After all, S&R did still have a claim even when solvent; the issue is simply whether the auditors can rely on a procedural defence.

Lord Walker acknowledged that the Law Commission has provisionally recommended a wider, more flexible test for the application of the illegality defence: *The Illegality Defence: A Consultative Report* CP No. 189 (2009). This would undoubtedly be an improvement on the current law. However, Lord Walker also stated that such proposals would only be effective "if enacted by Parliament", at [130]. The Law Commission suggested that legislative reform in the tortious sphere is not necessary; but it is to be hoped that the final report will recognise the need for a statutory discretion. It may also be incumbent upon the Law Commission to re-examine the issue of whether the illegality defence should provide an absolute bar to a claim. Their Lordships were not persuaded by the argument that contributory negligence should be used to adjust the burden of loss between the parties, but Lord Mance was attracted by the possibility of a more balanced, discretionary defence. It is submitted that the courts should be able to apportion damages after applying the illegality defence; its current all-or-nothing nature renders it very much a "blunt instrument".

Moore Stephens will no doubt come as a great relief to auditors, but the scope of the decision is very narrow and limited to "one-man" companies (or arguably situations in which all the directors and shareholders are complicit in the fraud). It does not universally absolve auditors of a duty to detect fraud. This would be highly undesirable; indeed, even the result in *Moore Stephens* may be considered troublesome. "The world has had sufficient experience of Ponzi schemes operated by individuals owning 'one man' companies for it to be questionable policy to relieve from all responsibility auditors negligently failing in their duty to check and report on such companies' activities", *per* Lord Mance at [206].

PAUL S. DAVIES

NEGLIGENCE, NEIGHBOURLINESS, AND THE WELFARE STATE

WHEN Lord Atkin enunciated the neighbour principle (in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580), he struck a blow for simplicity in negligence law. For he declared that defendants – all defendants – could be held liable for carelessly inflicting harm on others while closely and directly interacting with them. However, Lord Atkin's colleagues made it plain nine years later, that they were not prepared to apply this approach to public bodies (*East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74). Since then, judges have worked assiduously to

https://doi.org/10.1017/S0008197309990365 Published online by Cambridge University Press

limit the circumstances in which claimants can successfully sue public bodies. Thus claimants have to negotiate a number of barriers to recovery that do not exist in other areas of negligence law. They include the requirement that claimants show that a public body has exercised a statutory discretion "so carelessly or unreasonably" as to have "acted in abuse or excess of [its] power" (*Home Office* v. *Dorset Yacht Co Ltd* [1970] A.C. 1004, 1031, *per* Lord Reid).

But while negligence doctrine relating to public bodies has developed along these lines, some judges go about their business in Atkinian fashion. This is true of Maddison J.'s response to the claim in *X and Y* v. *Hounslow L.B.C.* [2008] EWHC 1168. X and Y were a couple with learning difficulties who (with their children) occupied a council flat. The couple (who were vulnerable to exploitation) befriended some youths and, as a result, saw their home turned, by degrees, into a den of evil. The youths used the flat as a place where they could take drugs, have sex, and store stolen goods. The couple's social worker, on becoming aware of these developments, urged the Council to relocate them. But before the Council had considered what to do, the youths physically and sexually abused the couple in their home. The couple sued the Council in negligence. Maddison J., having applied the three-stage duty of care test in *Caparo Industries plc* v. *Dickman* [1990] 2 A.C. 605, concluded that he could incrementally develop the law and impose la duty of care on the Council. For harm to the couple was reasonably foreseeable by the time the couple's social worker became aware of the youths' presence in the flat. The relationship between the parties was also proximate and, on the judge's analysis, the imposition of a duty of care was just, fair, and reasonable. He took this view on the ground that the duty he was imposing was "very narrow" and would not inspire "a flood of future claims". Maddison J. also described the Council as "a single entity". This led him to conclude that Council personnel performing one task may be, and here were, duty-bound to respond to requests for assistance from those performing other tasks. Moreover Maddison J. found that the Council had breached its duty of care and that this breach caused the claimants' damage.

The Council appealed successfully. Unlike Maddison J., Sir Anthony Clarke M.R. (with the support of Goldring and Tuckey L.JJ.) did not simply address the three questions that make up the *Caparo* duty test (*X and Y* v. *Hounslow L.B.C.* [2009] EWCA Civ 286). Instead he noted that the claim fell outside existing categories of case in which judges have imposed negligence liability (*e.g.* where the person causing harm is under the supervision of a public body). He also noted that Maddison J. had not considered whether the Council had assumed responsibility for the claimants. The Master of the Rolls added that, if the defendant had owed a duty, the claimants' social worker would not

https://doi.org/10.1017/S0008197309990365 Published online by Cambridge University Press

have breached it, contrary to the finding of Maddison J. This was because she had conducted herself in a way that a responsible body of fellow professionals would have endorsed. Hence, she satisfied the test in *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 587. The Master of the Rolls also criticised the judge's decision to treat the Council as "a single entity". On Clarke M.R.'s view, Maddison J. had failed to grasp that a local authorities' statutory powers and duties are "many and various" and that council personnel typically concentrate on "particular functions".

The body of negligence doctrine applied by Maddison J. and the Court of Appeal in *X and Y* is fraught with tension. Judges are sensitive to the demands of corrective justice. Thus we find Lord Browne-Wilkinson declaring that this ideal has the first claim on judicial "loyalty: *X (Minors)* v. *Bedfordshire County Council* [1995] 2 A.C. 633, 633. But judges are also aware that they may, by imposing liability on public bodies, deflect them from the pursuit of the public interest. The House of Lords has recently made this point in *Mitchell* v. *Glasgow City Council* [2009] UKHL 11, [2009] 1 A.C. 874 (when rejecting a claim against the defendant for failure to protect one of its tenants from a fatal attack mounted by another tenant).

The tensions on display in *X (Minors)* and *Mitchell* were at work in *X and Y*. The Court of Appeal's response was to read the relevant doctrine narrowly and to emphasise the Council's many responsibilities to the public. These points suggest that the Court paid scant regard to corrective justice and based its decision on public interest-related considerations. For the Court might have interpreted doctrine bearing on the parties' relationship quite differently. After all, the threat of harm was readily apparent to the claimants' social worker. The court might have concluded that, the close relationship between the couple and the Council made them neighbours in Lord Atkin's sense. Hence, the Court might have incrementally developed existing doctrine by establishing a new category analogous to existing ones.

But before we berate the Court of Appeal for failing to do this, we should think hard about the context in which the claimants sued. As the welfare state has grown, judges have elaborated negligence doctrine in ways that have reduced the circumstances in which public bodies are the neighbours of those they serve. This suggests that, as Parliament has saddled councils with more welfare-related burdens, judges have identified neighbourliness as a luxury that society cannot afford. These points provide support for the conclusion that we would be wrong to see in the welfare state the outlines of New Jerusalem.

RICHARD MULLENDER

https://doi.org/10.1017/S0008197309990365 Published online by Cambridge University Press