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# Confusion, contradiction and chaos within the House of Lords post *Caparo v Dickman*

John Hartshorne\*

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*This article seeks to demonstrate how decisions of the House of Lords upon duty of care in negligence following Caparo Industries plc v Dickman [1990] 2 AC 605 have introduced confusion into the law and created avoidable difficulties for those who must apply them. It describes the varying concepts which have been adopted by their Lordships when analysing whether to create new duties of care, and explores the extent to which these concepts are intelligible. It draws attention to the contradictory reasoning adopted by their Lordships, which has contributed to general erosion in the integrity of their judgments. It is contended that the making of just decisions and the creation of clear laws are not necessarily mutually incompatible objectives.*

## INTRODUCTION

The House of Lords, as a supreme appellate tribunal, should not merely endeavour to ensure that justice is done in the individual appeals which are argued before it, but it should also attempt to shape and develop the law in a manner which is conducive to the effective operation of the doctrine of stare decisis. Lower court judges, lawyers and teachers are obliged to apply, advise upon, and teach the law as crafted by the appellate courts. Where there is confusion, contradiction or even chaos within the jurisprudence of the appellate courts, however, injustice, unpredictability of outcome and despair will inevitably follow in its wake. On any rational level such mischief should be reduced to a minimum. Yet in the sphere of duty of care within the law of negligence, it would appear that the House of Lords has been set upon a course diametrically opposed to this ideal. As this article seeks to demonstrate, decisions of the House of Lords upon duty of care have of late reduced to the brink of incomprehensibility issues such as which, if any, legal principles should be applied in determining whether a duty of care was owed, and what those principles actually mean. It could be contended that in many appeals their Lordships were preoccupied with arriving at a just outcome and that in order to do so they manipulated and did violence to existing legal principles. Many might see this as the inevitable trade-off where matters of justice are concerned. However, such a perspective would presumably only have been arrived at after discounting the possibility that appellate decisions could afford both a just outcome *and* legal certainty for those who must apply them.

This article shares some parallels with the article written by Stanton on decision-making in the tort of negligence in the House of Lords published in this Review in 2007.<sup>1</sup> Stanton considered the methodologies used by the House when deciding negligence cases, and considered the extent to which the House has abandoned the formal use of precedent in favour of policy-based decision-making. This article also considers methodologies adopted by the House of Lords in deciding cases, but focuses upon the intelligibility of these methodologies. The author agrees with Stanton's analysis that reasoning against what may be termed "policy" rather than against precedent has become a prominent feature of many of the decisions of the House, albeit against the unifying backdrop of the third limb of the *Caparo* test in several of these cases. What this article will seek to demonstrate, however, is that the House has generated utter confusion about the role and intelligibility of the concept of "policy", and about whether in reality there is any distinction to be made between the concepts of "public policy", "legal policy", "distributive justice" and "fairness, justice and reasonableness". Moreover, it will be shown that many of these policies have been analysed in a manner which has eroded their integrity, and with it the credibility of some of the judgments in which they have been deployed. So even if methodologies and underlying policies can be identified, this

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\* Lecturer in Law, University of Leicester.

<sup>1</sup> Stanton K, "Decision-making in the Tort of Negligence in the House of Lords" (2007) 15 Tort L Rev 93.

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does not necessarily make it any easier for lawyers to understand judgments, advise clients or predict the outcome of cases, even where these policies are operating within what may appear to be a “pocket of liability”: that is a central message of this article.

In the sections which follow an attempt is made to demonstrate how their Lordships have introduced confusion into the law of negligence through inconsistent and contradictory reasoning. The analysis of the case law has been limited to those decisions handed down since 1990. This is not an arbitrary starting point, however, but the year in which the House handed down its judgment in *Caparo Industries plc v Dickman* [1990] 2 AC 605. This decision represented an attempt by the House to describe the preferred method of analysing whether a duty of care was owed by the defendant. It is therefore apt that a decision which endeavoured to set the law of duty of care upon a new path should be adopted as the starting point for an analysis of whether this law is now lost in the woods. The first area of confusion to be considered is whether the decision in *Caparo* should be viewed by legal professionals as having laid down a “test” for ascertaining whether a duty of care was owed in negligence.

### **CAPARO V DICKMAN: A TEST OR NOT A TEST?**

As every student of tort learns, the decision in *Caparo* represented the culmination of the so-called “retreat from *Anns*”. The two-stage “test” of duty culled from the speech of Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 had become increasingly deprecated in judgments of the House of Lords because of its expansionist tendencies, and it was finally consigned to outdated tort texts by the decision in *Caparo*. Part of the dissatisfaction with the *Anns* test lay in the objection that there should, or indeed could, be any test for establishing a duty of care in negligence. Thus in *Caparo* Lord Bridge stressed the inability of any single general principle to provide a practical test which could be applied to every situation to determine whether a duty of care was owed (at 617). In his Lordship’s opinion (at 617-618), in addition to the requirement of foreseeability of damage,

necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

In addition, his Lordship stressed that novel categories of duty ought to be developed incrementally and by analogy with established categories of duty (at 618). Lord Bridge immediately sought to scotch any encouragement to view the foregoing as merely representing the substitution of one test of duty for another; according to his Lordship (at 618):

[T]he concepts of proximity and fairness ... are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.

To anyone involved in the practice of the law, attempts to retard the expansion of liability through the abandonment of tests or principles will be viewed as ultimately self-defeating. Despite Stapleton’s view that there is no test for a duty of care and that there can be no “duty test”,<sup>2</sup> the daily business of advising clients, drafting pleadings, framing submissions for court, and even drafting of judgments creates an irrepressible incentive for lawyers to distil principles, guidelines and indeed tests from appellate judgments. Over time, several Law Lords appear to have arrived at the inevitable conclusion that *Caparo* did indeed establish what may be described as a framework test for the creation of a duty

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<sup>2</sup> Stapleton J, “Duty of Care Factors: A Selection from the Judicial Menus” in Cane P and Stapleton J (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford University Press, Oxford, 1998) p 60.

