Mond v Hyde & Anor: Immunities in Insolvency

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Abstract

In this research paper, I will aim to prove that the court ruling in *Mond v Hyde & Anor* was not the correct interpretation of the Bankruptcy Act 1914 because it was based on policy rather than justice. I will 1) analyse the respective roles of the O.R. and trustee set out by the Bankruptcy Act 1914; 2) explore controversy around public policy; 3) argue why immunities given to public officials undermine the rule of law, a notion which justice depends upon; and 4) provide my recommendation for an alternative judicial reasoning test for the case that would lead to a fairer outcome, in line with the rule of law.

Keywords: public policy, immunity, justice, judicial reasoning

1. Introduction

For the purposes of this paper, the rule of law has two definitions. The first one is the formal definition, stipulating that everyone, including both government officials and citizens, is subject to the law; the law must also "be set forth in advance, be made public, be general, be clear, be stable and certain".[1] The second is the substantive definition given by Justice Tom Bingham in his book The Rule of Law, whereby "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts."[2]

In addition, "justice" means that the law should be applied and interpreted equally to everyone, regardless of their identity or status.[3] "Policy" is in relation to public policy – the rules that an entity, usually a governing entity, applies to solve specific public issues, and may take the form of regulations or laws.[4]

In *Mond v Hyde & Anor*,[5] the court's public policy motive was to ensure that a public official – the O.R. – would not be held accountable for his actions, so as to allow his execution of a public duty without fear of lawsuits. I postulate that this public policy motive was used to inform judicial discretion in granting the O.R. immunity from lawsuit. This use of public policy, however, undermines the rule of law because immunities compromise the principles whereby everyone is subject to the law, as well as the need for fair trials. My recommendation is to instead use an incremental approach, thereby establishing that the O.R. was in fact guilty.

2. The Facts

On 16 July 1998, the case of *Mond v Hyde & Anor* was heard at the civil division of the England and Wales Court of Appeal. In summary, the key issue was whether an Official Receiver (O.R.) in Bankruptcy (Mr Hyde, 1st respondent) was, on public policy grounds relating to immunities granted to officers of the court, immune from damages sought by the trustee (Mr Mond, appellant). The trustee had suffered financial loss by relying upon a negligent statement made to him by the O.R. during the bankruptcy proceedings. Crucially, the Court of Appeal held that the O.R. was indeed entitled to immunity from negligent misstatement; the public policy motive here was to ensure that public officials would

[1] Brian Tamanaha, 'A Concise Guide to the Rule of Law' (2007) SSRN 3 accessed 30 August 2023
[2] Tom Bingham, *The Rule of Law* (first published 2010, Penguin 2011) 37
[3] Brian Tamanaha, 'A Concise Guide to the Rule of Law' (2007) SSRN 12 accessed 30 August 2023
[4] 'What Is Public Policy?' (*Project Citizen*) <https://civiced.org/project-citizen/what-is-public-policy> accessed 30 August 2023
[5] *Mond v Hyde & Anor* [1998] EWCA Civ 1226.

be able to perform their duties without being "constantly in fear of actions."[6] Furthermore, the Court held that "there was no sufficient causal relationship" between the O.R.'s negligent statement and the loss claimed by the trustee.[7]

The root cause of the issue of negligent misstatement lies in the background facts of the case. After Mr David Hood ('the Bankrupt') officially declared bankrupt on 12 October 1984, he entered into an agreement with Mr John Walton and Mr Rupert Webb where the latter two men agreed to provide £100,000 for the implementation of a property scheme in Tenerife. Immediately afterwards, the Bankrupt claimed he had been misled by the two men and sought to claim damages against them. According to s 38 (a) of the Bankruptcy Act 1914, his right of action vested in the O.R., with whom he consequently spoke on the telephone on 5 February 1990. The O.R. disclaimed all right to the claim. Despite this, the Bankrupt obtained legal aid and successfully claimed damages.

After subsequent negotiations, on 16 September 1993, Mr Walton and Mr Webb offered to settle the Bankrupt's claim by payment of £50,000, provided that the O.R. confirmed that he disclaimed all right to this sum. It was at this stage that the O.R. appointed the appellant as trustee, who confirmed with the Bankrupt's solicitors that the O.R. had waived all claim on 5 February 1990. Yet, the O.R. told the appellant that he knew of no waiver, and now sought contribution for the benefit of the estate; this was inconsistent with his declaration to the Bankrupt on 5 February 1990 that he waived all claim to the £50,000 sum.

