



MASTER OF
THE ROLLS

LORD DYSON, MASTER OF THE ROLLS

THE DUTY OF CARE OF PUBLIC AUTHORITIES: TOO MUCH, TOO LITTLE OR ABOUT RIGHT?

PIBA RICHARD DAVIES LECTURE

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To be asked to give this lecture in memory of Richard Davies was, for me, a truly poignant honour. An honour, because it has become established as one of the most prestigious annual lectures on the legal scene. And poignant, because Dickie welcomed my arrival at what is now 39 Essex Street in 1986 with all the warmth and commitment for which he was well known and for which he was loved by so many of his friends and admirers. He was a brilliant advocate. He brought to his advocacy a remarkable passion and intensity. Shades of grey were not for him. Not even 50 shades of grey. He painted in vivid colours. He had huge expertise in the field of personal injury law. His early death was a terrible loss to the legal profession. He is greatly missed to this day.

Personal injury law has become increasingly complex in recent years. Some of the issues that have troubled the courts have been peculiar to personal injury litigation. The law reports are replete with tricky points relating to the assessment of damages in that area of the law. But questions of wider application have also arisen in personal injury litigation. Take, for example, the vexed issue of causation, which was once thought of as being essentially one of fact, otherwise known as a “jury question”. Some of the most teasing of the causation questions that have arisen in recent times have been decided in personal injury cases. And of perhaps even more general importance is the fundamental issue of whether a duty of care is owed and the whole question of immunity from suit. This too has as much relevance to personal injury practitioners as it does to those who practice in other areas of litigation. I wish to devote my lecture to this topic, with particular reference to the circumstances in which a public authority owes a duty of care in negligence. This is a huge subject in a developing area of the law. There are many cases, and, as is so often the case, many of them cannot be reconciled with each other. This is fertile territory for academics; but less attractive for lawyers trying to advise their clients and to hard-pressed first instance judges who have to make sense of and apply the law.

I shall take as my starting point the Bar Council Law Reform Lecture given by Lord Hoffmann on 17 November 2009 entitled “Reforming the Law of Public Authority Negligence”. I start here because this characteristically brilliant polemic encapsulates the arguments in favour of limiting the duty of care owed by public authorities. The lecture was written as a vigorous riposte to the Law Commission Consultation Paper No 187 entitled “Administrative Redress: Public Bodies and the Citizen”. A central proposal in that paper was that a person who had suffered loss in consequence of the act or omission of a public body would be able to claim compensation if it had been seriously at fault in the exercise of its powers. Lord Hoffmann said that this was “an absolutely terrible idea” and he hoped that it would be quietly dropped. In fact, the proposal was dropped and Lord Hoffmann will have been pleased.

Time does not permit me to do justice to his lecture. He said that the concept of the duty of care, whose moral basis had been the Aristotelian concept of corrective justice, did not fit well upon questions involving the administration of public bodies. Unlike individuals, such bodies often have no choice as to whether to provide a service or not; their funds are limited and, in a democratic country, they have choices about their spending priorities. So the question of whether they have acted reasonably in matters of administration cannot be equated with whether a plumber or doctor has exercised reasonable care. He criticised as hopelessly question-begging the well-known quotation from Lord Bingham: “the rule of public policy which has first claim on the loyalty of the law [is] that wrongs should be remedied.” And then there was the question of democracy. Was it right for judges to create a duty of care in private law when Parliament had omitted to do so? Creating such a liability means adding to the financial burdens on the public body: to defend actions or to pay compensation. Was it not better for Parliament to decide whether resources should be used in this way? The courts are ill-equipped to assess the effect of the introduction of new causes of action on the behaviour of public bodies.

But Lord Hoffmann acknowledged, rightly, that there are circumstances where the law recognises that a public body owes a duty of care. He explained his approach as follows:

“Of course, if Parliament creates statutory powers or duties which enable public authorities to do things which create a duty of care in private law, Parliament must be taken to have accepted that if the public body is in breach of that duty of care, it will be liable to pay compensation just as a private body would have been liable. You cannot set up a National Health Trust which treats patients as in a private hospital and then claim that public funds should not be used in paying compensation for medical malpractice. But when Parliament has created a purely public power or duty and the public body has done nothing which would generate a duty of care in private law, the question is a very different one.”

