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PRINCIPLE AND POLICY IN PRIVATE LAW REASONING

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ABSTRACT. *Under the present law, policy-based reasoning plays a major role in the judicial determination of private law disputes. The propriety of this type of reasoning, however, has been the subject of much debate. Whilst many argue that there is nothing objectionable about using policy-based reasoning, others, particularly those who believe in a rights and/or corrective justice-based view of private law, argue that policy should play no role in the determination of private law disputes, and that courts should instead rely on what they call "principle". This article will examine both sides of the debate, initially exploring what is actually meant by "principle" and "policy", and then providing an overview of the primary arguments relied on in favour of both a policy- and principle-based approach to resolving private law disputes. Finally, a compromise between the two approaches, the so-called "pluralist" approach, will be examined.*

KEYWORDS: *principle, policy, private law, private law theory, private law reasoning.*

I. INTRODUCTION

The common law often provides no specific guidance on how a particular private law dispute is to be resolved, whether because the existing law is too vague or because the issues raised by the case are so novel that no directly relevant rules exist.[1] In such situations, courts often rely on policy-based reasoning. Yet, the use of policy-based reasoning is controversial. Indeed, whilst some describe use of such reasoning as letting "daylight in on magic",[2] others believe it should play no role in judicial decision-

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[1] R. Dworkin, *Taking Rights Seriously* (London 1979), 82. Dworkin calls these "hard cases".

[2] J. Stapleton, "The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable" (2003) 24 Aust. Bar Rev. 135, at 138. See also J. Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in P. Cane and J. Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford 1998), 430.

making whatsoever,[3] and that the courts should instead rely on considerations of "principle". Whilst this debate is hardly new,[4] it has risen in prominence recently due to the increased influence of rights-based theories of private law, most of which tend to reject the use of policy-based reasoning.

Although the debate is principally a theoretical one, it is also of considerable practical importance, as policy-based arguments play a major role in many private law determinations, particularly at the appellate level. In contract law, for example, policy-based arguments provide the basis for the courts' refusal to give effect to "illegal" contracts, which, according to Peel, include those that, despite being otherwise enforceable, are "contrary to public policy".[5] Such contracts are wide and varied, and include contracts to commit an illegal act, contracts promoting sexual immorality, contracts interfering with the course of justice, contracts purporting to oust the jurisdiction of the courts, contracts restricting personal liberty, and, perhaps most significantly, contracts relating to restraint of trade.[6] Waddams has therefore described the use of policy in contract law as of "enormous practical as well as theoretical importance".[7] Tort law, too, relies heavily on policy-based arguments in determining what is and is not the subject of tortious liability. The existence of the defences of absolute and qualified privilege, for example, have been justified on the basis of arguments of policy,[8] as has been the existence of vicarious liability,[9] and exceptions to the otherwise strict logic of factual causation.[10] Policy-based arguments also play a particularly explicit role in determining the existence or otherwise of a common law duty of care.[11] Accordingly, Morgan has described the role of policy-based reasoning in tort law as "a central, perhaps *the* central, characteristic of the judicial development of tort law".[12] The

[3] See generally E. Weinrib, "The Disintegration of Duty" in M.S. Madden (ed.), *Exploring Tort Law* (Cambridge 2005); E. Weinrib, *The Idea of Private Law*, revised ed. (Oxford 2012); A. Beever, *Rediscovering the Law of Negligence* (Oxford 2007); and R. Stevens, *Torts and Rights* (Oxford 2007).

[4] See e.g. the comments of Burrough J. in *Richardson v Mellish* [1824] 130 E.R. 294, 303; 2 Bing 229, 252: "I, for one, protest … against arguing too strongly upon public policy; – it is a very unruly horse, and once you get astride it you never know where it will carry you"; and the comments of Lord Mansfield in *Holman v Johnson* (1775) 98 E.R. 1120, 1121; 1 Cowp 341, 343: "The objection, that a contract is immoral or illegal … sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so". See also the discussion in S. Waddams, *Principle and Policy in Contract Law* (Cambridge 2011), ch. 5.

[5] E. Peel, *Treitel: The Law of Contract*, 14th ed. (London 2015), 11–001.

[6] See generally ibid., at ch. 11.

[7] Waddams, *Principle and Policy*, p. 148.