To resolve this dispute, the Bankrupt issued proceedings claiming a declaration that the O.R. had waived all claims. Relying on the O.R.'s assurance, the appellant defended himself against these claims in the proceedings. However, the High Court of Justice ruled that the O.R. had in fact disclaimed all right to the sum and ordered the appellant to pay for the Bankrupt's costs of the proceedings plus the costs he had incurred on behalf of the estate – altogether, a considerable sum of £113,855. Thereafter, the trustee sought damages, culminating in the case in question, *Mond v Hyde & Anor*.

3. Comparison of O.R. and Trustee

Clearly, the relative positions of the O.R. and trustee were central to the issue being addressed in this case; it is therefore worth establishing their respective roles and duties, in line with legislation at the time. The Bankruptcy Rules 1952 – which was used to interpret the case in question – was secondary legislation, created to support the primary legislation that was the Bankruptcy Act 1914.

According to the 1914 Act, the O.R. would continue to be appointed and removable by the Board of Trade, but would also be officers of the courts to which they were attached. The O.R. has a statutory duty to investigate the affairs and conduct of the Bankrupt, as well as to administer and protect their estate. Essentially, they act as an interim receiver and – where a special manager is not appointed – the manager of the Bankrupt's estate.

In contrast, as is illustrated by the appellant Mr Mond, a trustee is a licensed insolvency practitioner appointed after the O.R; they are not an officer of the court. All the bankrupt's assets are vested into the control of the trustee following their appointment. Their duty is much like the O.R. in that it involves the management of the bankrupt's estate and the distribution of its assets to creditors; in fact, the 1914 Act says that the trustee "shall use his own discretion" when fulfilling this duty.[8] Thus, it may be concluded that, although the O.R. and trustee have similar roles, the former is a public servant associated with the courts, while the latter is a private individual. This may be further corroborated by the rules on the appointment of a trustee. According to the 1914 Act, a trustee may be appointed at the first meeting of the creditors, or by the O.R. on the requisition of any creditor in order to fill a vacant trustee position. Even if, within three weeks after the occurrence of a vacancy, the creditors fail to appoint someone, and the Board of Trade may appoint a trustee, the creditors would still be able to replace this person with their own choice of trustee.

4. Controversy around Public Policy

One key issue that consequently arises from this comparison of the respective roles of the O.R. and trustee is that, according to the Bankruptcy Act 1914, the latter appears to have equal authority to the former. Yet, in *Mond v Hyde & Anor*, there is no doubt that the court gave the appellant's claim little to no consideration. This suggests that a specific circumstance during the proceedings had led to such a discrepancy. Bearing in mind that the O.R. was deemed immune based on public policy grounds, I propose that the court had used a public policy motive to inform judicial discretion in granting immunity. This discretion must, in the first place, have come from legislation that had afforded room for interpretation; namely, the Bankruptcy Act 1914.

It is crucial to understand that the Act itself did not contain any express stipulation of immunities granted to Official Receivers. The Court of Appeal had interpreted s. 70 (1) of the Act, which states that Official Receivers are

[6] Ibid. 21

[7] Ibid. 7

[8] Bankruptcy Act 1914, s 79 (4)

"officers of the courts to which they are respectively attached". This section gave room for judicial discretion because the notion of Official Receivers as public officials grants them absolute privileges. Consequently, the court used the public policy motive whereby any statements made by the O.R. should be entitled to absolute privilege and therefore immunity, so that the O.R. would be able to fulfil his public duty without fear of lawsuits. This would ensure that the administration of justice would not be impeded.

This type of public policy motive can be illustrated by the ongoing housing crisis in the UK: at times, courts interpreted legislation to reduce obligations on public bodies to spend money on homelessness reduction.

In general, the housing crisis began in 1980, after Thatcher's government introduced large discounts to housing prices in the Housing Act of 1980.[9] The immediate consequence was a massive increase in the number of people buying houses; the long-term consequence has been a highly volatile housing market due to insufficient houses being built to satisfy high consumer demand, resulting in housing prices increasing exponentially.[10] However, since wages have not kept up with these prices, an increasing number of people cannot afford to buy houses, leading to higher homelessness rates. This is a specific issue that public policy seeks to resolve.

