IN 2007, the Metropolitan Police Commissioner was sued for false imprisonment and battery allegedly committed by police officers for whom the Commissioner was vicariously liable. The Commissioner admitted liability and apologised for the officers’ “gratuitous violence”. Those officers in turn brought a claim against the Commissioner, alleging breach of a duty of care to safeguard their economic and reputational interests by the Commissioner when defending the original (battery) claim. But in James-Bowen v Metropolitan Police Commissioner [2018] UKSC 40, [2018] 1 W.L.R. 4021, it was held that no such duty exists.

Lord Lloyd-Jones identified a number of policy reasons telling against liability. Foremost among these was the conflict of interests between the parties. Litigants (such as the Commissioner in the original claim) should be free to pursue their own interests when deciding whether and how to defend or settle. This freedom should not be undermined by requiring consideration of the interests of (e.g.) employees; “stark differences” may exist (at [32]).

Regarding the conduct of civil litigation generally, the alleged duty would have had a number of undesirable effects. The fear of liability could chill, delay and disrupt the defence of civil proceedings; could “operate as a powerful disincentive to settlement” (at [36]); and provide a “fruitful source” of undesirable satellite litigation (at [38]). Frank, confidential communication between litigants and their legal advisers could also be inhibited by the apprehension of disclosure in subsequent satellite litigation. Finally, given the Commissioner’s overall responsibility for the Metropolitan Police in addition to being the claimant officers’ (quasi-) employer, it was important that the Commissioner be able to discharge that public duty free of distractions.

Taken together this forms a powerful case for the denial of a duty of care. There are also reasons that favour the claimants’ position. That is not to criticise the Supreme Court’s decision. Cogent, competing arguments are inevitable at the frontier of liability. It is a strength, not a weakness, to admit this openly and weigh up the contending considerations. That is the court’s function. It is welcome that this happened in James-Bowen. It is pleasant to report that the Supreme Court still sometimes allows such policy reasoning in negligence cases.

Compare Robinson v Chief Constable of West Yorkshire [2018] UKSC 4, [2018] A.C. 736. Lord Reed held that only in supposedly novel cases is consideration of policy appropriate or even permissible. (We use “policy” as a synonym for “fair, just and reasonable”, following Lord Bingham in Customs and Excise Commissioners v Barclays Bank plc [2006] UKHL 28, [2007] 1 A.C. 181, at [4], [7].) Robinson fell within the paradigm category of established negligence liability (i.e. direct physical injury).
Lord Reed therefore held that the Court of Appeal in Robinson had not merely balanced the competing policies incorrectly but erred by taking policy into account at all. It was wrong even to entertain the chief constable’s argument that no duty was owed during active police operations (pursuit of a suspected criminal). (For another rebuke to the Court of Appeal for considering policy reasons countervailing against supposedly established liability, see also now Darnley v Croydon Health Services NHS Trust [2018] UKSC 50, [2018] 3 W.L.R. 1153.)

A ready passport to success is therefore to persuade the court that liability is “established”, at which point arguments against the existence of the duty of care cannot even be heard (short of asking the Supreme Court itself to reconsider the “established” liability). Counsel for the claimants in James-Bowen understandably placed at the “forefront” of his argument an employer’s well-established contractual duty of trust and confidence, contending that it left “no scope or need for the court to conduct an assessment of ... whether the imposition of such a duty would be fair, just and reasonable” (at [14]). Alas for the claimants, and in contrast to Robinson and Darnley, the court was unconvinced. The employer’s duty of trust and confidence was accepted to apply, by analogy, to the Commissioner as a “quasi employer”. But it has never been generalised into an overarching duty to protect employees’ economic well-being (e.g. Crossley v Faithful & Gould Holdings Ltd. [2004] EWCA Civ 293, [2004] I.C.R. 1615, where Dyson L.J. said (at [36]) that delimiting the trust and confidence duty requires “balancing of competing policy considerations”). It had not previously encompassed a duty to protect employees against harm occasioned by the employer’s conduct of litigation. The claimants accordingly argued for expansion of liability to a novel situation, and this had to be “tested against considerations of legal policy” (at [23]).

The policy arguments relied upon have been summarised. By contrast, the Court of Appeal had held that a duty of care arguably existed (an arguable duty being sufficient to defeat the Commissioner’s application to strike out the police officers’ claim). Accepting that the Commissioner had a duty to act in the best interests of the Metropolitan Police (and by extension the public) when defending the battery claim, Moore-Bick L.J. did not think that liability to the officers would necessarily undermine it. A duty to take “reasonable care not to sacrifice [the claimant officers’] interests and professional reputations without good reason” would not inevitably cut across the Commissioner’s public responsibility for the police force as a whole: [2016] EWCA Civ 1217, at [36]. What Moore-Bick L.J. seems to have had in mind is that this duty of care would be easily discharged. Provided the Commissioner could show a “good reason” for having admitted liability for battery, the Commissioner would not (indeed could not) be in breach, notwithstanding foreseeable damage to the officers’ reputations.
Moore-Bick L.J.’s alternative approach to divided loyalty problems is not unprecedented. At one time advocates did not owe duties of care to their clients. Tort liability was thought to imperil the administration of justice by inhibiting an advocate’s fearless discharge of his “overriding duty to the court . . . [which may often] conflict with his client’s wishes”: Rondel v Worsley [1969] 1 A.C. 191, 227, per Lord Reid. But Rondel was overruled in Arthur J.S. Hall & Co. v Simons [2002] 1 A.C. 615. Advocates now can be sued in negligence. The House of Lords was not dissuaded by the divided loyalty argument. Lord Hoffmann commented (Hall v Simons, pp. 692–93) that if an advocate damaged his client’s interests while performing his public duty (e.g. disclosing authorities contrary to his case) this could never constitute breach of the duty owed to the client: “It cannot possibly be negligent to act in accordance with one’s duty to the court.”

