity or neighbourhood” such that in the reasonable contemplation of the offending party, “carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises”.¹² The second element asks whether, if such proximity exists, there are considerations that should negate or limit the scope of a duty or the class of persons to which it is owed.¹³ This approach was subsequently used to attack “previously well-entrenched principles of non liability”.¹⁴

The principles set out in the *Anns* test were subsequently overruled in *Caparo Industries plc v Dickman*,¹⁵ which set out a three-stage test when considering whether a duty of care existed in

⁷ *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595 (SC) at [22–23], [31] and [51].

⁸ At [40]; *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL).

⁹ *Anns v Merton London Borough Council* [1978] AC 728 (HL).

¹⁰ *Donoghue v Stevenson* [1932] AC 562 (HL) at 580.

¹¹ *Anns* at 751–752.

¹² At 751–752.

¹³ At 752.

¹⁴ Edwin Peel and James Goudkamp *Winfield and Jolowicz on Tort* (19th ed, Thomson Reuters, London, 2014) at 85.

¹⁵ *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

a particular case. The elements of such test are foreseeability (i.e., was it reasonably foreseeable that negligent behaviours by the defendant may injure the claimant), proximity and whether it is fair, just and reasonable to impose a duty of care on the defendant.¹⁶ However, it should be noted that the Supreme Court elaborated further on such approach in *Robinson*. Lord Reed noted that the suggestion that there is a *Caparo* test applying to all claims under the tort of negligence is mistaken.¹⁷ Instead, *Caparo* seeks to achieve “a balance between legal certainty and justice”.¹⁸ Courts should consider previous decisions and follow precedents (unless they have to consider whether the precedents should be departed from).¹⁹ There is thus no need to repeat the analysis whether it is fair, just and reasonable to impose a duty in each case if a duty has previously been recognised, as such analysis formed part of the basis on which the duty was previously recognised.²⁰ If the question whether a duty of care arises has not been previously decided, the courts should consider the closest analogies in existing law and weigh up the reasons speaking for and against imposing liability, in order to decide whether the imposition of a duty of care would be just and reasonable.²¹

D *The New Zealand Test*

In New Zealand, the two-stage test set out in *Anns* was not abandoned outright but the questions were somewhat reformulated. The first, internal stage focuses on the relationship between the parties, though with a sufficiently proximate relationship not automatically raising a presumption of a prima facie duty. The second, external stage looks at an assessment of policy and/or principle that speak in favour or against an imposition.²² The ultimate question, in the words of Glazebrook J, being “whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed”.²³

More recently, the Supreme Court provided an overview of the duty methodology in *North Shore City Council v Attorney-General*.²⁴ Therein, Blanchard, McGrath and William Young JJ noted that:²⁵

The important insight found in Canadian and New Zealand cases is that when a court is considering foreseeability and proximity, it is concerned with everything bearing upon the relationship between the parties and that, when it moves to whether there are policy features

¹⁶ At 617–618.

¹⁷ *Robinson*, above n 7, at [21].

¹⁸ At [29].

¹⁹ At [29].

²⁰ At [26].

²¹ At [29].

²² Stephen Todd “Negligence: The Duty of Care” in Stephen Todd, Ursula Cheer, Cynthia Hawes and Bill Atkin *The Law of Torts in New Zealand* (7th ed, 25th anniversary ed, Thomson Reuters, Wellington, 2016) at 155.

²³ *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 at [58].

²⁴ *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341; Stephen Todd, above n 22, at 156.

²⁵ At [156].

pointing against the existence of a duty of care – that is, whether it is fair, just and reasonable to impose a duty – the court is concerned with externalities – the effect on non-parties and on the structure of the law and on society generally. But, as already remarked, aspects of some matters may require to be considered more than once.

With regard to methodology, they as well as Elias CJ referred to the caveat provided by Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, being that:²⁶

A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.

Thus, it should be borne in mind that the two stage approach only provides a framework while a detailed analysis of the actual circumstances as well as an exercise of judgment is required whenever considering if a duty of care should be recognized or not.

E Other Avenues Existing in New Zealand

The tort of negligence is but one of several avenues how police officers may be held to account. A police officer may be subject to internal disciplinary measures if it is found that his or her behaviour breached the police code of conduct, with the personal grievance procedures under the Employment Relations Act 2000 providing a framework for review and appeal.²⁷ Complaints about a police officer's actions may further be made to the Independent Police Conduct Authority. Its mandate includes receiving complaints alleging misconduct or neglect of duty by any member of the police service and concerning any police service practice, policy or procedure affecting a complainant as well as investigating incidents in which a police officer (acting in the execution of his or her duty) causes or appears to have caused death or serious bodily harm.²⁸ Its investigations result in a determination whether a police service act or omission was unlawful, unreasonable, unjustified, unfair or undesirable. and it may recommend criminal or disciplinary measures, but it may not lay criminal charges or take disciplinary measures itself.²⁹

A police officer may further be criminally liable for criminal acts as any other person, unless it is an area where police officers are granted immunity (such as the execution of judicial

²⁶ At [26] per Elias CJ, at [161] per Blanchard, McGrath and William Young JJ; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 294.

²⁷ New Zealand Police Code of Conduct of May 2015 at 7–8; Policing Act, s 56; Employment Relations Act, ss 101–142.

²⁸ Independent Police Conduct Authority Act 1988, s 12.

²⁹ Sections 27–28.

process).³⁰ Liability may also arise under a tort other than negligence, e.g., false imprisonment. Finally, the actions may give rise to a public law action under the New Zealand Bill of Rights Act which may result in compensation.³¹

III Liability of the Police Service under the Tort of Negligence

A Preliminary Remarks

To be liable under the tort of negligence, four conditions need to be fulfilled: The person seeking to be held liable must owe a duty of care, such duty must be breached, the breach must lead to a damage and such damage must not be remote.³² These four elements are analysed in turn. While not all of these elements have direct equivalents in Swiss tort law, the Swiss parts are analysed under the ones that correspond the most.