In recent years, there has been considerable progress in addressing homelessness, such as the Homelessness Prevention Grant rolled out in 2022-23 consisting of £316 million in government funding to support vulnerable households.

However, before this progress, government support for homeless people was limited and, in conjunction, courts were at times reluctant to place obligation on the government to provide this support, leading to public policy controversy. A significant case is that of *Din & Anor v London Borough of Wandsworth*.[11] The appellants' homeless applications were rejected on the grounds that they were "intentionally homeless", but a County Court made an order that they should be awarded accommodation, subject to a pending appeal. Yet, the Court of Appeal by majority reversed this order; clearly, they had interpreted the legislation at the time – the Housing (Homeless Persons) Act 1977 – to achieve an outcome where the council would not have to provide accommodation for the appellants, thus saving on expenses.

I propose that this was the case in *Mond v Hyde & Anor*. Just like how the Housing Act 1977 was interpreted to remove any obligation on the council (a public body) to provide accommodation for private parties, the Bankruptcy Act 1914 was interpreted using judicial discretion, informed by a public policy motive, to grant the O.R. immunity from negligent misstatement and therefore remove any obligation on a public official to deal with the consequences of their actions. Consequently, the trustee – representing a private party – was not granted the degree of authority consistent with the 1914 Act in writing.

5. Immunities and The Rule of Law

As mentioned in the above section, the Bankruptcy Act 1914 did not contain any express stipulation of immunities granted to Official Receivers. The Insolvency Act 1986 changed this by including a section that granted immunities to former administrators analogous to the retired O.R.: if "a person ceases to be the administrator of a company… he is discharged from liability in respect of any action of his as administrator."[12] While the legal proceedings of the case had occurred after 1986, Mr David Hood's declaration of bankruptcy had occurred in 1984; therefore, the Insolvency Act 1986 was not used. Consequently, the question here is whether this section of the 1986 Act was a step in the right direction towards enshrining protection of public officials, or conversely, one that undermines the very mechanism of the law in terms of achieving justice. "Justice", in this sense, as I have previously established in the introduction, means that the law should be applied and interpreted equally to everyone, regardless of their identity or status.

The fundamental framework for justice in democratic societies is unequivocally established by the rule of law. As mentioned in the introduction, a common, minimal baseline for all rule of law definitions stipulates that everyone, including both government officials and citizens, is subject to the law. Furthermore, the law "must be set forth in advance, be made public, be general, be clear, be stable and certain".[13]

Prior to a discussion, it is important to establish that public policy in itself does not necessarily undermine the rule of law. Public policy is often, quite simply, legislation; if this legislation satisfies the criteria of the rule of law, then it may be deemed as just.[14] This may be regarded as "good" public policy; although challenging to achieve, it is certainly not impossible. "Good" public policy conforms to national and international laws, and is "effective and efficient, robust, and

[9] Lydia McMullan et al., 'UK housing crisis: how did owning a home become unaffordable?' (*The Guardian*, 31 March 2021) accessed 30 August 2023

[10] Ibid.

[11] *Din & Anor v London Borough of Wandsworth* [1981] UKHL 14.

[12] Insolvency Act 1986, Sch B1 para. 98 (1)

[13] Brian Tamanaha, 'A Concise Guide to the Rule of Law' (2007) SSRN 3 accessed 30 August 2023

[14] Dean G Kilpatrick, 'Definitions of Public Policy and the Law' (*National Violence Against Women Prevention Research Center*, 2000) accessed 30 August 2023

principled".[15] It must also undergo continuous verification and evaluation, and have represented a compromise between the relevant parties.[16]

As mentioned in Section III, issues arise when legislation is created or interpreted to fit a certain public policy objective, as attempts to obtain a desirable outcome may introduce injustice. For example, a public policy exception is when public interest directly contradicts private interests, and should therefore be applied in a limited way so that individuals' rights and freedoms are protected.[17]

It is now possible to analyse whether immunities as a result of public policy exceptions undermine the rule of law and, therefore, notions of justice. By definition, "immunity" in this sense refers to exemptions from particular legal requirements. Immediately, this undermines the principle of equality before the law, as it allows certain people to evade the ordinary consequences of their actions.[18]

In particular, immunities in insolvency illustrate the crux of public policy exception. By granting former administrators immunity from lawsuits during their tenures, not only do these immunities undermine equality before the law, but they also promote conflict between public and private interests. In this case, the private party would always be at a disadvantage due to their inherent status; consequently, immunities in insolvency are unjust according to my definition of justice as dependent on the rule of law.