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of care, irrespective of the efforts of their Lordships in *Caparo* to achieve otherwise. Statements to this effect have been evident in some of the more recent decisions of the House of Lords in negligence. So in *JD v East Berkshire Community Health NHS Trust* [2005] 2 AC 373; [2005] UKHL 23 concerning the liability of social workers and health care professionals towards parents, Lord Bingham spoke (at [2]) of “applying the familiar test laid down in *Caparo*”. In *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495; [2005] UKHL 24 concerning the liability of the police towards victims and witnesses of crime, Lord Steyn stated (at [17]) that “counsel accepted that the issues must be resolved in the framework of the principles stated in *Caparo*”. Likewise in *Sutradhar v Natural Environment Research Council* [2006] 4 All ER 490; [2006] UKHL 33, concerning the liability of the research council towards consumers of polluted drinking water in Bangladesh, Lord Hoffmann said (at [32]) that the “standard framework within which this question is usually examined is to ask whether the damage was reasonably foreseeable, whether there was sufficient ‘proximity’ between the claimant and the defendant and whether it is fair, just and reasonable to impose a duty: see Lord Bridge of Harwich in *Caparo*”. Similarly Lord Brown spoke (at [49]) of the “three pre-conditions to the imposition of a duty of care classically formulated in *Caparo*”. The greatest suggestion yet that the House of Lords may have turned full circle since its decision in *Caparo* may be found in the judgment of Lord Bingham in *Customs and Excise Commissioners v Barclays Bank plc* [2006] 3 WLR 1; [2006] UKHL 28, where his Lordship spoke (at [8]) of “the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances”. Moreover, earlier on in his judgment (at [4]), his Lordship had used a heading titled “The test of tortious liability in negligence for pure financial loss” under which reference was made to what “is commonly known as the threefold test”.

It may be seen therefore that the House of Lords has transmitted distinctly mixed signals to practitioners concerning whether the analysis of the duty question should take place according to tests and frameworks, or instead be decided with reference to the selection of random factors. This inconsistency has been unhelpful to lawyers and lower court judges, to put it mildly. Steele has observed, eg, how “in *Caparo* ... the elements of the test (especially the ‘proximity’ part of it) have been declared (whether boldly or despairingly) to have no content, yet at the same time, they continue to be talked about and apparently applied”.<sup>3</sup> In the years following *Caparo*, however, the issues referred to in that case have not uniformly been adopted as the starting point for the analysis of whether a duty of care should be imposed in a novel situation. Putting to one side psychiatric harm cases where discrete guidelines have been developed,<sup>4</sup> the case law reveals that other concepts such as assumption of responsibility and distributive justice have emerged to play an increasingly significant role in discussions about duty of care. However, as will be demonstrated in this article, diverging judicial viewpoints have rendered these concepts largely unintelligible to those whose task it is to apply them.

### **ASSUMPTION OF RESPONSIBILITY: AN ALTERNATIVE TEST TO CAPARO, OR JUST A MEANINGLESS LABEL?**

The concept of assumption of responsibility emerged from the landmark decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, which established that there could be liability in negligence in respect of carelessly produced statements resulting in pure economic loss. Precisely what was entailed in this concept, along with the accompanying concepts of reasonable reliance and a special relationship, has never been entirely clear,<sup>5</sup> but up until 1994 this uncertainty was largely contained within the sphere of actions for negligent misstatements. However, in that year, in *Spring v Guardian Assurance plc* [1995] 2 AC 296, Lord Goff utilised the concept in a remarkable example of judicial creativity to find that the supplier of an employment reference owed a duty of care to its subject. In doing so, his Lordship commented (at 318): “[A]lthough *Hedley Byrne*

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<sup>3</sup> Steele J, “Scepticism and the Law of Negligence” (1993) 52 CLJ 437 at 445.

<sup>4</sup> See eg the guidance provided by decisions of the House of Lords in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; and *Page v Smith* [1996] AC 155.

<sup>5</sup> See Barker K, “Unreliable Assumptions in the Modern Law of Negligence” (1993) 109 LQR 461.

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itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client.” Lord Goff later developed this approach in his leading judgment in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, where underwriting members (“Names”) of Lloyd’s Insurance were claiming against their underwriting agents. His Lordship explained (at 181):

[T]he concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is “fair, just and reasonable” to impose liability for economic loss.<sup>6</sup>

Furthermore, Lord Goff clarified that “an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff” (at 181). In *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, this approach came to be referred to as the “extended *Hedley Byrne* principle” and was described by Lord Steyn (at 834) as the “rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services”. *Williams* appeared to secure the concept’s position as a bona fide means of imposing a duty of care upon defendants in economic loss cases,<sup>7</sup> and an attractive one at that, given the apparent absence of any requirement to consider whether it would be fair, just and reasonable to do so.

In a further development it is now clear that the assumption of responsibility concept is not necessarily restricted to economic loss cases.<sup>8</sup> What is less clear, however, is precisely *when* it would be more appropriate to utilise this approach towards a duty of care inquiry, and whether its application would necessarily lead to a *different outcome*.<sup>9</sup> For example, in *McFarlane v Tayside Health Board* [2000] 2 AC 59, where the claimants were seeking compensation from hospital authorities for a combination of personal injuries and economic loss following a “wrongful birth”, their Lordships adopted a variety of differing approaches in resolving the dispute, notwithstanding that the claim had been brought under the extended *Hedley Byrne* principle. Further uncertainty has been generated by judicial observations concerning the intelligibility of the concept. Even before Lord Goff’s liberalisation of the concept in *Henderson*, several Law Lords had made such observations. For example, in *Caparo* (at 628) Lord Roskill spoke of finding

considerable difficulty in phrases such as “voluntary assumption of responsibility” unless they are to be explained as meaning no more than the existence of circumstances in which the law will impose a liability upon a person making the allegedly negligent statement to the person to whom that statement is made; in which case the phrase does not help to determine in what circumstances the law will impose that liability or indeed, its scope.<sup>10</sup>

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<sup>6</sup> See McBride N and Hughes A, “Hedley Byrne in the House of Lords: An Interpretation” (1995) 15 LS 376.

<sup>7</sup> The *Hedley Byrne* principle was also relied upon by a majority of their Lordships in *White v Jones* [1995] 2 AC 207, concerning the liability of a solicitor towards intended beneficiaries under a non-executed will.

<sup>8</sup> See eg *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, where Lord Slynn accepted that an educational psychologist could assume responsibility towards children and their parents for failure to diagnose a congenital condition such as dyslexia, and *Brooks v Commissioner of the Police for the Metropolis* [2005] 1 WLR 1495; [2005] UKHL 24, where Lord Steyn acknowledged that the police could assume responsibility towards victims of crime.