In addition, the test under the Liability Act provides for two additional elements that are not independently found in the four element test of the tort of negligence. These elements are that the person causing the damage is a public official and that such damage was caused in the exercise of a public function.³³ Under the English and the New Zealand approach, respectively, these are generally taken into account when determining whether a duty of care exists under the tort of negligence, to the extent that police officers would be treated differently from any other party.

As to the canton of Zurich, the first of the two elements poses little difficulty in determining whether police officers may be held liable as they are employees of the canton. This is, for example, illustrated by the reference in para 55 Police Act to the Liability Act, which governs the liability of employees of the canton.

As regards the second element, whether a police officer causing a damage acted in exercise of a public function requires an analysis of the specific circumstances of the particular case. However, the Police Act and the Police Organisation Act provide guidance by setting out the tasks of the police, which include the maintenance of public security and order, assisting the population, supporting public officials in the enforcement of the public order, the prevention and investigation of crime, the increase of road security and prevention of accidents on roads and waterways and the defence against immediate threats to people, animals, environment and property and the clearing up of corresponding disturbances.³⁴ Police officers carrying out typical police functions such as arresting suspects or apprehending speeding drivers thus highly likely act in the exercise of public functions.

³⁰ Crimes Act 1961, s 26.

³¹ *Simpson v Attorney-General* [1994] 3 NZLR 667 [*Baigent's Case*].

³² Craig Purshouse "Arrested development: Police negligence and the Caparo 'test' for duty of care" (2016) 23 TLJ 1 at 3–4.

³³ Liability Act, para 6.

³⁴ Police Act, paras 3–7, and Police Organisation Act 2004 (ZH), paras 7–10.

Finally, given the dearth of case law that deals explicitly with the liability of police officers pursuant to the Liability Act, the Swiss analysis refers to cases that arise under either the liability laws of other cantons or under federal liability law as well as art. 41 Swiss Code of Obligations. It is, however, easy to draw analogies therefrom to the Liability Act as the concepts of causality and damage and, for the cantonal and federal liability law, illegality are substantially the same.³⁵

B Duty of Care for Direct Actions of Police Officers

1 England

The most recent pertinent Supreme Court decision to discuss the liability of police officers under the tort of negligence in depth is *Robinson*. In that case, police officers tried to arrest a suspected drug dealer who resisted arrest. A struggle ensued, and the suspect and the police officers knocked over Ms Robinson, described as a relatively frail lady aged 76, who suffered injuries.³⁶

In proceedings before the recorder, the recorder found that the officers had acted negligently but that the decision in *Hill* provided the police with immunity against claims in negligence and that, based on the decision in *Desmond v Chief Constable of Nottinghamshire Police*,³⁷ such immunity is not limited to cases of omissions.³⁸ The Court of Appeal subsequently denied the existence of a duty of care in the first place (and further set out that, even if a duty had been owed, that the police officers had not acted in breach of it).³⁹

Lord Reed, with whom Lady Hale and Lord Hodge agreed, first considered the applicability of the *Caparo* test, concluding that for the present case it was sufficient to apply “established principles of the laws of negligence”,⁴⁰ before turning to the liability of public authorities in general and the police in particular. Recognizing some confusion following the decision in *Anns*, he notes that public authorities are “generally subject to the same liabilities in tort as private individuals” and that acts that would be tortious if committed by a private individual are also tortious if committed by a public body.⁴¹ Thus public authorities “are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise”.⁴²

³⁵ *BGE 107 Ib 160* at [2].

³⁶ *Robinson*, above n 7, at [1].

³⁷ *Desmond v Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3 (CA),

³⁸ *Robinson*, above n 7, at [14].

³⁹ At [15–19].

⁴⁰ At [30].

⁴¹ At [31–33].

⁴² At [33].

The same principles apply if the police service is the public authority in question.⁴³ Despite some misunderstandings in this regard, as shown, e.g., by the previous judgments in the *Robinson* proceedings,⁴⁴ this has been the case since *Hill* was decided. Therein, Lord Keith noted that “a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions” which can include negligence.⁴⁵ A police officer causing personal injury is thus subject to liability under the general law of tort.⁴⁶ This view is supported by various authorities,⁴⁷ including, *Knightley v Johns*, where a police officer attending the scene of a road accident carelessly created an unnecessary danger,⁴⁸ and *Rigby v Chief Constable of Northamptonshire*, where a police officer fired a tear gas canister in a building under siege that set the building aflame while not having firefighting equipment present.⁴⁹ Other examples include *Attorney General of the British Virgin Islands v Hartwell*, where police authorities entrusted a firearm to an officer that was still on probation and had shown signs of mental instability,⁵⁰ *Frost v Chief Constable of South Yorkshire Police*, where police forces, while not technically employers, were treated as owing the same common law duty as employers to take reasonable care for the safety of their officers,⁵¹ and *Marshall v Osmond*, where it was found that a police driver owed the same duty to a suspected criminal he was pursuing as that owed to anyone else, being to exercise such care and skill as is reasonable in the circumstances.⁵² These decisions are inconsistent with a general rule that police owes no duty of care regarding actions taken to suppress crime.⁵³ Therefore, *Hill* was not an authority for arguing that the police enjoy general immunity from being sued for anything done by them while investigating or preventing crime.⁵⁴

Following up on such review of the state of the law, Lord Reed concluded that the officers did owe a duty of care towards pedestrians in the immediate vicinity, including Ms Robinson, when they attempted to arrest the suspect.⁵⁵

2 *New Zealand*

The principle set out by Lord Keith in *Hill* that police officers may be held liable in tort as anyone else applies in New Zealand as well. Thus, if they act negligently and their actions lead

⁴³ At [45].