A common law duty was created, if at all, he said, by what the public body actually did: whether it had assumed responsibilities or done acts which, if they had been done by a private body, would have given rise to a duty of care.

Phelps v Hillingdon BC [2001] 2 AC 619 was not contrary to these general principles, because it did not use the authority’s statutory powers to generate a duty of care at common law. That was the case in which the House of Lords held that a local education authority could be sued in negligence for failing to diagnose dyslexia in school children. The authority’s educational psychologist, who examined the child, had assumed a duty similar to that which would be undertaken by a private medical adviser and therefore owed a duty of care. But a main plank of Lord Hoffmann’s lecture was that the consequences of the *Phelps* decision were “an unqualified disaster for this country’s education system”. This suggests that, quite apart from his hostility to the Law Commission’s proposal, Lord Hoffmann was also opposed to the idea that public bodies should owe a duty of care at all to children whose education they undertake. It is difficult to square this with the notion that a public body should owe a duty of care for acts done which, if done by a private body, would give rise to a duty of care.

He had conducted some empirical research on the effect of the *Phelps* decision. This revealed that Leicestershire County Council were faced with 58 claims immediately after the *Phelps* decision. Almost all of them failed. At considerable expense, the local education authorities succeeded in defending themselves. Lord Hoffmann made the point that these cases are very difficult to prove both on liability and causation. He had been able to find only 3 cases in which such claims had succeeded and in those the amounts recovered were relatively trivial. As against that, the local authorities had been required to spend large amounts of scarce public resources to defend themselves, almost always successfully.

I doubt whether it is any longer controversial that you cannot get a common law duty of care simply out of a statutory power or public law duty. That is why the proposal contained in the Law Commission paper would have required legislation, since it would have involved a change in the law. As the law currently stands, a common law duty is created, if at all, by what the public body actually does: whether it assumes responsibilities or does acts which, if they had been done by a private body, would have given rise to a duty of care. This explains why an NHS Trust owes a duty of care to its patients in relation to the care they receive from its doctors, nurses and other staff; and the Prison Service owes a duty of care to prison inmates in relation to the manner in which they are treated whilst they are in prison.

In *Caparo v Dickman* [1990] 2 AC 605, the House of Lords laid down the famous three-fold test for determining when a duty of care is owed. It applies equally in cases involving public and private defendants alike. In *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 (a public authority case) Lord Bingham said at para 42 that the threefold test laid down in *Caparo* is currently the most favoured test of liability. The application of the third test (whether it is fair, just and reasonable that the law should impose a duty of a given scope) has proved particularly problematic. It is applied in personal injury cases no less than it is in cases like *Caparo* which was a case of pure economic loss: see per Lord Hope in *Mitchell v Glasgow City Council* [2009] 1 AC 984 at para 24. So the question whether it is fair, just and reasonable to impose a duty of care on a public authority has to be addressed in personal injury cases like any other. The special position of public authorities sometimes makes the answer to this question peculiarly difficult.

As I have already said, Lord Hoffmann criticised as question-begging the dictum of Lord Bingham to which I have already referred that the policy which has the first claim on the loyalty of the law is that wrongs should be remedied, a dictum which was approved by the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 749 and elsewhere. In a sense, I agree that the dictum is question-begging, since rights and wrongs are only such if they are so recognised by the law. But it is clear what Lord Bingham meant. He was saying that prima facie if A foreseeably suffers harm as a result of the careless acts of B and there is a relationship of sufficient proximity between the two of them, then A should be compensated by B for the harm he has caused. That seems to me to be a good working principle. But it is no more than that. It requires some fine tuning, which is provided by the third *Caparo* test. On any view, this is an uncertain and difficult test. It is not surprising that judges have not always seen eye to eye as to how to apply it any given situation. Palm trees and the feet of Lord Chancellors inevitably come to mind.