<sup>9</sup> In *McFarlane v Tayside Health Board* [2000] 2 AC 59, Lord Steyn commented (at 83) that “in regard to the sustainability of a claim for the cost of bringing up the child it ought not to make any difference whether the claim is based on negligence simpliciter or on the extended *Hedley Byrne* principle. After all, the latter is simply the rationalisation adopted by the common law to provide a remedy for the recovery of economic loss for a species of negligently performed services.”

<sup>10</sup> To similar effect see also Lord Griffiths in *Smith v Eric S Bush* [1990] 1 AC 831 at 862.

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In *Williams* Lord Steyn noted (at 837) that the concept had been subjected to such criticisms, and appeared to concede these arguments with the rejoinder that “Coherence must sometimes yield to practical justice”.

Curiously, in the most recent discussion of the concept by the House of Lords in *Customs and Excise Commissioners v Barclays Bank plc*, an economic loss case where the revenue authorities were seeking to hold a bank liable for erroneously allowing companies to remove sums from their accounts while freezing orders in the revenue’s favour were in place, a markedly less enthusiastic tone was adopted by all of their Lordships towards the concept, combined with a renewed interest in the three-fold *Caparo* approach. Lord Bingham noted that insofar as the assumption of responsibility approach was to be applied objectively rather than by considering what the defendant thought or intended, little difference existed between that approach and the three-fold approach in *Caparo* (at [4]-[8]). Lord Hoffmann turned Lord Goff’s remarks in *Henderson* about the role of fairness, justice and reasonableness on their head by declaring that “fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like ‘assumption of responsibility’ and ‘fair, just and reasonable’” (at [36]). Lord Rodger felt that “voluntary assumption of responsibility does not necessarily provide the answer in all cases” and in the absence of there being any single touchstone he found himself in the “familiar position” where the court, faced with a novel situation, must apply the three-fold test (at [49]-[53]). Lord Walker appeared to re-engineer the concept so as to be applicable only where there was a “conscious”, “considered” or “deliberate” voluntary assumption of responsibility, and saw the appeal turning on the issue of whether it would be fair, just and reasonable to impose a novel duty of care upon a bank (at [68]-[77]). Lord Mance similarly saw the appeal turning on the issue of whether it would be fair, just and reasonable to impose a duty of care upon a bank. His Lordship also appeared to re-engineer the concept of voluntary assumption of responsibility to focus upon cases where either a fiduciary relationship existed between the parties, or where the defendant had voluntarily acted with knowledge that the claimant was relying upon him. *Customs and Excise Commissioners* therefore represents a dramatic shift from the earlier impression that the assumption of responsibility doctrine was becoming the touchstone of liability in economic loss cases, and clouds the extent to which matters of fairness, justice and reasonableness and/or policy may still need to be considered even in the context of whether there has been an assumption of responsibility.<sup>11</sup>

Despite the development of the assumption of responsibility concept as a basis upon which to impose a duty of care, the nature and scope of the concept and the circumstances in which it may be applied are still a mystery. Barker has described the concept as a “conceptual veil” which shrouds the true face of tort law.<sup>12</sup> This may have been acknowledged by their Lordships in the *Customs and Excise Commissioners* case. The treatment of this concept by the House of Lords since 1994 represents merely one of several cautionary tales that warn that the desire to achieve practical justice may culminate in a legal landscape which is unintelligible to those who must work with it.

## THE EBB AND FLOW OF PROXIMITY

As noted earlier, Lords Bridge and Oliver in *Caparo* sought to remove any temptation on the part of practitioners to view proximity as a discrete legal concept capable of precise application to the resolution of legal disputes. Instead, encouragement was given to view proximity in descriptive terms rather than as a definitive concept. During the 1990s and early 2000s proximity became a somewhat neglected concept in the jurisprudence of the House of Lords, the important decisions during this period being disposed of primarily on grounds of fairness, justice and reasonableness, policy, and the

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<sup>11</sup> See eg Whittaker S, “The Application of the ‘Broad Principle of Hedley Byrne’ as Between the Parties to a Contract” (1997) 17 LS 169, who argues that Lord Goff’s remarks in *Henderson* should not be interpreted to mean that questions of policy are incapable of negating a prima facie duty of care arising from an assumption of responsibility. See also Stanton K, “Professional Negligence: Duty of Care Methodology in the Twenty First Century” (2006) 22 PN 134.

<sup>12</sup> Barker, n 5 at 483.

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elusive concept of assumption of responsibility. To some extent this might have been attributable to a judicial backlash against proximity due to its association with the discredited *Anns* era. For example, in 1996 in *Stovin v Wise* [1996] AC 923, Lord Nicholls endeavoured to keep proximity in its place by disparagingly remarking (at 932):

The *Caparo* tripartite test elevates proximity to the dignity of a separate heading. This formulation tends to suggest that proximity is a separate ingredient, distinct from fairness and reasonableness, and capable of being identified by some other criteria. This is not so. Proximity is a slippery word. Proximity is not legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care. This is only another way of saying that when assessing the requirements of fairness and reasonableness regard must be had to the relationship of the parties.

Since 2005, however, proximity has become more prominent within decisions of the House, and it has been adopted by some of their Lordships as a central analytical tool for disposing of appeals. This has created the impression that proximity might, in fact, have been elevated to the dignity of being a concept in its own right after all. In *JD v East Berkshire*, eg, Lord Bingham, dissenting, chose to rest his judgment upon proximity irrespective of the fact that lack of proximity had not been relied upon by counsel as an independent ground for dismissing the parents' claims; instead, the focus of the debate had been upon whether it would be fair, just and reasonable to impose a duty of care upon health care and child protection professionals. Lord Bingham nevertheless said of these submissions (at [20]): "But it is acknowledged – I think by both sides, and in my view rightly – that this question cannot be divorced from consideration of proximity." Lords Nicholls and Rodger also adopted approaches which were heavily influenced by proximity considerations. Furthermore, in the 2006 decision in *Sutradhar* their Lordships identified lack of proximity as the central basis upon which to dismiss the appeal. Lord Hoffmann said (at [38]) that, in cases of conduct causing physical injury, there "must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation", a feature which was lacking in the present case. Lord Brown talked (at [48]) about the "essential touchstones of proximity" being lacking in the merits of the claim. Noting the overlap between the *Caparo* requirements, his Lordship nevertheless continued (at [49]):

But all that said, if ever there were a case which is bound to fall at the proximity hurdle this surely is it. Whatever is required to constitute a sufficient proximity to support a duty of care – and I acknowledge the imprecision of the concept and the many criticisms it has attracted down the years – it is not to be found on any possible view of the facts here.