[8] See e.g. *Reynolds v Times Newspapers Ltd.* [2001] 2 A.C. 127 (HL), 194, per Lord Nicholls.

[9] *Various Claimants v Catholic Child Welfare Society* [2013] 2 A.C. 1 (UKSC), at [35], per Lord Phillips; *Cox v Ministry of Justice* [2016] UKSC 10, at [41], per Lord Reed.

[10] See e.g. *Fairchild v Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32 (HL), 66–67, per Lord Hoffmann.

[11] See e.g. *Caparo Industries plc. v Dickman* [1990] 2 A.C. 605 (HL), 617–18, per Lord Bridge, 633, per Lord Oliver; C. Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 M.U.L.R. 569, at 574; A. Mason, Policy Considerations" in A. Blackshield, M. Coper, and G. Williams (eds.), *The Oxford Companion to the High Court of Australia* (Melbourne, Oxford 2001), 536.

[12] J. Morgan, "Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics" (2009) 125 L.Q.R. 215, at 215, emphasis in original.

implication of the claim that policy arguments are impermissible is therefore considerable, as it calls the basis of many private law decisions and rules of law into question.

Central to the debate about the appropriate role of principle- and policy-based reasoning is the meaning of the terms "principle" and "policy". An objection to the use of policy in one sense, for example, may not apply to the use of policy in another. However, as MacCormick notes, policy has become a "hideously inexact word in legal discourse",[13] whilst, according to Waddams, there is also "much uncertainty" surrounding the meaning of the term "principle".[14] This has led to confusion at the highest levels of the judiciary. In *Sullivan v Moody*,[15] for example, the High Court of Australia, after expressing a clear preference for the use of principle over policy when determining the existence or otherwise of a duty of care,[16] listed the potential for a decision to result in indeterminate liability,[17] or defensive policing,[18] as examples of arguments based on principle; both types of arguments, however, as we will see, are widely considered to be arguments based on policy. Similarly, in *Macfarlane v Tayside Health Board*,[19] after disclaiming any reliance on the "quicksands" of public policy, Lord Steyn explained that his decision instead depended on considerations of distributive justice[20] – again, a type of argument that is typically considered to be policy-based.[21]

The prominence of the debate about the appropriate role of principle and policy in private law reasoning, its significance for right-based theories of private law, the effect it has on the outcome of private law disputes, and the confusion that surrounds it make understanding the debate important. The aim of this article is to provide such an understanding, by providing an overview and analysis of: first, the most commonly understood meanings of "principle" and "policy" in the private law context; second, the primary arguments relied on favour of both a policy- and principle-based approach to resolving private law disputes; and, third, a potential compromise between the two approaches, being the so-called "pluralist" approach. Whilst none of the approaches is specifically endorsed, it is nevertheless suggested that many of the standard objections to the use of policy-based arguments are either highly problematic or apply with similar force to the

[13] N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford 1978), 263.
[14] S. Waddams, "Private Right and Public Interest" in M. Bryan (ed.), *Private Law in Theory and Practice* (London 2008), 7. See also P. Cane, "Another Failed Sterilisation" (2004) 120 L.Q.R 189, at 191; Waddams, *Principle and Policy*, p. xv.
[15] *Sullivan v Moody* (2001) 207 C.L.R. 562 ("*Sullivan*").
[16] *Sullivan*, para. [49].
[17] Ibid., at paras. [61]–[63].
[18] The High Court was referring specifically to the comments of Lord Keith in *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53 (HL), 63.
[19] *Macfarlane v Tayside Health Board* [2000] 2 A.C. 59 (HL).
[20] Ibid., at p. 83.
[21] Beever, *Rediscovering*, p. 18.

use of principle-based arguments, such that the case for the prohibition of policy is less convincing than it is often made out to be.

II. The Meaning of "Principle" and "Policy"

The terms "principle" and "policy" are ubiquitous throughout private law. We often hear about unimpeachable "principles of law" and arguments being pejoratively described as "unprincipled".[22] Similarly, many arguments are described as "policy-based", typically as an alternative to an argument based on the strict law. But what, exactly, does it mean to base a decision on "principle" or "policy", and are the two necessarily mutually exclusive or can they overlap? Can we, for example, have a policy based on a principle of law, or a principle of law based on some policy?[23] Part of the problem is that principle and policy mean different things in different contexts, so that policy may mean one thing in one context and something else entirely in another. We will therefore begin by examining the terms in their widest and most general sense, before looking at the narrower definitions that are commonly used in private law discourse.