The *Bedfordshire* case is a good place to start. The court was concerned with 5 cases which fell into two groups: two were child abuse cases, and three were education cases. I shall summarise the reasoning which led Lord Browne-Wilkinson to hold that in the child abuse cases, the policy considerations which militated against there being a duty of care on the part of the local authority outweighed those which favoured the existence of a duty. In the first case, a child sued the local authority for failing adequately to investigate allegations of parental neglect and abuse, and failing to exercise its powers to institute care proceedings and protect the child from harm. In the second case, the child and her mother brought proceedings against inter alia the local authority alleging that it had carried out its investigation into allegations of child abuse by the mother's cohabitee incompetently and had negligently obtained a court order removing the child from her mother, placing her in a foster home and restricting the mother's contact with her.

A number of reasons were given by Lord Brown-Wilkinson to support his conclusion that it was not just and reasonable to superimpose a common law duty of care on the local authority in relation to the performance of its statutory duties to protect children. First, such a duty would cut across the whole statutory system set up for the protection of children at risk. This is inter-disciplinary, involving the

participation of the police, educational bodies, doctors and others. It would be almost impossible to disentangle the respective liability of each for reaching a decision found to be negligent. But this seems to me to be hardly a convincing reason. Courts are well familiar with the task of having to disentangle the liability of several defendants each of which is alleged to have caused or contributed to the loss for which a claimant seeks compensation. Multi-partite litigation is common enough. Claims for contribution between defendants and allegations of contributory negligence may be difficult to resolve. But that is all part of the rich pattern of the complexities of contemporary litigation. None of these difficulties should be a reason for denying compensation to a claimant who has suffered loss as a result of what would otherwise be the actionable acts or omissions of a public authority. It is noteworthy that this consideration was not accepted as a reason for excluding liability in *Phelps*.

The second reason was the fact that the task of the local authority in dealing with children at risk is extraordinarily delicate. But that is surely not a good reason for denying the existence of a duty of care, although it is a good reason for being slow to find a breach. All professional persons have to assess fraught and difficult situations from time to time. Take the surgeon who has to make a potentially life-threatening decision at the operating table or the advocate who has to make a snap decision in the heat of battle in court. They respectively owe their patient and client a duty of care, but the bar of liability is raised to reflect the exigencies of professional life.

The third reason was that, if there were potential liability for damages, it might well mean that local authorities would adopt a more cautious and defensive approach to their duties. The opposite view on this point was subsequently taken by the House of Lords in *Barrett v Enfield BC* [2001] 2 AC 550, 568 as well as in *Phelps* p 672. This is an interesting illustration of how different courts can reach conflicting conclusions on what, in the absence of empirical evidence, is little more than speculation. A similar argument has been deployed in other contexts and I shall revert to it later in this lecture.

The fourth reason was that the relationship between the social worker and the child's parents is often one of conflict. This would be likely to breed ill-feeling and often hopeless litigation which would divert money and resources away from the performance of the social services for which they were provided.

Fifthly, there were other remedies for maladministration of the statutory system for the protection of children in statutory complaints procedures and the power of the local authorities' ombudsman to investigate cases.

The final reason was that the development of novel categories of negligence should proceed incrementally and by analogy with decided categories: there were no close analogies. The court should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoing of others.

It can be seen that most of this reasoning falls fairly and squarely within the 3rd limb of the *Caparo* test. It is heavily policy-laden. The weight to be given to the various considerations is one on which judges can and do differ.

I want to come back to the argument that imposing a duty of care may cause public officials to respond in an unduly risk averse or "defensive" manner. This is a recurring theme in some of the cases. For example, in the *Bedfordshire* case, it was said that if social workers were made liable for wrong decisions in respect of removing children at risk, they might hesitate when it came to making such decisions in the future. The delay would prejudice the child who was actually being abused, as well as other children who would suffer as a result of slower decision-making by individuals: p 750. In another case, it was suggested that, if local authorities were to owe a duty of care in their supervision of building construction, then building inspectors might be overcautious in their enforcement of building regulations and insist on