It is therefore unclear whether proximity should now be regarded as a discrete analytical concept around which arguments may be constructed, or merely as a slippery expression reflective of the fairness, justice and reasonableness of imposing a duty of care upon the defendant in the light of the nature of his relationship with the claimant.

### **THE FAIR, JUST AND REASONABLE REQUIREMENT AND THE CONCEPT OF POLICY: IDENTICAL OR DISCRETE ELEMENTS?**

Within the discredited two-stage *Anns* test, policy factors performed a qualifying role that could negate or reduce the scope of a duty of care which was otherwise presumed to exist by virtue of there being a relationship of proximity between the parties. Policy factors could therefore operate as a "longstop" against a finding of a duty. The *Caparo* tripartite approach made no reference to the concept of policy. Instead, Lord Bridge spoke only in terms of a duty of care being imposed where the court considered that it would be fair, just and reasonable to do so. The natural inference from this passage was that traditional policy factors could therefore continue to be considered by the courts, but that any conclusions about policy would then be fed into the court's overall assessment of whether it would be fair, just and reasonable to impose a duty of care. This interpretation appears to have been

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adopted in a number of decisions. For example, in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, concerning allegations that local education authorities had negligently failed to support children with special learning needs, Lord Clyde stated (at 671), “The test of fairness is a test which may principally involve considerations of policy.” The most significant example of this approach occurred in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633,<sup>13</sup> concerning the liability of local authorities towards victims of child abuse, where in the leading judgment Lord Browne-Wilkinson meticulously considered a number of policy-type factors under the heading of whether it would be fair, just and reasonable to impose a duty of care. Lord Browne-Wilkinson repeated this approach in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, concerning the liability of a local authority towards children it had taken into its care, where his Lordship commented (at 559): “In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, eg some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases.” More recently, Lord Bingham in *Customs and Excise Commissioners* spoke in terms of the “third, policy, ingredient of the threefold test” (at [15]). However, other decisions have suggested that the concept of policy might operate on a discrete level, and that it might continue to be used as a long stop to deny a duty of care even after the three elements of *Caparo* have been considered. Moreover, in some decisions policy appears to have been used as a core analytical tool as opposed to one which is an adjunct to *Caparo*. *Spring* is an example of a decision in this former group. Lord Keith, dissenting and adopting a somewhat muddled approach, was of the view that liability might have been established on the application of the *Caparo* approach had it not been for the fact that reasons of policy intervened and therefore “this is, in my opinion, a case in which the second stage of the test propounded by Lord Wilberforce in *Anns* ... properly comes into play” (at 308). Lord Lowry in the same decision also appeared to view “public policy” as a discrete basis upon which a claim might be dismissed, observing (at 326) that “public policy ought not to be invoked if the arguments are evenly balanced: in such a situation the ordinary rule of law, once established, should prevail”.

The leading examples of decisions since *Caparo* where policy has been adopted as a core analytical tool are those of *Arthur JS Hall & Co (a firm) v Simons* [2002] 1 AC 615, concerning an advocate’s immunity from suit, *McFarlane v Tayside Health Board*, where the essential facts have already been noted, and *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52, another case of “wrongful birth” but on this occasion involving a visually handicapped mother. *Arthur JS Hall* was exceptionally decided by a seven-judge panel of the House of Lords. The central issue concerned the extent to which an advocate’s immunity from negligence suits, which had been conferred upon advocates through previous decisions of the House,<sup>14</sup> should be removed. This immunity had been imposed principally on grounds of “public policy”, and therefore the discussion in *Arthur JS Hall* focused upon whether these policy arguments had lost their cogency in the intervening period. *Caparo* was not referred to in any of the seven judgments, which was perhaps understandable given that the House was assessing whether to depart from a precedent which had been established in a period prior to *Caparo*. The decision nevertheless conveyed the clear impression that liability could in some cases be excluded for compelling reasons of public policy, there being no requirement to analyse these within the *Caparo* framework. *McFarlane* and *Rees* contain divergent approaches and are difficult decisions to interpret. A literal reading of *McFarlane* reveals that their Lordships variously determined the appeal through the application of the fair, just and reasonable requirement,<sup>15</sup> the concepts of “distributive justice”<sup>16</sup> and restitution,<sup>17</sup> and the concept of “legal policy”.<sup>18</sup> However in *Rees*, which exceptionally like *Arthur JS Hall* was also heard by a seven-member panel of the House, *McFarlane* was reinterpreted by several of their Lordships as a case which had been

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<sup>13</sup> See also the approach of the House of Lords in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, and the leading judgment delivered by Lord Steyn in *Marc Rich v Bishop Rock Marine* [1996] AC 211.

<sup>14</sup> *Rondel v Worsley* [1969] 1 AC 191; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.

<sup>15</sup> Lords Slynn and Hope.

<sup>16</sup> Lord Steyn.

<sup>17</sup> Lord Clyde.

<sup>18</sup> Lord Millett.

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determined through the application of “legal policy”. According to Lord Bingham (at [6]), “The five members of the House who gave judgment in *McFarlane* adopted different approaches and gave different reasons ... But it seems to me clear that all of them were moved to adopt it for reasons of policy (legal, not public, policy).” The decision in *Rees* therefore clouds the picture even further in terms of the role that the concept of policy might or should play in the assessment of whether a duty of care should be imposed in a novel situation.