⁴⁴ At [44].

⁴⁵ *Hill*, above n 8, at 59.

⁴⁶ *Robinson*, above n 7 at [45].

⁴⁷ At [46–47].

⁴⁸ *Knightley v Johns* [1982] 1 WLR 349 (CA).

⁴⁹ *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 (QB).

⁵⁰ *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273 (PC).

⁵¹ *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL).

⁵² *Marshall v Osmond* [1983] QB 1034 (QB).

⁵³ *Robinson*, above n 7, at [46].

⁵⁴ At [55].

⁵⁵ At [74].

to a damage, they may be held liable under the tort of negligence.⁵⁶ In *Fyfe v O'Fee*, a case where the armed offenders squad arrested the wrong person after a false identification, the High Court held that while “Police do not owe a duty of care to the public at large as to the manner of policing in a general sense ... individual Police officers can in certain circumstances be liable in tort, including negligence, in respect of their particular actions”, referring to the decisions in *Hill* and *Rigby*. However, ultimately no duty of care was recognised.⁵⁷ New Zealand thus follows a similar approach to England, though with the possibility that more focus is laid on the second, external stage of the test, which looks at an assessment of policy and/or principle that speak in favour or against an imposition of a duty.

3 Switzerland

Switzerland asks a slightly different question. It is not whether a police officer owed a duty of care to the claimant but whether the action taken by the officer was illegal. The analysis whether an action qualifies as illegal has to be conducted in two stages: The first element asks whether the action itself was illegal. The second element asks whether such initial illegality is extinguished due to the action having been justified.

As to the first part, illegality is given if an *absolut geschuetztes Rechtsgut* (which roughly translates as absolute legally protected right) is injured. Absolute legally protected rights are, in particular, physical integrity and property. Any action that leads to a physical injury or property damage is thus illegal under the first element, which encompasses most types of damages typically incurred through police actions.⁵⁸ In addition, illegality is also given if the exercise of a public function violates commands or prohibitions of the legal order that serve to protect the legally protected right injured by such exercise.⁵⁹ This criteria is usually used in cases of pure economic loss where no absolute legally protected right is injured.⁶⁰

Once illegality is established in a first place, the question arises whether such illegality may be extinguished, the second element. No illegality is given if the injured person consented to the action that lead to the injury if such action is of a type to which consent can legally be given (for example, it is not possible to consent to another person killing oneself). In addition, the legitimate use of force by a public official too serves as an element that extinguishes illegality. However, not every injury is justified by the mere fact that no regulations are violated. The injury is only justified if it constitutes the legally provided purpose of an action (for example, privation of liberty is the purpose of an arrest) or if it is mandatorily related to the execution of

⁵⁶ Laws of New Zealand Police: Liabilities and Remedies (online ed) at [47].

⁵⁷ *Fyfe v O'Fee* [2003] NZAR 662 at [65]; the case subsequently went to the Court of Appeal but the issue was not reconsidered *Fyfe v Attorney-General* [2004] NZAR 731 at [60]; *Rigby v Chief Constable of Northamptonshire*, above at n 49.

⁵⁸ *BGE 132 II 449* at [3.3].

⁵⁹ *BGE 123 II 577* at [4d].

⁶⁰ At [4d)cc)].

the law, i.e., the official must cause an injury to fulfil the duties that he is obliged to fulfil by law. This principle is, however, not absolute. If the injury is an (i) unintended, (ii) not required by law and (iii) not needed to achieve the purposes provided by the law side effect occurring during the execution of a per se legitimate action, the injury is not justified.⁶¹

This leads to the question of what principles apply to the use of force by the police. The Police Act provides for a variety of such principles: Paragraph 8 sets out that the police service is bound by the legal order and has to respect the constitutional rights and human dignity of the individual. Paragraph 10 provides that the police service has to act in a proportionate manner, meaning, for example, that among several available measures, the police service has to choose the one that affects the affected persons and the community the least and such measures may not lead to a disadvantage that is recognisably disproportionate to the purpose intended by it. Paragraph 9 finally provides for a general right of the police service to prevent imminent severe danger to public order or security even without an explicit legal basis. If the police service fulfils its duties as the law provides or allows, its actions are legal even if the criminal code or another statute would punish such action.

Finally, it should be noted that the above principles may lead to situations where the police service has caused a damage but it is not liable due to its actions having been justified, with such situation not seeming just, e.g., because the damage was caused to an uninvolved third party. Paragraph 12 of the Liability Act provides for the possibility for the canton to be liable if a third party is injured by a legitimate action of the canton if a specific law provides so. Paragraph 56 of the Police Act provides that if legitimate police actions causes a damage to a third party then the canton may be liable for reasons of equity, provided that the injured third party has not caused the police action or has caused the damage in gross negligence.

4 *Analysis*

The English/New Zealand approach starts with the circumstances of the particular case and, based on these, decides whether the necessary elements for a duty of care (foreseeability, proximity, absence of policy reasons/fair, just and reasonable) are given. The additional elements of an employee of the canton and of acting in the exercise of a public function present in the Swiss test flows into such analysis where appropriate. This approach thus goes from the circumstances to the action. The Swiss approach goes the other way. It starts with the illegal action and then looks at the circumstances when questioning whether the action was justified. Notwithstanding these different approaches, the outcomes will often be similar. I see no need to give precedence to either of the two approaches as they are both the product of their relevant legal system, with the England/New Zealand approach being easily adaptable to new circumstances by finding new duties of care, if appropriate, while the Swiss approach provides the necessary statutory basis required in a civil law system, with the combination of illegal

⁶¹ At [4d)i)].

action and reasons for justification allowing it to take into account new circumstances as well (as any future action causing an illegal damage such as physical injury will result in liability, unless the illegality can subsequently be extinguished).