higher standards than are actually required under the regulations. This would come at a considerable cost to those constructing buildings: per Lord Keith in *Rowling v Takaro Properties Ltd* [1988] AC 473, 502. This view was in sharp contrast to that expressed by Lord Denning MR as long ago as 1971 when in *Dutton v Bognor Regis UDC* [1972] 1 QB 373, he considered whether there were any policy reasons for not holding a local authority liable for loss caused by the negligent inspection of building foundations. He asked whether, if liability were imposed on the council, it would have an adverse effect on the work. Would it mean that the council would not inspect at all, rather than risk liability for inspecting badly? Would it mean that inspectors would be harassed in their work or be subject to baseless charges? Would it mean that they would be extra cautious and hold up work unnecessarily? He noted that such considerations had influenced cases in the past, as in *Rondel v Worsley* [1969] 1 AC 191. But, he said “I see no danger. If liability is imposed on the council, it would tend, I think, to make them do their work better, rather than worse.” Such confidence! Such optimism! Maybe you need to be a Master of the Rolls to be able to throw doubt to the winds in this way. But Lord Denning had no more empirical evidence to support these assertions than do those who rely on the risk of cautious or defensive practice as a reason for *not* imposing a duty of care.

He then considered whether there was any economic reason why liability should not be imposed on the council. Was there a risk that councils would be liable for large sums of money? He had no difficulty in rejecting this as a reason for excluding liability, because in most cases the builder would have primary liability and would be insured: “It will be very rarely that the council will be sued or found liable. If it is, much greater responsibility will fall on the builder and little on the council”. Finally, he addressed the floodgates argument, but he saw no reason to reject the claim on that ground: “The injured person will always have his claim against the builder. He will rarely allege—still less be able to prove—a case against the council”. How wrong the history of the succeeding years proved him to be.

Policy arguments based on the risk of cautious or defensive practice have been criticised by academic commentators on the basis that they are unsupported by empirical evidence: see, for example, D Fairgrieve, *State Liability in Tort* (2003) pp 130 to 131. Moreover, in foreign jurisdictions, including US states, France and Germany, the presence of a legal duty to compensate has not induced a risk averse culture: see Law Comm 3.150. Nevertheless, despite the absence of empirical evidence to support it, the argument based on defensiveness still carries weight in our jurisprudence. A good example is the immunity enjoyed by the police.

In *Hill v Chief Constable of West Yorkshire* [1989] AC 53, the House of Lords held that, as a matter of public policy, the police were immune from actions for negligence in the investigation and suppression of crime. Lord Keith wrote the main opinion. He said rather cautiously that “in some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded”. He also gave other reasons for holding that no duty of care was owed. These included that, if actions were instituted arising from a police investigation, it would be necessary to examine the manner of the conduct of the investigation. This would entail scrutinising a variety of decisions on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued, and what is the most advantageous way to deploy the available resources. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime.

A similar approach to public policy was applied in *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228 where it was held that no duty of care was owed by the police in the conduct of disciplinary proceedings against a police officer. In *Elguzouli –Daf v Commissioner of Police of the Metropolis* [1989] QB

335, the issue was whether the CPS owed a duty of care to those whom it was prosecuting. Relying in large measure on the reasoning in *Hill*, the Court of Appeal held that there was no such duty. Steyn LJ said at p 349-350 that the interests of the whole community were better served by not imposing a duty. Such a duty would tend to have an inhibiting effect on the discharge by the CPS of its central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors to their multifarious duties and a risk that prosecutors would act so as to protect themselves from claims of negligence. There was the further familiar point that the CPS would have to spend valuable time and use scarce resources in order to prevent law suits against themselves. It would generate a great deal of paper to guard against the risks of law suits; and the time and energy of CPS lawyers would be diverted from concentrating on their prime functions of prosecuting offenders.

Many may think that, at least in the context of the police and the CPS, these are powerful reasons for not imposing a duty of care. But this approach has not been followed in Canada or South Africa. Moreover, in *Hill* the House of Lords relied in part on the barrister's immunity enunciated in *Rondel v Worsley* [1969] 1 AC 191 and that immunity was subsequently swept aside. It was in these circumstances that in *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 the House of Lords was asked to look again at the question of police liability for the treatment of victims or witnesses in respect of their activities when investigating suspected crimes.