### THE INTELLIGIBILITY OF THE CONCEPT OF POLICY

In addition to the confusion that has been generated by decisions of the House of Lords concerning the *role* that the concept of policy should play, uncertainty has also been generated over its *meaning*. The concept of policy has never been comprehensively defined by their Lordships, but until relatively recently the expression appeared to be used in a generic sense to refer to those broader non-legal factors or arguments which might outweigh the competing claim for the imposition of a duty of care. In particular, the concept of “public policy” has been referred to in many cases, but to an observer there appeared to be little distinction between this and the concept of “policy” generally, save that the former expression was apparently used to refer to policy arguments of greater social or moral importance. In *Spring* Lord Lowry said of a submission based on public policy that to “assess the validity of the argument entails not the resolution of a point of law but a balancing of moral and practical arguments” (at 326). Departing from this to some extent, in *Arthur JS Hall* Lord Hobhouse said that “the question of public policy is based not upon some higher moral imperative but upon a pragmatic assessment of what is justifiable in our society” (at 735). However, since the decision in *McFarlane* a new breed of policy has appeared within the jurisprudence of the House of Lords, one described as “legal policy”. This concept was referred to for the first time in the context of duty of care by Lord Millett in *McFarlane*. Whereas most of their Lordships spoke in terms of whether the claim for the costs of raising a “wrongful birth” might be defeated by considerations of public policy, in contrast Lord Millett considered whether the claim was precluded on the basis of what his Lordship referred to as legal policy. His Lordship explained (at 108):

Limitations on the scope of legal liability arise from legal policy, which is to say “our more or less inadequately expressed ideas of what justice demands” (see *Prosser and Keeton on Torts*, 5th ed (1984), p 264). This is the case whether the question concerns the admission of a new head of damages or the admission of a duty of care in a new situation. Legal policy in this sense is not the same as public policy, even though moral considerations may play a part in both. The court is engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper. It is also concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases.

Despite this attempt by Lord Millett to explain the difference between legal policy and public policy, the distinction appeared somewhat elusive. *McFarlane* presented no particular need for practitioners to unravel the meaning of legal policy, however, given that Lord Millett alone had made reference to it. The concept later reappeared in *Rees* and on this occasion it was apparent that the concept could not simply be disregarded as four of the seven Law Lords hearing the appeal made reference to it;<sup>19</sup> furthermore, they identified it as the basis upon which the claim in *McFarlane* for child-rearing costs had been dismissed. The judgments in *Rees* are as unhelpful as Lord Millett’s judgment in *McFarlane*, however, in terms of unravelling the meaning of the concept.<sup>20</sup> Lord Bingham referred to the concept and cited in support of it a passage from Lord Denning MR’s judgment in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, but all this passage appears to stand for is that the shape of the common law is a matter for judges and that sometimes a particular legal stance must be adopted as a matter of policy. Included in Lord Denning MR’s list of examples of decisions

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<sup>19</sup> Lords Bingham, Steyn, Hope and Millett.

<sup>20</sup> See Morris A, “Another Fine Mess ... The Aftermath of *McFarlane* and the Decision in *Rees v Darlington Memorial NHS Trust*” (2004) 20 PN 2.



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where the legal outcome had been shaped by policy was *Rondel v Worsley* [1969] 1 AC 191, concerning the immunity of advocates; yet this decision was expressly based on public policy which suggests that Lord Denning MR was making no distinction between different degrees of policy in using the term “legal”. Indeed, how can there be any rational distinction between public policy and legal policy if public policy can shape the *legal* decision about whether or not to impose a duty of care? Lord Hope attempted to explain that because the decision in *McFarlane* had been based on legal policy, this “means that we are dealing with an area of the law where the responsibility for making choices about its development lies with the judges” (at [52]). Again this fails to illuminate why a judicial decision about the development of the law based on reasons of public policy should fall to be categorised any differently. The judgments of Lord Millett and Lord Steyn in *Rees* offer the greatest scope for confusion, however. Lord Millett said of the outcome of the appeal in *McFarlane* (at [105]):

[T]he individual members of the Appellate Committee all based this conclusion on legal policy, though they expressed themselves in different terms. My noble and learned friend, Lord Steyn, spoke of distributive justice; he asked himself what would be morally acceptable to the ordinary person. Others spoke of what was “fair, just and reasonable” – which expresses the same idea. I spoke openly of legal policy.

Lord Steyn said that “the moral theory of distributive justice, and the requirements of being just, fair and reasonable, culled from case law, are in context simply routes to establishing the legal policy” (at [29]). These remarks therefore suggest that the denial of a duty of care under the third limb of *Caparo* equates with a denial of a duty of care on grounds of legal policy; yet (as has been noted above) in several House of Lords decisions no discernible distinction has been drawn between issues of fairness, justice and reasonableness and the concept of public policy.

The concept of legal policy cannot simply be categorised as a phenomenon peculiar to cases dealing with wrongful birth, however. Since *Rees* it has been referred to by Lord Hope in *Chester v Afshar* [2005] 1 AC 134; [2004] UKHL 41, in the context of whether the law of causation should be modified in order to offer redress to a claimant in a medical negligence case,<sup>21</sup> and by Lord Steyn in *Brooks v Commissioner of Police of the Metropolis*. In *Brooks* Lord Steyn said (at [26]) that the precedent that had been set by the earlier decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, concerning the liability of the police towards members of the public, had to be “judged in the light of our legal policy and our bill of rights”. Whatever explanation lies behind the emergence of the concept of legal policy surely cannot justify the damage which its usage has wreaked upon the intelligibility and coherence of the law. As a final example of the despair which practitioners and lower court judges must have experienced in attempting to decipher the above decisions, Lord Bingham’s speech in the proof of causation case of *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32; [2002] UKHL 22 may be cited, a decision post that in *Rees*; here a chunk of his Lordship’s analysis was conducted under the simple heading of “policy”, without a single reference being made in the text to the existence of separate brands of public, legal or moral policy.

## THE CONCEPT OF DISTRIBUTIVE JUSTICE

The concept of distributive justice, like that of legal policy, has also been a relatively new visitor to the jurisprudence of the House of Lords.<sup>22</sup> It made its first appearance in Lord Hoffmann’s judgment in *White v Chief Constable of South Yorkshire* [1999] 2 AC 455,<sup>23</sup> a claim arising out of the psychiatric harm suffered by police officers assisting at the Hillsborough football stadium tragedy. His Lordship noted the perceived unfairness which would arise if the police officers could recover damages in circumstances where relatives of those who had died in the disaster had been unable to

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<sup>21</sup> “I would prefer to approach the issue which has arisen here as raising an issue of legal policy which a judge must decide. It is whether, in the unusual circumstances of this case, justice requires the normal approach to causation to be modified” (at [85]).

<sup>22</sup> See generally Mullender R, “Corrective Justice, Distributive Justice, and the Law of Negligence” (2001) 17 PN 35; Lord Steyn, “Perspectives of Corrective and Distributive Justice in Tort Law” (2002) 37 *Irish Jurist* 1.

<sup>23</sup> For discussion of the distributive justice arguments in *White* see Mullender R and Speirs A, “Negligence, Psychiatric Injury, and the Altruism Principle” (2000) 20 OJLS 645.

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following the decision of the House in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. His Lordship said (at 510) that the imposition of liability

would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.