However, this discussion so far has only considered immunities in terms of the formal definition of the rule of law. In contrast, substantive definitions go on further to establish fundamental principles derived from the rule of law.[19] Notably, Justice Tom Bingham, in his book *The Rule of Law*, gave his seminal substantive definition as "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts".[20] Clearly, in addition to stipulating that everyone is subject to the law, Bingham's definition goes further to establish the nature of the law and its methods of application.

In particular, one of his eight principles of the rule of law states that "The adjudicative procedures provided by the state should be fair": in other words, the need for fair trials.[21] Under this substantive principle of the rule of law, granting immunities on public policy grounds is unfair because it results in procedures favouring public officers, acting in what is seemingly for the public good, at the expense of private individuals.[22] Furthermore, it also jeopardises the independence needed to ensure the integrity of decision-makers in the courts. Crucially, decision-makers must be independent of "vested interests" and "public and parliamentary opinion", among others.[23]

Based on this analysis, it is apparent that immunities in insolvency undermine both formal and substantive definitions of the rule of law. Based on unjust public policy grounds, these immunities threaten the principles whereby everyone is subject to the law, as well as the notion of fair trials.

I contend that this is what happened in Mond v Hyde & Anor. The Court of Appeal used public policy in interpreting the Bankruptcy Act 1914 to grant the O.R. immunity from negligent misstatement, thereby ensuring that a public official would not be sued by a private party and would be able to continue carrying out a public duty without fear of legal consequences. This was unjust because, firstly, the O.R. was not subject to the law that should, in theory, apply to everyone equally; secondly, the trustee was not given a fair trial due to his inherent status as a private party, and procedures overwhelmingly favoured the O.R.

6. My Recommendation

As a result of the Court of Appeal's public policy motive, it rejected the trustee's claim of negligent misstatement based on a flawed approach towards establishing a duty of care. I will now establish why the O.R. was in fact guilty of negligent misstatement.

Firstly, it is important to review the facts of the case; specifically, the O.R.'s contradictory statements regarding the £50,000 payment to be settled between the Bankrupt, and Mr Walton and Mr Webb. Initially, the trustee confirmed with the bankrupt's solicitors that the O.R. had waived all claim to the £50,000 on 5 February 1990. Yet, when the appellant then telephoned the O.R., the O.R. told him that he "knew of no waiver". Furthermore, on 14 October 1993, the O.R. then sent the appellant a copy of a letter written to the bankrupt's solicitors in which he stated: "In any event I cannot conceive of any circumstances in which I would have given […] an

[15] 'The UK Parliament' (*Northern Bridge*) accessed 30 August 2023
[16] Ibid.
[17] Hossein Fazilatfar, *Overriding Mandatory Rules in International Commercial Arbitration* (Elgar 2019) 11
[18] 'The Rule of Law Lecture' (*Law Teacher*, November 2018) accessed 30 August 2023
[19] Michael P Foran, 'The rule of good law: form, substance, and fundamental rights' (2019) CLJ 2 accessed 30 August 2023
[20] Tom Bingham, *The Rule of Law* (first published 2010, Penguin 2011) 37
[21] Ibid. 90
[22] Ibid. 90
[23] Ibid. 92

assurance that the trustee in bankruptcy would not have a claim in a right of action […]".[24]

Relying on the O.R.'s assurance, the appellant defended the proceedings. However, the High Court of Justice ruled that the O.R. had in fact disclaimed all right to the sum and ordered the appellant to pay for the bankrupt's costs of the proceedings plus the costs he had incurred on behalf of the estate – altogether, a considerable sum of £113,855. Crucially, the Court of Appeal rejected the trustee's subsequent appeal of the costs on the grounds that "there was no sufficient causal relationship" between the O.R.'s negligent statement and the loss claimed by the trustee.[25] In order to prove that the O.R. had committed a negligent misstatement and thereby refute the Court of Appeal's judgement, it is essential to establish that the O.R. owed a duty of care to the trustee.

6.1 Duty of Care

In the UK, the tort of negligent misstatement is defined as when a Party A has honestly but carelessly made a false statement of fact to Party B, and in doing so breached the duty of care that Party A owes to Party B.[26] There have been two landmark cases on establishing the existence of a duty of care.