Lord Steyn gave the leading speech. He endorsed the main thrust of the approach enunciated in *Hill*. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence. A retreat from the principle in *Hill* would have detrimental effects for law enforcement. The police would in practice 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 ability of the police to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would be bound to lead to an unduly defensive approach in combating crime. There is nothing tentative about this. Unlike Lord Keith in *Hill* who spoke of the *possibility* of defensive police practice, Lord Steyn confidently predicted that a defensive culture of policing *would* be the result. So police immunity has survived, although advocates' immunity has not. The House of Lords drew a clear distinction between the two. The policy of law enforcement and protecting us all from crime is so strong that, on policy grounds, the police should not be at risk of liability for negligence, regardless of how egregiously they may have behaved.

Moving away from the world of crime, I return to child abuse. In *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373 the parents of young children brought actions for negligence against healthcare authorities and, in one case, a local authority for alleged psychiatric harm caused as a result of unfounded allegations made by healthcare and child care professionals, that the parents had abused their children. The House of Lords (Lord Bingham dissenting) upheld the decision of the judge on a preliminary issue that no duty of care was owed to the parents by any of the defendants on the ground that it was not fair, just and reasonable to impose such a duty. Lord Bingham welcomed what he perceived as a shift of emphasis from consideration of duty to consideration of breach. He thought that the concept of duty had proved to be a blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not. The reasoning of the majority, on the other hand, was very much in line with that of Lord Browne-Wilkinson in *X v Bedfordshire*. Lord Nicholls emphasised the conflict of interests point. Where a doctor suspected that a child might have been abused by a parent, there was, potentially at least, a conflict between the interests of the child and those of the parent. Lord Nicholls said at para 85 that when considering whether something does not feel "quite right", the doctor must be able to act single-mindedly in the interests of the child. He ought not to have at the back of his

mind an awareness that, if his doubts about abuse prove unfounded, he may be exposed to claims by a distressed parent. The seriousness of child abuse as a social problem demands that health professionals acting in good faith in what they believe are the best interests of the child should not be subject to potentially conflicting duties when deciding whether a child may have been abused. Lord Brown referred to the appalling prevalence of child abuse in our society and said that doctors (and presumably other health professionals) have a vital part to play in combating the risk of child abuse. Nothing must be done to discourage them in that task. Then at para 137, he said that there is always a temptation to say in all these cases that no-one will ever in fact be held liable unless he has conducted himself manifestly unreasonably; it is unnecessary, therefore, to deny a duty of care, better rather to focus on the appropriate standard by which to judge whether it is breached. But Lord Brown rejected this solution, which commended itself to Lord Bingham, because it overlooked two fundamental considerations: (i) the insidious effect that his awareness of the proposed duty would have on the mind and conduct of the doctor (subtly tending to the suppression of doubts and instincts which in the child's interests ought rather to be encouraged); and (ii) the need to protect him against the risk of costly and vexing litigation, by no means invariably soundly based. This latter consideration would seem to be a real risk in the case of disgruntled parents wrongly suspected of abuse.

I would draw attention to two features of the reasoning of the majority. First, they reached their conclusion without any empirical evidence as to the likely effect of imposing a duty of care. Lord Brown felt that he had a sufficient understanding of the psychology and motivation of professional men that he was able to say with confidence what the effect of the existence of a duty of care would be. Some might find this surprising. Are there not shades of Lord Denning here? Lord Nicholls put the point in a rather more restrained way. He said in terms that he was not suggesting that doctors or other health professionals would be consciously swayed by the conflict of interests. As he put it: "these professionals are surely made of sterner stuff". It seems to me that this must be right. After all, doctors often owe duties to more than one person. An analogous situation is faced by advocates and expert witnesses who owe duties both to their clients and the court. But the existence of divided loyalties is usually not a sufficient reason for denying the existence of a duty of care.

So why did the House decide that no duty was owed to the parents? It is the second feature of their reasoning which provides the answer. This is that the scourge of child abuse was considered to be so great and the need to protect children from it so compelling that health care professionals should not be placed in a position where they *might* put the interests of children at risk. It is in the interests of society as a whole that, so far as possible, children are protected from abuse. There is an analogy with the police and the prosecuting authorities here. As we have seen, one of the reasons why no duty of care was imposed in those cases was that nothing should be done which *might* deflect those authorities from the activities of detecting and prosecuting suspected criminals which they perform in the interests of society as whole.