The concept has sometimes been used in the context of an appeal to the modernised standard of the “man on the Clapham omnibus”, the legal metaphor for the reasonable person. Lord Steyn referred to this standard in *White* (at 495), expressing the concern that liability might create “an imbalance in the law of tort which might perplex the man on the Underground”. Lord Steyn expanded upon the concept of distributive justice in *McFarlane*, describing it (at 82) as

a moral theory. It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges’ sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.

His Lordship also made it quite clear that in his view the disposal of a case on the grounds of distributive justice did not equate with basing the outcome on public policy.

These early judicial statements about distributive justice at least had the merit of endowing the concept with a degree of intelligibility which was arguably lacking in that of legal policy. However, as has already been noted, subsequent judicial statements have muddled the waters and cast doubt over the existence of any distinction between the concepts of distributive justice and those of fairness, justice and reasonableness and differing brands of policy. It was noted, eg, that in *Rees* (at [29]) Lord Steyn saw distributive justice, fairness, justice and reasonableness, and legal policy as essentially different manifestations of the same concept. Moreover, it was seen that Lord Millett in *Rees* made a statement to the same effect (at [105]). Appeals to the view of the person on the London Underground have also been derided. In *Chester v Afshar* Lord Hope said (at [83]):

On its own common sense, and without more guidance, is no more reliable as a guide to the right answer in this case than an appeal to the views of the traveller on the London Underground. As I survey my fellow passengers on my twice weekly journeys to and from Heathrow Airport on the Piccadilly Line – such a variety in age, race, nationality and languages – I find it increasingly hard to persuade myself that any one view on anything other than the most basic issues can be said to be typical of all of them.

Interestingly, later on in his judgment (at [85]) his Lordship declared that he “would prefer to approach the issue which has arisen here as raising an issue of legal policy which a judge must decide”. Contrary to the views expressed by Lords Steyn and Millett in *Rees*, therefore, presumably as far as Lord Hope was concerned, legal policy and appeals to the view of the person on the Underground were not merely manifestations of the same approach.

The emergence of the concept of distributive justice within the jurisprudence of the House of Lords has therefore served to further obfuscate the analysis of the duty question. It is unclear whether distributive justice is a distinct concept or merely another manifestation of the third limb of *Caparo*; the outcome of its application is impossible to predict given its appeal to abstract notions such as the person on the Underground; and its use inspires no confidence in judicial outcomes given that outcomes based upon distributive justice will in reality be little more than a reflection of subjective judicial values, rather than ones which have been reached through the application of explicit

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principles, or findings supported by evidence. Hoyano has observed that “distributive justice has proved to be just as empty a label as ‘proximity’; not only does it not tell us *how* to make decisions, but it fails to *explain* or *justify* those decisions”.<sup>24</sup>

## **EROSION OF THE INTEGRITY OF FAIR, JUST AND REASONABLE/POLICY ARGUMENTS**

Certain arguments of policy, and fairness, justice and reasonableness have played a significant role in a number of the negligence cases which have been considered by the House since *Caparo*. These arguments have been particularly prominent in those cases where their Lordships have been called upon to resolve whether a claim in negligence should be struck out under procedural rules for disclosing no reasonable cause of action, rather than being allowed to proceed to a full trial at which the judge would hear evidence. By the end of their studies tort students are able to trot out the familiar mantra of “floodgates”, “defensive practices”, “diversion of resources” and so on as explanations for why a judge might not find a duty of care in the factual scenario before them; however, any student who had taken the time to actually read the judgments of their Lordships since *Caparo* would hopefully also be able to venture the opinion that the credibility of many of these arguments, in the absence of evidence in support of them, has been chronically undermined as a result of inconsistent and contradictory judicial reasoning during this period. Even within what may appear to be “pockets of liability”,<sup>25</sup> these arguments are being deployed in an inconsistent manner. The extent to which these arguments may continue to be legitimately deployed to reject claims in negligence must therefore be open to question.

### **Defensive practices**

The defensive practices argument postulates that the imposition of a duty of care would inhibit the efficiency of the activity in question. It is typically deployed in claims against public services, notable examples being the claims in the *X (Minors)* litigation (at 750) where Lord Browne-Wilkinson expressed the following concern:

If the authority is to be made liable in damages for a negligent decision to remove a child ... there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay: the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children.<sup>26</sup>

This conclusion was reached in the context of a “striking out” application where any facts set out in the statement of claim were presumed to be true, and where evidence from experts or those working in the field had not been heard; it was therefore effectively an “educated guess”, which assisted in establishing a critical precedent that local authorities owed no duty of care in this field. Disconcertingly in *Barrett*, another striking out application decided four years later and on facts not entirely dissimilar to those in *X (Minors)*, their Lordships’ “guesswork” was producing different answers to the question of whether a local authority social services department could be held liable for failing to protect children in its care. Lord Slynn agreed with the Court of Appeal’s assessment that the prospective defensive practice of being required to keep a fuller paper trail should normally be a factor of little, if any, weight (at 568). Lord Hutton in the circumstances of the case agreed that he would not give this consideration great weight (at 589). This scepticism was echoed in *Arthur JS Hall* (at 682), where Lord Steyn was unpersuaded that the imposition of a duty of care upon advocates “might have a negative effect on the conduct of advocates. This is a most flimsy foundation, unsupported by empirical evidence.”

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<sup>24</sup> Hoyano LCH, “Misconceptions about Wrongful Conception” (2002) 65 MLR 883 at 905.

<sup>25</sup> See Stanton, n 1 at 104.

<sup>26</sup> See also Lord Steyn’s judgment in *Marc Rich v Bishop Rock Marine*, concerning the consequences of imposing a duty of care upon a ship classification society.

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However, any impression left by these cases that defensive practices was indeed a flimsy argument was cast into doubt in *Brooks* (at [30]), where Lord Steyn in a striking out application feared that if the police were to owe a duty of care to witnesses and suspects they would

be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded.

These contrasting approaches suggest that, in the absence of evidence in support, this argument is a straw in the wind which will turn in whichever direction the House of Lords wishes to blow it.