C Duty of Care for Omissions

1 England

The treatment of omission, i.e., police officers failing to act (including preventing a third party from injuring someone), is more controversial, in particular in connection with failures in the context of police investigations. Lord Reid, in *Robinson*, notes that “public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm”,⁶² referring to Lord Toulson’s dictum in *Michael v Chief Constable of South Wales Police* that “the common law does not generally impose liability for pure omissions”.⁶³ Lord Reid subsequently refers to the *omission principle* set out by Tofaris and Steel:⁶⁴

In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A’s status creates an obligation to protect B from that danger.

Related thereto, he further notes that they are not under a “duty of care towards individuals to prevent them from being harmed by the conduct of a third party” absent specific circumstances such as the public authority having created the danger or having assumed responsibility.⁶⁵

Omissions were the subject of a sequence of cases before *Robinson*, commencing with *Hill*. In *Hill*, the plaintiff’s daughter was the last victim of a serial killer, with the plaintiff claiming damages for negligence. The question to be asked, per Lord Keith, with whom Lords Brandon, Oliver and Goff agreed, was as follows:⁶⁶

The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.

⁶² *Robinson*, above n 7, at [34].

⁶³ *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [97].

⁶⁴ At [34]; Stelios Tofaris and Sandy Steel “Negligence Liability for Omissions and the Police” (2016) 75 CLJ 128 at 128.

⁶⁵ At [37].

⁶⁶ *Hill*, above n 8, at 59.

While the police service is subject to a common law duty to enforce the law, the common law does make no requirement how such duty is enforced.⁶⁷ Lord Keith then set out that foreseeability of harm itself was not sufficient but that proximity was also required, referring to the decision in *Dorset Yacht Co Ltd v Home Office*.⁶⁸ The victim in *Hill*, unlike the owner of yachts next to the island where borstal trainees were quartered and subsequently escaped from, damaging some of the yachts, in *Dorset*, was “at no special distinctive risk” and the element of proximity was not given.⁶⁹ While this element, in Lord Keith’s own words, was “sufficient for the disposal of the appeal”, he continued by looking at public policy.⁷⁰

Lord Keith noted several policy reasons why the police service should not be held liable in circumstances as those in *Hill*, i.e. investing and preventing crime (the *Hill* principle). These include that a liability would not reinforce the “general sense of public duty” that motivates the police force, that it might lead to a defensive mindset in carrying out investigative operations which often involved judgment calls, and that it may lead to a diversion of police resources away from preventing crime towards preparing defences against liability claim. He concluded that the police service should have an immunity against this kind of claims, similar to that of barrister regarding their conduct of proceedings in court existing at that time.⁷¹ It is this statement that lead to controversy, both in subsequent cases and in legal writing, or, as Lord Toulson put it in *Michael*:⁷²

If Lord Keith had stopped at that point [that no proximity was given], it is unlikely that the decision would have caused controversy ... However, having observed that what he had said was sufficient for the disposal of the appeal, Lord Keith went on

Subsequently, in *Brooks v Commissioner of Police of the Metropolis*,⁷³ the *Hill* principle was applied. The claimant, the victim of a racist attack in which his friend was killed, was dealt with by the investigating police officers in a manner that was subsequently severely criticised in an inquiry.⁷⁴ The question before the court were whether the investigating officers owed the victim a duty of care to assess his status as a victim and support him, including as usually afforded to a key witness, and to give reasonable weight to his account and act accordingly.⁷⁵

⁶⁷ At 59.

⁶⁸ *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (HL).

⁶⁹ At 62.

⁷⁰ At 63.

⁷¹ At [64].

⁷² *Michael*, above n 63, at [42–43].

⁷³ *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 (HL).

⁷⁴ At [1]; The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny of February 1999.

⁷⁵ At [14].

As set out in the speech by Lord Steyn, the alleged duties are linked to the police function of investigating crime and thus covered by the principle established in *Hill* and cannot exist.⁷⁶

Next, in *Smith v Chief Constable of the Sussex Police*,⁷⁷ the question of the police failing to properly investigate arose anew. In that case, the plaintiff informed the police over various threats that he received from his ex-partner and was told that the police would investigate. Some weeks later, the victim was attacked and severely injured.⁷⁸ Four of the judges denied liability of the police service based on the *Hill* principle.⁷⁹ Lord Bingham was the sole dissenting voice when he suggested introducing a new liability principle:⁸⁰

If a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.

He noted further that, in the present case, public policy pointed strongly towards imposition of a duty of care. Smith approached a professional force whose main function is to maintain the peace and prevent crime and was entitled to look to the police for protection. The police “owed him a duty to take reasonable steps to assess the threat to him and, if appropriate, take reasonable steps to prevent it”.⁸¹

The subsequent *Michael* case concerned the mishandling of an emergency call, leading to police officers arriving too late at the scene of an emergency. Five of their lordships denied liability, arguing in particular that the common law does not impose liability for pure omissions, though the claim under the Human Rights Act was allowed to go to trial.⁸² Lord Kerr, with support from Lady Hale,⁸³ in his dissent argued that the time had come to recognise a “legal duty of the police force to take action to protect a particular individual whose life or safety is, to the knowledge of the police, threatened by someone whose actions the police are able to restrain”.⁸⁴

Returning to *Robinson*, the case was ultimately decided to be a positive act and not an omission.⁸⁵ Nonetheless, Lord Kerr set out therein, by referring to Lord Toulson’s speech

⁷⁶ At [33].

⁷⁷ *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225 (HL).

⁷⁸ At [20–27].

⁷⁹ At [80] per Lord Hope, at [100–101] per Lord Phillips, at [106] per Lord Carswell, at [130] and [141] per Lord Brown.

⁸⁰ At [44].

⁸¹ At [60].

⁸² *Michael*, above n 63, at [97], [115–137] and [140].

⁸³ At [197–199].

⁸⁴ At [175].