Donoghue v Stevenson[27] established the foundational "neighbour principle" test. In this case, Mrs Donoghue had consumed ginger beer bought by a friend and suffered from illness due to a decomposed snail in the beer. Stevenson, the manufacturer of the beer, was found liable, even though Mrs Donoghue was not the one who had bought the beverage. The reasoning was that, under the "neighbour test", Mrs Donoghue was sufficiently a neighbour; in Lord Atkin's words, this is someone who is "so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being affected when I am directing my mind to the acts or omissions in question".[28]

However, subsequent courts found the "neighbour principle" too basic for more complex or novel cases, such as that of *Caparo Industries Plc v Dickman*.[29] In this case, Caparo Industries had purchased shares in Fidelity Plc, relying on their accounts that stated they had made a pre-tax profit of £1.3 million. However, Fidelity had actually made a loss of over £400,000. Consequently, Caparo claimed that Fidelity had been negligent. The House of Lords, however, ruled that Fidelity owed no duty of care to Caparo. In order to reach this conclusion, Lord Devlin refined Lord Atkin's "neighbour principle" into one of "close proximity": there was insufficient proximity between Caparo and Fidelity's auditors since the latter was unaware of the existence of Caparo, nor the purpose for which the accounts were being used.[30]

Lord Bridge then established, in the same case, what is now known as the "Caparo test", a three-part test to establish a duty of care: "in addition to the foreseeability of damage […] there should exist […] a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and […] one in which the court considers it fair, just and reasonable that the court should impose a duty […]".[31] Thus, this three-part test consists of three questions: 1) Was the loss to the claimant foreseeable? 2) Was there sufficient proximity between the parties? and 3) Is it fair, just and reasonable to impose a duty of care?

The "Caparo test" is, nevertheless, by no means the definitive test for establishing a duty of care. Indeed, in *Caparo Industries Plc v Dickman*, the House of Lords noted the test's limited practical use and the impossibility of finding a common formula for establishing a duty of care.[32] They did not explicitly endorse the three-part test, but rather used an "incremental approach" specific to the case in order to develop a novel category for a duty of care.[33] In essence, the "incremental approach" refers to establishing duties of care in specific situations, and accumulating these situations over time.[34] This was recently used in cases such as *Steel & Anor v NRAM Ltd*.[35] Lord Wilson, in the lead judgement, explained the procedure he used: firstly, whether the defendant had assumed responsibility for their negligent misstatement; secondly, whether it was reasonable for the plaintiff to have relied on the defendant's statement; thirdly, whether the defendant should have foreseen that the plaintiff would rely on the statement.[36]

6.2 Mond v Hyde & Anor

In *Mond v Hyde & Anor*, the Court of Appeal used their own incremental approach to determine if the O.R. owed a duty of care to the trustee. However, as a result of their public policy motive in interpreting the Bankruptcy Act 1914, this approach was wholly flawed and biassed towards

[24] *Mond v Hyde & Anor* [1998] EWCA Civ 1226 3
[25] Ibid. 7
[26] 'Negligent misstatement' (*Thomson Reuters Practical Law*) accessed 30 August 2023
[27] *Donoghue v Stevenson* [1932] UKHL 100.
[28] Ibid. 8
[29] *Caparo Industries Plc v Dickman* [1990] UKHL 2.
[30] Ibid. 46
[31] Ibid. 25
[32] Ibid. 29
[33] Kevin Kee, 'Caparo is Dead, Long Live Caparo!' (*LK*, 16 March 2018) accessed 30 August 2023; *Caparo Industries Plc v Dickman* [1990] UKHL 2 30
[34] 'Duty of Care Lecture' (*Law Teacher*, November 2018) accessed 30 August 2023
[35] *Steel & Anor v NRAM Ltd* [2018] UKSC 13.
[36] Ibid. [38]

the O.R. The Court analysed 1) whether it was reasonable for the trustee to have relied on the misstatement; 2) whether the O.R. could have foreseen such a reliance; and 3) the credibility of the defendants (the O.R. and his employer, the Department of Trade and Industry).