### **Diversion of resources**

The diversion of resources argument contends that legal exposure would impair the effectiveness of an activity due to the funds necessary to support it being diverted into the defence of legal proceedings or the implementation of precautionary measures. In this latter respect it overlaps somewhat with the defensive practices argument. Inevitably, it has been a prominent argument in litigation against public bodies, although it has also featured in disputes between private bodies. In *X (Minors)*, eg, it was adopted by Lord Browne-Wilkinson in dismissing claims that local education authorities had negligently exercised statutory discretions conferred upon them for the support of children with special learning needs. Lord Browne-Wilkinson feared that, if such a duty were established, "there is a very real risk that many hopeless (and possibly vexatious) cases will be brought, thereby exposing the authority to great expenditure of time and money in their defence" (at 761-762). It is an argument that is difficult to support with empirical evidence, although not impossible because the adverse effects that the imposition of a duty of care may have had upon an analogous body could be cited in support. In the absence of such evidence, however, this argument also appears to be a straw in the wind. For example, in *Phelps v Hillingdon London Borough Council* Lord Nicholls was unimpressed by this argument in the context of whether a local education authority should be held vicariously liable where educational professionals had failed to support children with special learning needs. His Lordship explained (at 667):

So, it is said, the limited resources of education authorities and the time of teaching staff will be diverted away from teaching and into defending unmeritorious legal claims. Further, schools will have to prepare and keep full records, lest they be unable to rebut negligence allegations, brought out of the blue years later. For one or more of these reasons, the overall standard of education given to children is likely to suffer if a legal duty of care were held to exist. I am not persuaded by these fears.

Furthermore, in *Marc Rich v Bishop Rock Marine* [1996] AC 211, Lords Steyn and Lloyd differed over whether the imposition of a duty of care upon ship classification societies would lead to a diversion of resources, Lord Steyn fearing that to do so would "divert men and resources from the prime function of classification societies, namely to save life and ships at sea" (at 241), Lord Lloyd's view being that, "It is not as if [they] are unable to afford the cost of insurance" (at 228).

### **Floodgates**

The floodgates argument is the concern that too many claims could be brought if a duty were created. The argument contends that this might have several negative consequences:

- it might impose crushing financial liabilities upon defendants;
- it might expose defendants to liability out of all proportion to their degree of fault; and
- it might overburden the court system, thus weakening its efficiency.

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It is an argument that is difficult to factually support, although in certain contexts in which it is used its accuracy is self-evident (eg, if the control mechanisms which exist in psychiatric harm cases were dispensed with, thousands of individuals could potentially bring claims against one defendant: see *Alcock*, where scenes of carnage caused by overcrowding at a football stadium were witnessed by thousands of spectators and untold numbers of viewers on live television). It was accepted by Lord Steyn in *Marc Rich*, who described the claimants' submission that the imposition of a duty of care would not result in wide-ranging exposure for ship classification societies as "an unrealistic position" (at 241), although no evidence was available to support his Lordship's assertion. In contrast, in *Phelps* (at 672) Lord Clyde confidently asserted without evidence in support that, "I am not persuaded that the recognition of a liability upon employees of the education authority for damages for negligence in education would lead to a flood of claims". In *Arthur JS Hall* (at 681) Lord Steyn declared that the removal of the advocate's immunity in negligence would provide "no reason to fear a flood of negligence suits against barristers". However, his Lordship reached this conclusion after examining the consequences of the removal of the immunity in other legal systems. Lord Bingham adopted a similar exercise in *JD v East Berkshire* (at [49]), dissenting over whether health care professionals were liable towards parents wrongly suspected of child abuse, noting that in neither France nor Germany had such liability resulted in a flood of claims. It is welcoming to see a willingness to rationally underpin such arguments rather than to simply pluck them out of the air. Now that their Lordships have demonstrated that this form of support can be obtained, any deployment of this argument without material in support should in future be viewed with scepticism.

### **The danger of attracting bogus/vexatious claims**

Allied to the floodgates argument, the danger of attracting bogus/vexatious claims has been discussed in a number of decisions under the policy/fair, just and reasonable banner, the issue here being more in the nature of the "bother factor" presented by such claims rather than in the possible number of them. It played a prominent role in the dismissal of the parents' claims against health care professionals in *JD v East Berkshire*. Lord Brown spoke (at [137]) of the need to protect doctors against "the risk of costly and vexing litigation, by no means invariably soundly based. This would seem to me a very real risk in the case of disgruntled parents wrongly suspected of abuse." However, on other occasions their Lordships have adopted a more bullish stance towards this argument. For example, in *Arthur JS Hall* (at 691) Lord Hoffmann cautioned against exaggerating the "bogey of vexatious claims", adding that "every other profession has to put up with them". Furthermore, in *Phelps* Lord Slynn said (at 655) that "the fact that some claims may be without foundation or exaggerated does not mean that valid claims should necessarily be excluded". This argument should therefore be viewed with as much scepticism as that concerning floodgates.

### **Alternative means of redress**

Where a claimant has suffered harm and a mechanism already exists through which some form of redress may be sought, it has been argued that this makes it unnecessary for a civil law remedy in tort to be additionally created. This argument, of course, may only be deployed where it is felt that the existing means of redress offer an effective remedy. A variation of this argument is that by creating alternative means of redress Parliament intended that it alone should represent the appropriate avenue for redress. These arguments were drawn upon by Lord Browne-Wilkinson in the *X (Minors)* litigation, his Lordship drawing attention to the existence of statutory complaints procedures and the local authorities Ombudsman. However, the subjectivity of these arguments was demonstrated by the rejection of them in *Barrett and Phelps*. In *Barrett* (at 568) Lord Slynn did not feel "that the remedies accepted to be available in the *Bedfordshire* case ... are likely to be as efficacious as the recognition by the court that a duty of care is or may be owed at common law". Lord Hutton conceded (at 589) that the Ombudsman would have the power to investigate the cases "but if the plaintiff suffered psychiatric injury by reason of carelessness amounting to negligence at common law, I consider that the jurisdiction of the court should not be excluded because of the existence of other avenues of complaint". In *Phelps* (at 658) Lord Slynn adopted an even more dismissive approach, opining that the fact that "appeal procedures exist (of which the parents may or may not be informed) does not seem to me to lead to the conclusion that a duty of care does not or should not exist". These

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contrasting approaches therefore provide no guidance whatsoever as to when the existence of an alternative remedy will militate against the imposition of a duty of care.