A. Wide Definitions of "Principle" and "Policy"

In its widest sense, the term "principle" typically refers to a broad generalisation of sets of rules.[24] Lord Atkin's neighbour principle from *Donoghue v Stevenson*,[25] which sought to provide a "general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances", is a clear example of, at least what Lord Atkin believed to be, a "principle" of the law of negligence. Whilst some consider principles to be abstractions of *any* set of rules, including not only legal rules, but social and moral norms,[26] the more common view is that principles are abstractions of legal rules only, being the rules that have been used to justify the outcome of previously decided cases, so that by "principles" it is meant "*legal* principles" or "principles *of law*".[27] A principle-based

[22] As Waddams notes, "Principle, in relation to judicial decision making, has been, almost invariably, a term of approbation. . .": Waddams, *Principle and Policy*, p. xv.

[23] In *Waters v Commissioner of Police of the Metropolis* [2000] 1 W.L.R. 1607, for example, Lord Jauncey held that "In *Hill v Chief Constable of West Yorkshire* [1989] the House of Lords held that public policy precluded an action for damages in negligence against the police arising out of the manner in which they investigated crime, in that case the activities of a serial killer. I see no reason why this principle should not apply equally [here]". Similarly, Lord Wright, writing extra-judicially about *Egerton v Brownlow* (1853) 4 H.L.C. 1, 151; 10 E.R. 359, 419, referred to "the principle of public policy" in R. Wright, *Legal Essays and Addresses* (Cambridge 1939), 81.

[24] H. Hart, *The Concept of Law*, 3rd ed. (Oxford 2012), 260. Although Hart is contrasting "principles" to "rules" rather than "policy", the definition is nevertheless suitable for our purposes.

[25] *Donoghue v Stevenson* [1932] A.C. 562, 580.

[26] See e.g. MacCormick, *Legal Reasoning*, pp. 260–61.

[27] Beever, for example, limits principles to the "rules and doctrines of the law itself": Beever, *Rediscovering*, p. 3. Similarly, Bell believes that "principles rationalise a number of *legal prescriptions*" (emphasis added): J. Bell, *Policy Arguments in Judicial Decisions* (Oxford 1983), 26.

argument, then, in its widest sense, justifies an outcome on the basis that it conforms to a generalisation of a particular set of legal rules.

If we then define "policy" as "everything apart from principle", as Beever does,[28] then a policy-based argument is a justification for an outcome that does *not* rely on the law itself. As Bell explains:

> Policy arguments may be defined as substantive justifications to which judges appeal when standards and rules of the legal system do not provide a clear resolution of a dispute .... Such substantive reasons can be both ethical and non-ethical. Ethical reasons justify a result by showing that it will conform to some standard, such as fairness, which is valuable in itself. Non-ethical or goal-based reasons justify a decision by showing that it advances some accepted goal, such as greater wealth for the community or a better environment. They seek to show the ways in which the decision will be good for individuals in society, whereas ethical arguments do not turn so much on the benefits accruing from the decision, as on its moral desirability.[29]

The "value of human life" argument in wrongful birth and conception cases, typically to the effect that to allow damages for the upkeep of a healthy baby is morally offensive, is an example of an "ethical"-type policy argument, as the outcome is being justified on the basis of its inherent moral rightness or wrongness.[30] An argument that a particular decision would result in decreased road-traffic accidents,[31] on the other hand, is an example of a "non-ethical" type policy argument, as the outcome is being justified on the basis that it will advance "some independently desirable goal(s)".[32] Non-ethical policy arguments, which are more commonly known as "goal-based" arguments, are often associated with "consequentialism", as they justify or oppose a rule on the basis of its consequences or expected outcome, such as its effect on people's behaviour.[33]

In its widest sense, then, a principle is a generalisation of legal rules, whilst policy describes a reason that does not rely on the law and is either goal-based or ethical/deontological in nature.