The cases show that, in deciding whether it is fair, just and reasonable to impose a duty of care on a public authority, the courts tend to adopt a multi-factorial approach. A good example of this is to be found in *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861. The question there was whether the Child Support Agency which had the responsibility for the assessment, collection and enforcement of child support maintenance payments from non-resident fathers for qualifying children owed a duty of care to those children. The claim included a claim for psychological injury by one of the claimants. The Court of Appeal held that a common law duty would be inconsistent with the statutory scheme which gave a right of appeal against a refusal to make a maintenance assessment and the amount of the assessment. The court went on to give two further reasons why it would not be fair, just and reasonable to impose a duty of care. First, complaints about maladministration by the CSA could be referred to the ombudsman. Secondly, the sums at stake where there were complaints of incompetence

on the part of the CSA would usually be small relative to the cost of recovering them as damages for negligence. Litigation was likely to be complex, protracted and expensive. Having held that it would not be fair, just and reasonable to impose a duty of care to avoid pure economic loss, the court considered whether there should be a duty of care to avoid personal injury, such as the psychological harm that was alleged by one of the claimants. The court decided that, although, in many contexts, different considerations are applicable in relation to personal injury claims from those applicable in relation to other claims, this was not the case here. I have to confess that I was the author of the main judgment in this case,

The cases show that whether it is fair, just and reasonable to impose a duty of care on a public authority depends on various factors. The open-textured nature of the test is such that, to some extent, its application is likely to vary according to the philosophy of the judge. Some, like Lord Hoffmann, believe that litigation against public authorities is a bad thing. The authorities are hard-pressed, strapped for cash and often have to perform difficult and sensitive functions. They should not be diverted from performing the important functions that they perform in the public interest. They should not be distracted by the fear of the possibility of facing costly (and usually unsuccessful) litigation. Such judges tend to apply the third *Caparo* test in a way which favours public authorities. For them, the suggestion that there should be a shift of emphasis from a consideration of duty to a consideration of breach (in other words, raising the bar for breach) is an unsatisfactory answer. It is unsatisfactory because it does not remove the spectre of potential litigation; public authorities will continue to perform their functions defensively; they will have to make and keep detailed records of everything they do; and they will have to incur great expense in unwelcome and usually unsuccessful litigation from which only the lawyers will benefit.

But even Lord Hoffmann accepts that you cannot set up a National Health Trust which treats patients as in a private hospital and then claim that public funds should not be used in paying compensation for medical malpractice. As I said earlier, there is something of a tension between (i) his accepting that a public authority owes a duty of care for acts which, if done by a private person, would give rise to a duty of care and (ii) his statement that the *Phelps* decision has been an unqualified disaster.

So the conundrum of when a duty of care is owed and when it is not owed continues to perplex the courts. The courts' view of the dictates of policy is always important. This can change over time as circumstances change. We see good examples of this in some areas of professional negligence. In *Rondel v Worsley*, one of the policy reasons given to justify the immunity of barristers was that its removal might have an adverse effect on their conduct, and in particular might inhibit them from acting in accordance with their overriding duty not to mislead the court. Some 20 years later, the House of Lords took a different view on the same point. All members of the House thought that the possibility of a conflict between the duty owed to the court and the duty owed to the client was not sufficient to justify maintaining the immunity for negligence in civil cases, although a minority thought that the position should be otherwise in criminal cases. Circumstances had not changed during the intervening 20 years. It was simply that the views of the members of Judicial Committee in *Arthur Hall v Simons* [2002] 1 AC 615 differed crucially from those of their predecessors. This shows how the court's assessment of the same public policy considerations may change in response to what it understands to be the needs and perceptions of society from time to time. Lord Hoffmann considered in detail whether it was likely that the removal of the immunity would have a significant effect on the discharge by advocates of their duty to the court. He identified a number of factors which suggested that the force which induces advocates to discharge their duty to the court loyally is very powerful. There were pressures that might induce the advocate to disregard his duty to the court in favour of pleasing the client, but the prospect of an action for negligence was not high amongst them, since it could not be negligent to act in accordance with one's

duty to the court. Lord Hoffmann concluded that the existence of what he referred to as the “divided loyalty” did not justify the immunity.