With regards to the first point, the Court held that it was not reasonable for the trustee to have relied on the statement because it "amounted in effect to no more than a statement by the O.R. that he had no recollection of the telephone conversation".[37] In terms of the second point, the Court held that the O.R. could not have foreseen the trustee's reliance because it was "the appellant's own decisions to contest the proceedings".[38] Finally, in terms of the third point, the Court simply argued that "the relative credibility of the two crucial witnesses"[39] corroborated the veracity of the O.R.'s claim that he had not committed an act of negligent misstatement.

6.3 An Alternative Test

I propose that, in order to establish whether the O.R. owed the trustee a duty of care in *Mond v Hyde & Anor*, an alternative incremental approach should be used . It is recognised that using this approach does have its flaws: an accumulation of different novel cases on duties of care is not ideal due to the resulting complexity of precedent. Certainly, a common formula would be more efficient and simpler to use. However, the reality is that pragmatic tests are rarely perfect; the incremental approach ensures practicality and a balance between legal certainty and justice.[40] As such, it should be used for the common law to evolve rather than be adopted into statute.

The alternative test I propose includes three incremental considerations: 1) the proximity between the O.R. and the trustee; 2) whether it was reasonable for the trustee to have relied on the misstatement; and 3) the foreseeability of such reliance.

Firstly, the facts consist of a retiring trustee (the O.R.) handing over to a successor whom he appointed himself, a private insolvency practitioner (the trustee). Clearly, there is a close proximity between the two parties and, in the words of the Vice-Chancellor's initial argument in M*ond v Hyde & Anor*, the O.R. would therefore "be expected to answer the successor's requests for information about the trust and its affairs and would be expected to exercise due care in doing so."[41]

Secondly, according to the Bankruptcy Act 1914, it is wholly the trustee's job to effectively continue the work of the retiring O.R. whom he had been appointed by; this role includes protecting the interests of the bankrupt's estate. Therefore, it is not unreasonable for the trustee to have relied on the O.R.'s misstatement in order to secure a contribution for the estate.

Finally, one key piece of evidence in the case was that "the O.R.'s reaction was to seek a contribution for the benefit of the estate and at this stage he approached the appellant to act as trustee."[42] This clearly suggests that the trustee had not acted on his own accord, but according to the explicit wishes of the O.R. It was the O.R.'s intention for the trustee to secure a claim to the £50,000; consequently, he should certainly have foreseen that the trustee would rely on his assurance.

Overall, by applying this alternative incremental approach, it becomes apparent that, contrary to the Court of Appeal's judgement, the O.R. did in fact owe a duty of care to the trustee and was therefore guilty of negligent misstatement. It seems illogical for the Court to have rejected the trustee's claim of negligent misstatement unless it had been pursuing a public policy motive – which I have explored in Sections I and III – of granting the O.R. immunity from a private party's lawsuit in order to ensure the execution of a public duty, without fear of consequences.

7. Conclusion

In *Mond v Hyde & Anor*, the Court of Appeal ruled that the O.R. was entitled to immunity from lawsuit and rejected the trustee's claim of negligent misstatement. However, this was simply not a just and correct interpretation of the Bankruptcy Act 1914.

By comparing the roles of the O.R. and trustee, it becomes apparent that the Court's prejudiced treatment of the trustee was not consistent with the 1914 Act. The Court had used a public policy motive to inform judicial discretion during its interpretation of the 1914 Act, resulting in the O.R. being granted immunity. This ensured that a public official would not be sued by a private party and would be able to continue carrying out a public duty without fear of legal consequences.

On a broader level, the case illuminates key issues around immunities in insolvency proceedings. When based upon unjust public policy grounds, immunities undermine both formal and substantive definitions of the rule of law: they threaten the principles of both equality before the law and the need for fair trials.

[37] Mond v Hyde & Anor [1998] EWCA Civ 1226 7
[38] Ibid. 7
[39] Ibid. 7
[40] Richard McMeeken, 'Negligence: An Incremental Development of the Law' (*Morton Fraser*, 22 March 2018) accessed 30 August 2023
[41] *Mond v Hyde & Anor* [1998] EWCA Civ 1226 6
[42] Ibid. 3

Crucially, by using my recommendation for an alternative incremental approach, it is clear that the O.R. did owe the trustee a duty of care and was therefore guilty of negligent misstatement. As such, I conclude that the O.R. was granted immunity from a lawsuit that would otherwise have been upheld if it were not for the Court of Appeal's public policy motive.

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