⁸⁵ *Robinson*, above n 7, at [72–73].

in *Michael*, that there is no liability, absent special circumstances, in cases of pure omissions by the police such as the ones set out in the *omissions principle*.⁸⁶

The policy reasons underlying the *Hill* principle and the other decisions discussed above have been intensely discussed in legal writing as well, in particular by Tofaris and Steel.⁸⁷ First looking at the general reluctance of the common law to introduce liability for omissions outside special circumstances, based among else on individual freedom, lesser culpability as opposed to acts and erosion of individual responsibility, they find them not convincing as far as public authorities are concerned.⁸⁸ Regarding *Hill*, they note that the non-reinforcement of the general sense of duty mentioned by Lord Keith in *Hill* had already fallen into disfavour with the courts.⁸⁹ They were also not convinced by the other arguments from *Hill*, noting, among else, the weakening of the defensive policing argument in case law relating to other public authorities, including the *Dorset* case, and the potential positive effects of litigation (such as uncovering organisational failings).⁹⁰ Other arguments, such as the possibility to rely on alternative remedies, were not sufficient either, noting for example the additional requirements for bringing claims under the Human Rights Act.⁹¹

Turning then to arguments in favour of a duty, they note the “general moral duty to take reasonable steps to prevent reasonably foreseeable, avoidable physical suffering” as well as a special duty due to the police service’s special status and the fact that liability can increase accountability.⁹² The police service should be held liable for failing to prevent a crime that harmed a claimant if (i) such failure is justiciable, (ii) it was reasonably foreseeable that the failure would lead to harm to the claimant and the police service has either assumed responsibility for the claimant or the claimant is at special risk of harm, with the police service knowing about such risk, having the power to protect the claimant and such claimant depending on the police service’s protection, and no policy reasons

⁸⁶ At [34] and [54].

⁸⁷ Stelios Tofaris and Sandy Steel, above n 64.

⁸⁸ At 129–133.

⁸⁹ At 133; *Brooks*, above n 73, at [28].

⁹⁰ At 133–136; see also Claire McIvor “Getting Defensive about Police Negligence: The Hill Principle, the Human Rights Act 1998 and the House of Lords” (2010) 69 CLJ 133 at 135; Mandy Shircore “Police Liability for Negligent Investigations: When Will a Duty of Care Arise” (2006) 11 Deakin LR 33 at 59–60; Zoha Jamil “Police Liability for Negligent Investigations: Unravelling the Blanket of Immunity” (2013) 1 BBKLR 303 at 314–322 and Hanna Wilberg “Defensive practice or conflict of duties? Policy concerns in public authority negligence claims” (2010) 126 LQR 420 for further critical discussion of the *Hill* policy arguments.

⁹¹ At 139–141.

⁹² At 142; see also Dermot PJ Walsh “Police Liability for a Negligent Failure to Prevent Crime: Enhancing Accountability by Clearing the Public Policy Fog” (2011) 22 KLJ 27 at 53.

speak against recognising a duty, (iii) the police service breached its duty of care and (iv) the normal rules regarding causation and remoteness of damage are fulfilled.⁹³

In my view, both *Smith* and *Michael* were wrongly decided and I would side with the dissenting views. In each of the two cases, the police service had both the knowledge and the ability to prevent the crime in question but, due to gross errors, failed to do so. Relying on policy reasons to deny liability in negligence when the police service's failure is as evident as in these two cases sends the wrong signal to the general public, risking the support of the community on which the police service has to rely if it wants to be effective. The conditions for police liability set out by Tofaris and Steel appear to me a sensible approach to ensure liability in cases such as *Smith* and *Michael*, though their practical feasibility will still need to be established.

2 *New Zealand*

For New Zealand, the case of *Couch v Attorney General*⁹⁴, while not directly dealing with the police but with the probation service, provides guidance on whether a duty of care should be imposed in case of an omission. In such case, the victim of a violent assault by a parolee at their common work place claimed exemplary damages for failures by the Probation Service “to exercise reasonable care in the supervision of the parolee who seriously injured her”.⁹⁵

When analysing whether a duty of care existed, Tipping J, also on behalf of Blanchard and McGrath JJ, noted the law's traditional caution when imposing a duty of care for an omission, when a public authority acted for the benefit of the community as a whole and when it were the actions of a third party that caused the damage in question.⁹⁶ All three of these elements will generally be fulfilled in a case where the police service did not act to stop a potential offender and such offender subsequently caused a damage to a third party. The required link between the defendant's actions and the harm could, however, be established if the defendant had “sufficient power and ability to exercise the necessary control over the immediate wrongdoer”.⁹⁷ The question would thus turn on whether the police officers were in a position to stop the offender.

Furthermore, it is also required that the relationship between plaintiff and defendant is special in a way that there is “sufficient proximity between the parties to render it fair, just and reasonable, subject to matters of policy, to impose the duty of care in issue.”⁹⁸ The plaintiff has to demonstrate that she, “as an individual or as a member of an identifiable and sufficiently

⁹³ At 156–157.

⁹⁴ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

⁹⁵ At [1].

⁹⁶ At [80].

⁹⁷ At [82].

⁹⁸ At [85].

delineated class”, was subject of a distinct and special risk of suffering harm of the type inflicted.⁹⁹

Elias CJ and Anderson J took a somewhat wider view when considering to whom a duty was owed. In particular, they did not consider it necessary that a duty of care can only be owed to members of a limited class, noting that such class may be a wide class and go as far as the general public if the responsibilities imposed are for public protection and the risk warrants it. They further noted that knowledge of the actual risk posed by the offender is critical in any decision regarding legal responsibility.¹⁰⁰

The applicability of these principles thus decides whether police officers may be found to have been subject to particular duties of care that makes them liable for omissions. In my view, cases similar to *Smith* or *Michael* where the police has information about an actual threat and the possibility to intervene but does not do so should fulfil the conditions set out in *Couch*.