### **Duty of care cutting across existing arrangements**

This argument rests upon the concern that arrangements that have been put in place in order to regulate the performance of an activity might be undermined by the imposition of a duty of care. In *X (Minors)*, eg, Lord Browne-Wilkinson was concerned that the introduction of a duty of care would cut across the whole statutory system set up for the protection of children, and would create unfairness if only one body was subject to a duty, but present an almost impossible challenge of disentangling primary liability if all of them were. Similarly, in *Marc Rich* Lord Steyn feared that the international trade system supported by the Hague and Hague-Visby rules would be unbalanced by accommodating claims by cargo owners against ship classification societies. However, in the same case Lord Lloyd had no such concerns, stating (at 223) that he was “unable to see why the existence of the contract of carriage should ‘militate against’ a duty of care being owed by a third party in tort. The function of the law of tort is not limited to filling in gaps left by the law of contract.” Equally, in *Barrett* their Lordships were less concerned than they had been in *X (Minors)* about the possibility of existing arrangements being undermined by the imposition of a duty of care upon local authority social services departments, the somewhat spurious explanation being offered (at 589) that “in the present case it appears that other disciplines were not involved, or were not closely involved”.

### **Duty of care inappropriate due to sensitivity of activity**

In areas where professionals are required to exercise judgments about delicate emotional matters such as whether a child should be removed from its family and taken into care, a policy factor that has been mooted is whether the nature of the task is so sensitive that it would be almost morally objectionable to open it up to negligence claims. This factor among others persuaded Lord Browne-Wilkinson in *X (Minors)* that it would not be fair, just and reasonable to impose a duty of care upon local authorities. However, the degree of respect which their Lordships have shown for the delicacy of the activity in question has been far from consistent. For example, in *Arthur JS Hall* Lord Hoffmann was unswayed by the submission that advocacy was such an unpredictably tricky exercise that it would be inappropriate for exponents of it to be exposed to liability. His Lordship observed (at 690):

[T]here are many professional activities which require delicate judgment and advocacy is not the only one which may involve a divided loyalty. The doctor, for example, owes a duty to the individual patient. But he also owes a duty to his other patients which may prevent him from giving one patient the treatment or resources he would ideally prefer. We do not say that they should have immunity merely because they do a difficult job in which it is easy to make a bona fide error of judgment.

This latter point in particular undermined the earlier use of this argument by Lord Browne-Wilkinson in *X (Minors)*, although to a degree this argument had already been undermined by the decision in *Barrett*, where Lord Hutton had remarked (at 589) that “in the present case, where the plaintiff was already removed from his natural mother, the duties of the defendant were not so delicate”. Given the narrowness of any distinction between the delicacies of the daily work of doctors on the one hand and that of social services departments on the other, if indeed one actually exists, the cogency of this policy factor is therefore highly questionable.

### **Impact upon insurance**

Conventionally judges have disregarded the role played by insurance when determining whether to establish a duty of care, but all lawyers know that, in reality, issues concerning insurance have influenced the outcome of appeals, albeit on an unacknowledged basis. *Marc Rich* represents an exception. In rejecting the claim, Lord Steyn for the majority referred (at 240) to the likelihood that greater legal exposure for ship classification societies would drive up the costs of liability risks

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insurance and ultimately lead to an increase in the fees charged by societies. Lord Lloyd rejected this argument, pointing out (at 222):

[I]t is enough to say that there was no evidence one way or the other as to the cost of the insurance, or whether it would be passed on. It is mere guess work. But having regard to the prevailing competition among classification societies, it by no means follows that the cost of insurance would be passed on to shipowners; and even if it was, I doubt if it would be a significant factor in upsetting the balance of rights and liabilities under the Hague Rules.

In a section which sums up the central deficiency with the majority of the policy/fair, just and reasonable arguments, his Lordship later added (at 228-229):

[I]t cannot be right that the courts should reach conclusions on the availability of insurance, or the impact of imposing a fresh liability on the insurance market generally, without proper material ... the court should be wary of expressing any view on the insurance position without any evidence on the point, and should not speculate as to the effect, if any, of an extra layer of insurance on the cost of settling claims.

## CONCLUSION

The foregoing survey has attempted to demonstrate that legal professionals may rightfully feel bewildered following any endeavour to identify the applicable principles or approaches when advising upon or seeking to resolve duty of care issues. At the outset it was noted that legal chaos may be the price to pay for justice in the individual case, or to put it more tritely, that hard cases make bad law. However, it was also observed that treating hard cases justly and making good law in the process are not necessarily mutually incompatible objectives. The House of Lords is a composite of the most intellectually able and experienced members of the legal profession. If bodies such as the Law Commission are able to review laws and make sensible and workable proposals for change, it is surely not beyond the wit of the House of Lords to do likewise. Contrary to Stanton's view,<sup>27</sup> the author feels that the foundations of the law being developed by the House are weak, because even if the policies that are at work can be identified, they are often deployed in an unconvincing and inconsistent manner. A prominent feature of some of the more recent House of Lords' decisions has been a willingness to review comparative material as aids to the outcome of appeals. A review of such materials in the context of general approaches towards establishing a duty of care might help rescue English negligence law from its present state of intellectual chaos. The approach which has been adopted by the Supreme Court in Canada, eg, has much to commend itself in terms of yielding scope for openness and flexibility in judicial decision-making, which does not have to be at the expense of the clarity of the law. In *Cooper v Hobart* [2001] 3 SCR 537; (2002) 206 DLR (4th) 193,<sup>28</sup> the Canadian Supreme Court formulated a test of duty very similar to that which emerges from *Caparo*. However, the Canadian formulation has the merit of explicitly recognising that policy factors play a role in the determination of whether a relationship of proximity existed between the parties. Policy considerations are therefore considered at two stages, the first when the court is assessing whether the relationship of proximity existed, and the second when the court is considering whether a duty of care should be denied on residual grounds of policy. If this approach is adopted, in combination with a requirement that policy arguments should only be accepted by a court where they are supported by evidence or are otherwise logically sustainable, then confusion, contradiction and chaos within the House of Lords could be avoided.

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<sup>27</sup> Who argues that the foundations of the law being developed would seem to be strong because pockets of liability are being built on the basis of policies suited to the particular function: see Stanton, n 1 at 106.

<sup>28</sup> See Klar L, *Tort Law* (3rd ed, Thomson Carswell, Toronto, 2003) pp 161-169; Neyer J, "Distilling Duty: The Supreme Court of Canada Amends Anns" (2002) 118 LQR 221; Rafferty N, "The Test for the Imposition of a Duty of Care: Elucidation or Obfuscation by the Supreme Court of Canada" (2002) 18 PN 218.