B. Narrow Definitions of "Principle" and "Policy"

Unfortunately, at least as far as the debate about the appropriate role of principle and policy in *private law* reasoning is concerned, the definitions of principle and policy that we have just seen are of limited analytical use. In particular, such a wide sense of policy could be seen to underpin and

[28] Beever, *Rediscovering*, p. 3.
[29] Bell, *Policy Arguments*, p. 23.
[30] A. Robertson, "Constraints on Policy-Based Reasoning in Private Law" in A. Robertson and H. Tang (eds.), *The Goals of Private Law* (Oxford 2009), 263. This type of argument is often also called a "deontological"-type argument.
[31] Dworkin, *Taking Rights Seriously*, p. 22.
[32] Weinrib, "The Disintegration of Duty", p. 177.
[33] Robertson, "Constraints", p. 263.

justify *all* legal principles[34]; after all, why bother creating a rule at all unless it has some purpose, some ethical or non-ethical justification?[35] And, if policy-based arguments underlie principle-based arguments, then it is meaningless to say that arguments based on principle should be preferred to arguments based on policy, and the debate becomes moot. The wide definition of principle, being generalisations of legal rules, is similarly problematic, giving rise to at least three difficulties. First, the definition is very loose and imposes little restriction on what may be termed a "principle". As Waddams points out: "There is never a single principle that applies to a controversial legal question; principles may be stated and restated at an infinite number of levels of generality; often principles conflict with each other; any legal rule, as Hart pointed out, may be called a principle."[36] Second, if "principle" is defined only as abstractions of *legal* rules, then cases involving novel legal problems must *necessarily* have to rely on policy-based arguments, as novel cases are by definition not covered by existing rules and so there can be no principle on which to base a finding.[37] Third, the wide definition of principle permits considerable overlap with the wide definition of policy, such that there is nothing to prevent principles from being reformulated as policies, and policies being reformulated as principles. As Dworkin explains:

> The distinction [between principle and policy] can be collapsed by construing a principle as stating a social goal (i.e. the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (i.e. the principle that the goal the policy embraces is a worthy one) or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness for the greatest number).[38]

None of this is to say that a wide definition of principle is objectionable per se; it is not. It is, however, difficult to see how one could argue that, on these wide definitions, arguments based on principle should be preferred to arguments based on policy.

Unsurprisingly, therefore, in the private law context, both principle and policy tend to be understood more narrowly. In the case of policy, whilst the wide definition includes both ethical/deontological *and* goal-based arguments, it is typically only the *latter* that is meant when private lawyers speak of policy – in particular, goals that improve some economic, political,

[34] Cane, "Another Failed Sterilisation", p. 192. See also O.W. Holmes, *The Common Law* (Boston 1881), 35: "… every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy."

[35] Cf. Weinrib, who famously stated that private law has no purpose at all other than to be private law: Weinrib, *The Idea*, p. 5. For criticism of this view, see Stevens, *Torts and Rights*, p. 325.

[36] Waddams, "Private Right", p. 7 (footnotes omitted).

[37] For more on this inherent conflict in the definition of principle, see Waddams, *Principle and Policy*, p. 18.

[38] Dworkin, *Taking Rights Seriously*, p. 23.

or social feature of the *community*.[39] Robertson, for example, defines policy, at least in the duty context, as "considerations of community welfare, as distinct from considerations of interpersonal justice".[40] Similarly, Dworkin believes that "Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community *as a whole*".[41] Take, for example, an agreement that one party will perform an illegal act for the other. An argument that illegal acts are detrimental to the community and so agreements to commit such acts should not be enforced by the law would be a policy-based argument, as it focuses on the wider concerns of the community rather than the interests of the parties before the court.[42] "Policy", then, narrowly understood, refers to arguments that justify an outcome on the basis that it promotes a goal that improves community welfare overall. The narrow sense of policy may therefore be better described as *public* policy.[43]

But what about principle? As Waddams points out, whilst the wide meaning of "principle" may refer to a reason or rule framed at a higher level of generality than another, "As with other legal ideas the meaning of the word varies according to what is contrasted: for example, 'principle' and 'policy', 'principle' and 'precedent', 'principle' and 'authority', 'principle' and 'pragmatism', 'principle' and 'practice', 'principle' and 'utility'".[44] If, then, we are contrasting principle with our narrow sense of policy, and policy depends on the interests of the *community*, the corresponding idea of principle must depend on the interests of the *individual* – in particular, on the parties before the court.[45] Indeed, this is exactly how principle tends to be defined in the private law context. If we return to the example above, about the agreement to perform an illegal act, an argument that we should commit the criminal act, or be forced to compensate the promisee for not doing so, because *pacta sunt servanda* (agreements must be kept), would be an argument based on principle, as it focuses only on what is fair and just as between the parties before the court, and ignores any potentially negative consequences that such a decision may have for the wider community.[46] Broadly speaking, then, we can say that, in the

[39] Ibid., at p. 22.