From a procedural perspective, the Crown Proceedings Act 1950 needs to be taken into account as well. Pursuant to s 6 thereof, the Crown may only be sued vicariously for actions of its servants. With regard to omissions by the police service, the situation may arise that a failure to act is not attributable to specific police officers, with the question then being whether the police service itself may be sued in tort. In this regard, the Supreme Court held, in *Couch v Attorney General (No 2)* with respect to the probation service, that s 6 did not bar bringing an action against the Crown in those circumstances.¹⁰¹ From a legislative perspective, this issue, among others, has led to a proposal by the Law Commission to amend s 6 of the Crown Proceedings Act to allow the Crown to be directly sued in tort.¹⁰²

Interestingly, given the reluctance in England to impose duties of care on the police with regard to negligent investigation and the High Court’s refusal to admit a general duty of care to enforce and maintain the rule of law in *Evers v Attorney General* (referring heavily to the English precedents cited above),¹⁰³ the High Court, in a strike-out application in *King v Attorney General*, nevertheless noted that the police, while not owing a suspect a duty of care before laying a charge, may owe one once charges have been laid, allowing the case to go to trial.¹⁰⁴

3 Switzerland

As regards omission, the general principle in Switzerland corresponds to the one in England and New Zealand: If someone fails to act in circumstances in which he is not obliged to act by the legal order he does not act illegally and thus no liability ensues. There is no general legal

⁹⁹ At [112].

¹⁰⁰ At [67–68].

¹⁰¹ *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [71].

¹⁰² Law Commission *A new Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014) at 8, 10–13 and 59.

¹⁰³ *Evers v Attorney-General* [2000] NZAR 372 at [22–28].

¹⁰⁴ *King v Attorney-General* [2017] NZHC 1696, [2017] 3 NZLR 556 at [140].

obligation to act in the interests of others. Illegality through omission can only arise if the law demands an action or explicitly punishes the omission. Furthermore, such a failure to act is only relevant, from a liability perspective, if it is in the interest of the person suffering a damage and results from a protective obligation for the benefit of such person. For an omission to be illegal a position of guarantee in favour of the person suffering a damage is thus required. Protective obligations resulting in a position of guarantee may result out of anywhere in the legal order, including out general legal principles.¹⁰⁵ For a public official, a violation of such position of guarantee may lie in a violation of the legal rules defining the scope of such protective obligation.¹⁰⁶

The question to be asked is thus to what extent police officers of Zurich have such a position of guarantee towards members of the public that become the victims of crimes. I was unable to find any pertinent decisions, either from the Supreme Court or the Court of Appeals of the canton of Zurich, giving a definite answer to that question. However, it is nevertheless worthwhile to consider the following arguments.

A position of guarantee may arise from anywhere in the legal order. The Police Act and Police Organisation Act define the obligations of the police service of the canton of Zurich.¹⁰⁷ These include the maintenance of public order, assisting the population and preventing crime. Based thereon, an argument could be constructed that these protective obligations result in police officers being in a position of guarantee. A victim of a crime may then argue that, since the police failed to prevent a crime, it had violated such protective obligation and is thus liable (if the other conditions of para 6 Liability Act are fulfilled).

4 *Analysis*

Both the England/New Zealand and the Swiss approach show a certain reluctance to admit liability for police officers failing to act. Such reluctance goes from the, despite some dissenting voices,¹⁰⁸ hostility of the English Supreme Court to allow liability for omissions outside of the four areas described in the *omissions principle* described in *Robinson*, to the still rather high hurdles set out in *Couch* for New Zealand, to the requirement of the guarantee position under the Swiss approach. However, the current reluctance that exists in England, in my view, goes too far. Where the police officers make gross errors, they should be held liable also for omissions. The decision in *Couch*, at least, as well as *King v Attorney General*, provides hope that the New Zealand Supreme Court would not tolerate clear failures of the police service. Finally, why I am unable to make any final statements regarding Switzerland due to an absence of a pertinent Swiss Supreme Court judgment, I would be surprised if a court denies liability if

¹⁰⁵ *BGer 2C_1059/2014* at [5.3]; *BGE 116 1b 367* at [4c]; *BGE 115 II 15* at [3c)].

¹⁰⁶ *BGE 123 II 577* at [4d)ff)]; Bernhard Ruetsche “Staatshaftung für bewilligte Sicherheitsrisiken – warum die objektive Widerrechtlichkeitstheorie nicht funktioniert“ (2011) jusletter 4. April 2011 at [4].

¹⁰⁷ Police Act, paras 3–7, and Police Organisation Act, paras 7–10.

¹⁰⁸ See the dissenting speeches of Lords Bingham and Kerr in *Smith and Michael*, respectively.

the police service was grossly negligent in preventing a crime, be it due to not taking complaints seriously, be it due to not replying adequately to an emergency call.

D Breach of Duty

1 England & New Zealand

Once a duty of care has been established, liability under the tort of negligence requires that such duty be breached. The question asked is whether the defendant is careless, by failing to conform with the standard of care that is applicable to him.¹⁰⁹ Or, in the words of Pearson J, “negligence consists in doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation”.¹¹⁰ Furthermore, with regard to professionals, including police officers, the standard of the reasonable person set out in Pearson’s dictum is the one of a “reasonably competent person in the profession in question”.¹¹¹

New Zealand follows the English approach when considering whether a duty of care, once established, has been breached. Per Greig J, the “standard of care in all cases of negligence is that of the reasonable man”,¹¹² with Todd describing a reasonable person as a person of “ordinary intelligence and perception, and with possessing the common knowledge that enables him or her to appreciate danger and take steps to guard against it”.¹¹³ And, in the case of a skilled profession which includes police officers, members of such profession must “exhibit the care reasonably to be expected of skilled and informed members of their respective professions”.¹¹⁴

2 Switzerland

The criteria for breach of duty has no direct equivalent in the Liability Act as the mere causing of the damage is sufficient for liability to arise (provided that the other conditions are fulfilled as well). However, under art 41 Swiss Code of Obligations, the element of acting with intent or in negligence would fulfil a similar purpose by requiring that the tortfeasor acted with fault. The absence of this element is the major difference between the general liability provision and liability under the Liability Act. Notwithstanding this point, it should be noted that when analysing whether an action causing a damage was justified, the question whether the tortfeasor acted reasonably is taken into account as well. For example, it would be difficult to imagine

¹⁰⁹ Simon Deakin, Angus Johnston and Basil Markesinis *Markesinis and Deakin’s Tort Law* (7th ed, Clarendon Press, Oxford 2013) at 198.