Which brings me to the immunity accorded to expert witnesses. In *Jones v Kaney* [2011] 2 AC 398, the Supreme Court had to decide whether to abolish the rule that a witness could not be sued in negligence by his client. The justification for the immunity accorded to lay witnesses is long-standing and is based on policy considerations which are well understood. The immunity enjoyed by expert witnesses from liability to their clients had also been established, although it was a far less well entrenched principle. The majority of the court held that the immunity could no longer be justified, particularly in view of the abolition of the immunity of advocates. They held that the retention of the immunity rule could no longer be justified in the public interest. They were not persuaded that, if they were liable to be sued for breach of duty, they would be discouraged from providing their services at all; or that immunity was necessary to ensure that expert witnesses give full and frank evidence to the court; or that diligent expert witnesses would be harassed by vexatious claims for breach of duty; or that the removal of the immunity would engender a risk of multiplicity of suits. And all of this without the benefit of research as to the possible or likely results of removing the immunity.

The dissentients took a different view. Lord Hope said that the lack of a secure principled basis for removing the immunity from expert witnesses; the lack of a clear dividing line between what is to be affected by the removal and what is not; the uncertainties that this would cause; and the lack of reliable evidence to indicate what the effects might be all suggested that the wiser course would be to leave matters as they stood. Lady Hale saw the proposed abolition of immunity as an exception to the general rule that witnesses enjoy immunity from suit. She asked rhetorically how far the exception should go. Did it cover all classes of litigation? In particular, how far beyond ordinary civil litigation did it go and did it cover all or only some of the witness’s evidence? It was impossible to say what effect the removal of immunity would have, either on the care with which the experts give their evidence, or on their willingness to do so. It was not self-evident that the policy considerations in favour of introducing the exception to the general rule were so strong that the court should depart from previous authority to make it. It was “irresponsible” to make such a change on an experimental basis. This was a topic more suitable for consideration by the Law Commission and reform, if thought appropriate, by Parliament than by the court.

Although there are obvious differences between the position of advocates and that of expert witnesses, there are striking similarities too. It seems to me that, as an institution, the court was as well equipped to decide whether to retain the immunity of expert witnesses as it had been to decide whether to retain the immunity of advocates. It is striking that the court abolished advocates’ immunity without the benefit of any survey or consultation of interested parties as to the likely effect of the abolition. So too, the majority in *Jones v Kaney* were willing to abolish the immunity of expert witnesses without the benefit of any empirical evidence as to the effect of their doing so. It is difficult to see what value a survey or consultation of interested parties would have had, even if it had been placed before the court. Those who acted as expert witnesses might well have said that, if the immunity were abolished, they would think twice before giving evidence. They might also have said that their fees would have to rise in order to pay for the cost of professional negligence indemnity insurance. But responses of this kind are hardly likely to have affected the court’s decision.

It seems to me that one of the conclusions that one can draw from an examination of the cases is that it is very difficult to predict how the third *Caparo* test will be applied in any given situation. Much depends on the subject-matter and the mind-set of the judges to it. Even where the question appears to have been settled by a decision of the highest court in the land, a different answer to the same question may be given later even if circumstances do not appear to have changed materially or at all. This makes life difficult for

those giving legal advice and for judges in the lower courts. That is not because judges have been behaving capriciously in this area. It is because the test is not hard-edged and the answers are inherently difficult to predict. This is an area of the law which, I suspect, will never settle down completely, particularly in the area of public authority liability. That may be a source of joy to the academics who are assured a constant food supply sufficient for a veritable and moveable feast. I fear that what I have had to say this evening amounts to the most meagre of hors d'oeuvres. I dearly wish that I could have discussed it with Richard Davies. Of one thing I am certain, he would have had very strong views about it and would not have hesitated to express them with vigour and passion.

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