[40] A. Robertson, "Policy and the Duty of Care", SLS Conference, Cambridge, September 2011, 1. The meaning of "interpersonal justice" is discussed further below.

[41] Dworkin, *Taking Rights Seriously*, p. 82, emphasis added, though Dworkin does not confine his definition to the private law context.

[42] For examples of the use of this argument, see *Collins v Blantern* (1765) 2 Wils. K.B. 347, 350; 95 E.R. 850, 852, per Willmott C.J.; and *Holman* (1791) 1 Cowp 341, 350; 98 E.R. 1120, 1121, per Lord Mansfield.

[43] Indeed, Mason seems to equate "policy" with "public policy" and uses the terms almost interchangeably in Mason, "Policy Considerations", p. 536.

[44] Waddams, "Private Right", p. 7.

[45] Weinrib, "The Disintegration of Duty", p. 157.

[46] As discussed above, restraint of trade clauses and absolute and qualified privilege give rise to similar tensions. For discussion of these, and more, examples, see A. Robertson, "On the Function of the Law of Negligence" (2012) 33 O.J.L.S. 31, at 44–46.

private law context, principle-based arguments rely on considerations of "interpersonal justice".[47] Another important feature of arguments based on principle is that they tend to rely on the idea of "rights" – in particular, whereas an argument based on policy intends to advance a collective goal, arguments based on principle intend to justify the existence of an individual "right".[48] Indeed, proponents of a principle-based approach to private law are often associated with rights-based theories of private law.[49]

Accordingly, the narrow definition of policy involves considerations of community welfare, whilst the narrow definition of principle involves considerations of interpersonal justice; one focuses on the wider community and the other focuses on the parties before the court. Indeed, Robertson eschews the terms "principle" and "policy" altogether, instead preferring the language of "justice" and "welfare".[50] "Principle" and "policy", then, whilst of limited value when used in a wide sense, become distinct and potentially useful concepts when used in a narrow sense. Now that we have a workable understanding of the terms, we can turn to the arguments in favour of both a policy- and principle-based approach to resolving private law disputes.

III. Why Use the Policy-Based Approach?

Before we examine the apparent merits of the policy-based approach, we should, firstly, clarify what, exactly, we mean by "the policy-based approach". Whilst, as we have seen, advocates of the principle-based approach believe that principle is *exclusively* relevant, advocates of the policy-based approach simply believe that policy *can* be relevant. In other words, advocates of the policy-based approach believe that considerations of both policy *and* principle can be relevant, so that the appropriateness of relying on a particular argument depends only on how convincing it is and not whether it is labelled principle or policy.[51] Considerations of interpersonal justice may therefore be trumped by the interests of the community, just as considerations of interpersonal justice may trump the interests of the community. It is therefore, perhaps, misleading to describe those who insist that policy is relevant as advocates of a "policy-based approach", as they do not actually advocate an approach based on "policy" so

[47] Robertson, for example, uses this term to capture the various approaches: A. Robertson, "Rights, Pluralism and the Duty of Care" in D. Nolan and A. Robertson (eds.), *Rights and Private Law* (Oxford 2012), 437; A. Robertson, "Justice, Community Welfare and the Duty of Care" (2011) 127 L.Q.R. 370, at 373; A. Robertson, "Policy-Based Reasoning in Duty of Care Cases" (2012) 33 L.S. 119, at 119.

[48] Dworkin, *Taking Rights Seriously*, p. 90.

[49] For more on the relationship between interpersonal justice and rights-based approaches to private law, see D. Nolan and A. Robertson, "Rights and Private Law" in Nolan and Robertson (eds.), *Rights and Private Law*, pp. 23–25.

[50] Robertson, "Policy and the Duty of Care", p. 4.

[51] Though note Robertson, "Constraints", discussed further below.

much as an approach based on "convincing factors"[52] or "legal concerns"[53] which may or may not include considerations of policy. The language is nevertheless convenient and so will be adopted for this article.