¹¹⁰ *Hazell v British Transport Commission* [1958] 1 WLR 169 (QB) at 171.

¹¹¹ Simon Deakin, Angus Johnston and Basil Markesinis, above n 109, at 198.

¹¹² *Stieller v Porirua City Council* [1983] NZLR 628 at 635.

¹¹³ Stephen Todd “Negligence: Breach of Duty” in Stephen Todd, Ursula Cheer, Cynthia Hawes and Bill Atkin *The Law of Torts in New Zealand* (7th ed, 25th anniversary ed, Thomson Reuters, Wellington, 2016) at 421.

¹¹⁴ At 422.

that a tortfeasor that intentionally causes an unnecessary damage acted proportionally, with his actions thus no longer being justified.

3 *Analysis*

The second element of the tort, which requires that the tortfeasor did not act as a reasonable person would have in his situation, is at first sight absent from the Swiss test. Unlike the general Code of Obligations provision, the liability of the canton of Zurich does not require the employee to have acted with intent or with negligence. While this may at first look like a liability of a substantially wider scope than under the tort of negligence, this is not necessarily the case. The second element of the illegality test which extinguishes illegality, and thus liability, if the action was justified and the inclusion of the legitimate use of force defence will likely capture the majority of cases where liability under the tort of negligence would fail due to an existing duty not being breached. It is difficult to imagine a scenario where an unreasonable action or behaviour (that qualifies as a breach of duty) would qualify as a legitimate use of force and vice-versa.

E Damage

1 *England & New Zealand*

The third element of the tort of negligence requires a damage. The damages owed by the defendant consists of the amount required to put the plaintiff in the same position as if the tortious action (or omission) had not occurred.¹¹⁵ However, for New Zealand, the Accident Compensation Scheme removes a major part of the potential damages that may result from police actions. It provides cover for personal injuries such as death and physical injury¹¹⁶ and, by way of the statutory ban, prevents proceeding for damages under any rule of law or enactment.¹¹⁷ This leaves property damage as well as mental injuries that are not caused by certain criminal acts or work-related¹¹⁸ as the major areas where police officers may still be held liable under the tort of negligence. In addition, it should be noted that, pursuant to the Supreme Court's decision in *Couch v Attorney General (No 2)*, the statutory ban applies only to compensatory damages and does not prevent actions for exemplary damages.¹¹⁹

2 *Switzerland*

As under English and New Zealand law, the action of the police officer must cause a damage. The Supreme Court of Switzerland, in its long-standing jurisprudence, defines damage as follows: Damage is the unwanted reduction of the net assets. It can consist of a reduction of

¹¹⁵ Simon Deakin, Angus Johnston and Basil Markesinis, above n 109, at 803; Laws of New Zealand Damage: The Measure of Damages: General Principles (online ed) at [57].

¹¹⁶ Accident Compensation Act 2001, ss 20 and 26

¹¹⁷ Section 317(1).

¹¹⁸ Sections 21 and 21B.

¹¹⁹ *Couch v Attorney-General (No 2)*, above n 101, at [88].

assets, an increase of liabilities or in a loss of profits and corresponds to the difference between the current net assets and the level that the net assets would have had had the event causing a damage not occurred.¹²⁰ The Swiss approach is thus comparable to the one in England and New Zealand.

The Liability Act explicitly sets out the types of damages compensated in case of the death of a person where the damages consists of the incurred costs, including those for burial, and, if the death was not imminent, the healing costs and the disadvantages due to an inability to work¹²¹ plus, if the deceased was the provider for dependent persons, such dependent persons' damages arising due to the loss of their provider.¹²² For physical injuries, the damage consists of the costs incurred, including compensation for the disadvantages of full or partial inability to work, which has to take into account the increased difficult of professional advancement.¹²³ Furthermore, property damage, while not further elaborated on in the Liability Act, includes repair costs, rental costs, value reduction or replacement costs. Finally, the Liability Act also provides for the possibility to pay satisfaction (conceptually similar to aggravated damages) in cases of physical injury or death if the specific circumstances of a case justify it.¹²⁴

3 *Analysis*

The element of damage, where both England/New Zealand and Switzerland seek to place the injured party in the position it would have had if the tort had not occurred, follow the same principles in all jurisdictions, except for the statutory ban in respect of personal injuries in New Zealand.¹²⁵

F Causality & Remoteness

1 England & New Zealand

The fourth element of the tort negligence, causality and remoteness, requires that the tortious act causes a damage and that such damage is not remote. Causality applies the but-for or condition sine qua non test. It asks whether the damage would have occurred but for the action of the tortfeasor.¹²⁶ The second part, remoteness, serves as a qualifier on liability, given the wide area of potential factual scenarios that a pure but-for test may encompass. Remoteness

¹²⁰ *BGE 129 III 331* at [2.1].

¹²¹ Liability Act, para 8.

¹²² Liability Act, para 8.

¹²³ Liability Act, para 9.

¹²⁴ Liability Act, para 10.

¹²⁵ Accident Compensation Act, s 317(1).