In James-Bowen, Lord Lloyd-Jones accepted that “divided loyalty” is not necessarily conclusive against liability: [2018] UKSC 40, at [29]. As he noted, children’s homes owe duties of trust and confidence to their employees and duties of care to resident children. The latter duty prevails should they conflict: Gogay v Hertfordshire County Council [2000] I.R.L.R. 703. In substance this resembles the reconciliation of conflicting duties in Hall v Simons (not cited to or by the Supreme Court) and by Moore-Bick L.J. The reconciliation uses breach, not duty. It is more nuanced and fact-based. While recognising a duty of care in principle, it would not allow a negligence claim when alleged “breach” flows from loyal performance of a paramount duty, such as to vulnerable children (Gogay), to the court (Hall v Simons) or to the public (James-Bowen). Whereas an error, oversight or conscious sacrifice of the claimant’s interest “without good reason” (per Moore-Bick L.J.) could sound in negligence.

 Liability insurers are also subject to an analogous duty. Such insurers take over the defence of a claim. They may decide to admit liability, even though this harms the reputation of an assured (i.e. alleged tortfeasor) who preferred to defend the claim vigorously. The insurer has wide freedom to act as it thinks best. But there are limits: insurers must pursue “what they bona fide consider to be the common interest of themselves and their assured” (Groom v Crocker [1939] 1 K.B. 194, 203, per Greene M.R. – finding breach of this (contractual) duty, and also libel, when the insurer falsely admitted that the assured had negligently caused a road accident, knowing he had not). See further M.A. Clarke, The Law of Liability Insurance (London 2014), 83–85, and Ramsook v Crossley [2018] UKPC 9, [2018] R.T.R. 29, at [27], per Lord Mance. The tension between the insurer’s and assured’s interests mirrors the tension between vicariously liable employer’s and alleged-tortfeasor employee’s interests in James-Bowen. But this line of authority was not cited to or by the Supreme Court either.
Cases the other way include *J.D. v East Berkshire N.H.S. Trust* [2005] UKHL 23, [2005] 2 A.C. 373, on which Lord Lloyd-Jones relied. These authorities hold that an important duty to one group *does* preclude a cross-cutting duty of care to others. The two lines of authority are hard to reconcile. It is not entirely clear why Lord Lloyd-Jones preferred the *J.D.* approach. Was it the importance accorded to the Commissioner’s public duty which turned the scale, rather than the desirability of litigant freedom inherent in (all) civil proceedings? In which case does *James-Bowen* apply with full vigour (or at all) to a private employer? The arguments were finely balanced. Ultimately the Supreme Court’s function is to weigh them up and decide. In doing so, it must take all relevant policy considerations into account. *James-Bowen* is a welcome return to this approach.

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SECOND DEGREE BYRNE

WHERE a person (A) negligently misrepresents a fact to another (B) and that representation is then communicated by B to his undisclosed principal (P) who incurs loss in reliance on it, does A owe a duty of care with respect to the representation to B alone, or also to P? This was the question the Supreme Court considered in *Banca Nazionale de Lavoro v Playboy Club London* [2018] UKSC 43, [2018] 1 W.L.R. 4041. The Court held that the representor did not owe a duty of care to the undisclosed principal because it had only “assumed responsibility” towards the person to whom the information had been directly communicated. In so concluding, the Court rejected an attempt to argue by analogy from contractual agency principles, holding that although a person could be liable in contract to his co-contractor’s undisclosed principal, it did not follow that a negligent representor would be liable in tort to the representee’s undisclosed principal.

Playboy Club operated a casino. A member of the Club, Mr. Barakat, requested a cheque cashing facility to enable him to exchange cheques for casino chips. Before granting such a facility, it was the Club’s policy to seek a banker’s reference, verifying that the member had sufficient funds to meet liabilities of twice the facility’s limit. To protect its members’ privacy the Club used another company in its group, Burlington Street Services (Burlington), to obtain references on its behalf. Burlington duly obtained a reference from Barakat’s bank, Banca Nazionale del Lavoro (BNL), confirming that Barakat was trustworthy up to £1,600,000 in any one week. Relying on this, the Club approved Barakat’s facility. He used...