¹²⁶ Edwin Peel and James Goudkamp, above n 13, at 165; Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd, Ursula Cheer, Cynthia Hawes and Bill Atkin *The Law of Torts in New Zealand* (7th ed, 25th anniversary ed, Thomson Reuters, Wellington, 2016) at 1098 – 1099.

asks the question whether the damage was a foreseeable consequence, i.e., that a reasonable person must have seen a real risk that such a damage would result.¹²⁷

2 *Switzerland*

Swiss tort law analyses the element of remoteness under the term causality. Causality as understood for purposes of state liability under the Liability Act is the same as under the Code of Obligations. There is thus no difference between public law liability and private law liability in this element.

Causality requires both natural causality and adequate causality. Natural causality, in the words of the Supreme Court, is given if a behaviour is the condition sine qua non of the result, i.e., without such behaviour the resulting damage could not have occurred.¹²⁸ This element is thus comparable to the causality requirement under the tort of negligence. Given that natural causality can include extremely remote behaviour, causality also requires adequate causality. Adequate causality, in the long-standing jurisprudence of the Swiss Supreme Court, is given if an event is, in the ordinary course of events and pursuant to general life experience, suitable to lead to a result of the type which actually resulted and serves as a limitation to liability.¹²⁹ Adequate causality thus takes the place of the remoteness criteria in the tort of negligence.

In addition, it is worth noting that the causality formula described above needs to be amended in case of omissions. In such a case, the person held liable failed to make a change to the causality which it was obliged to effect, thus leading to the damage. Such hypothetical causality is given if timely action would have prevented the damage with a strong likelihood.¹³⁰

3 *Analysis*

As for the element of damage, the analysis of the elements of causation and remoteness follow the same principles as well. Causation/natural causality ask the same question, while remoteness/adequate causality have the same purpose, to serve as a limit to liability by demanding a certain proximity between the action leading to a damage and the damage itself.

IV *Lessons to be Learned*

Having discussed the differences and parallels in the approaches taken in England, New Zealand and Switzerland, the question arises what lessons the courts may learn from each other.

One that Switzerland may teach the common law courts is when to include violations of constitutional or human rights. In the Swiss approach, the Police Act specifies that the police service respects the constitutional rights and human dignity. The violation of constitutional

¹²⁷ Simon Deakin, Angus Johnston and Basil Markesinis, above n 109, at 247–250; *Laws of New Zealand Tort: The General Law of Tort* (online ed) at [9].

¹²⁸ *BGE 128 III 174* at [2b].

¹²⁹ *BGE 123 III 110* at [3a].

¹³⁰ *BGer 2C_1059/2014* at [5.2].

rights by police actions is thus a strong indication that such actions were illegal. Such approach could be included in the duty of care analysis, for example with a presumption that the police service owes a duty of care to persons it encounters to not injure their constitutional or human rights, instead of primarily analysing these issues in a separate cause of action under the Human Rights Act or the New Zealand Bill of Rights Act.

A second concerns whether the police service should be put on the offensive or the defensive. In Switzerland, once police officers have caused a physical injury or a property damage, the police service is on the defensive. It has to prove that the actions of the police officers have been justified under the legitimate use of force exception and are thus legal. Transposing such an approach to the common law countries would take some of the burden away from plaintiffs as they would no longer have to argue that the police service should, absent exonerating circumstances, be held liable. The damage would speak for itself. However, while the *Anns* test had a similar approach, the subsequent retreat from *Anns* and rewording of the questions asked, respectively, suggests limited willingness in the common law courts to consider such a change.

The element that the police service may only be held liable if it is fair, just and reasonable to do so present in both England and New Zealand could be used to inform the Swiss analysis when considering whether an action that lead to a damage was justified or not. It would allow the courts to consider more arguments when analysing justification, instead of relying primarily on those set out in the relevant laws such as the principles of police actions set out in the Police Act.

While not accepted by the majority in *Michael*, Lord Kerr's proposal that the police service has to protect someone who is in danger if it knows about such danger and is able to contain it and thus is liable if it fails to do so should be applied in Switzerland as well. In such a case, the courts should find that the police was in a position of guarantee towards the endangered individual, and thus liable if it fails to protect such individual.

Finally, New Zealand's Accident Compensation Scheme might have a lesson to teach to both England and Switzerland. By introducing a statutory compensation scheme for physical injuries, it provides compensation for a substantial number of potential police liability actions while circumventing the difficult questions of how far the police service's liability should go. It can also help to circumvent the floodgate issue of limitless litigation due to such litigation being banned. While it may not resolve all issues (exemplary damages and mental injuries come to mind), it may assist in preventing a substantial number of lawsuits against the police.

V Conclusion

Switzerland and New Zealand are not only geographically far apart, but also, at first, glance with regard to their legal systems: One of the two is a common law jurisdiction, the other is a civil law jurisdiction; one of them is an unitary state, the other a federal state consisting of cantons that jealously guard their sovereignty, with all the added complexity (and potential for

divergence) that such a system brings. Nevertheless, as I have shown in this paper, there are substantial parallels at least as far as the tort of negligence (in England and New Zealand) and its Swiss public law liability near-equivalent are concerned. The pertinent concepts exist in all jurisdictions, albeit under different names and somewhat different approaches – existence of a duty of care vs illegality comes to mind. The jurisdictions share a view that police officers should not enjoy *carte blanche* and be liable for direct actions leading to damages. They also share a reluctance to generally allowing liability for omissions outside of narrowly defined areas, though in my view, England is currently going too far, with the dissenting views set out by Lords Bingham and Kerr being the better approach.

Notwithstanding the numerous parallels that already exist, I have identified a number of lessons that courts may take from each other, such as including the element of fair, just and reasonable in the Swiss analysis or constitutional and human rights in the English and New Zealand duty of care analysis. It will be interesting to see whether any of these will be applied in any upcoming police liability cases in any of the jurisdictions.

* * *

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