What, then, are the principal arguments in favour of the policy-based approach? There appear to be three: its openness or transparency; the difficulty of clearly distinguishing between principle and policy; and the view that policy-free accounts of the law are neither descriptively plausible nor normatively desirable. These arguments will now be examined in further detail.

A. Openness and Transparency

Perhaps the most frequently advanced argument in favour of the policy-based approach is that it is transparent. In particular, advocates of the policy-based approach believe that, by not prohibiting any form of reasoning, judges are more able to be completely open about their reasons for a particular decision, resulting in more transparent decision-making. According to Stapleton, for example, transparency simply does not occur when judges appeal to principle alone as such appeals often "mask" the actual substance of a judge's reasoning process.[54] Appeal to principle, in other words, often obfuscates a judge's true reasons for a decision.

The requirement of foreseeability of harm to the claimant is, perhaps, the classic example of a principle-based approach to determining liability in negligence. Indeed, whether or not the defendant ought to have reasonably foreseen that their conduct would create a risk of harm to the claimant is concerned *exclusively* with what is fair and just between the parties before the court.[55] Yet, many have argued that the foreseeability requirement often conceals what are the true, policy-based reasons for a decision. In *Bourhill v Young*,[56] for example, the plaintiff suffered serious shock, ultimately leading to a miscarriage, as a result of hearing, but not seeing, a motorcycle accident involving a stranger. Although the House of Lords denied the existence of a duty of care on the grounds that the defendant motorcyclist could not have foreseen the injury to the plaintiff,[57] Lunney and Oliphant believe that there is "little doubt" that the *real* reason the court denied the existence of a duty of care was that the damage suffered by the plaintiff was psychiatric in nature, and the court felt that limits on recovery for such

[52] Stapleton, "Duty of Care Factors", *passim*.
[53] Stapleton, "The Golden Thread", p. 137.
[54] Ibid., at p. 136. J. Fleming, *The Law of Torts*, 9th ed. (Sydney 1998), 153. See also Lord Denning in *Dutton v Bognor Regis Urban DC* [1972] 1 Q.B. 373, 397; Lord Steyn in *Macfarlane* [2000] 2 A.C. 59, 82; and J. Fleming, "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31 Can. Bar Rev. 471, 487. Cf. Beever, *Rediscovering*, pp. 153–54.
[55] See e.g. ibid., at p. 120; Robertson, "On the Function", p. 33; Robertson, "Policy-Based Reasoning", p. 122; Robertson, "Justice, Community Welfare", p. 371.
[56] *Bourhill v Young* [1943] A.C. 92.
[57] Ibid., at p. 102.

injuries needed to be set.[58] Williams has also argued that, in cases involving psychiatric injury, limits are *really* imposed by undisclosed "conceptions of policy … even if the language of foreseeability is used to justify it".[59]

Proximity, too, despite ostensibly concerning the closeness of the relationship between the parties only, and so concerned with considerations of principle,[60] is often criticised for concealing the true, policy-based, reasons for decisions. According to Smillie, for example:

> Instead of providing a base criterion for determining the existence of a duty, it merely records the result of a determination based on quite distinct (and often undisclosed) reasons. The sole utility of the proximity concept is to obscure the fact that decisions in hard cases are based on controversial value judgments by the courts, and to preserve the appearance of value-free adjudication by reference to a fundamental pre-existing legal principle.[61]

According to its advocates, then, the policy-based approach, by not placing limits on the types of reasons that may be employed, makes it more likely that judges will reveal their true reasons for a decision, resulting in more transparent judgments. Future courts and commentators will therefore be better able to assess the adequacy of the court's reasoning and its applicability to new fact scenarios.

B. The Lack of a Meaningful Distinction between Principle and Policy

A second argument advanced in support of the policy-based approach is that there is no meaningful distinction between principle and policy. If this is correct, then it is meaningless to say that policy is irrelevant or that a principle-based approach is to be preferred to a policy-based approach, effectively putting an end to the principle-versus-policy debate. As Stapleton, perhaps the most prominent proponent of this idea, states:

[58] M. Lunney and K. Oliphant, *Tort Law: Text and Materials*, 5th ed. (Oxford 2013), 134. See also R. Kidner, "Resiling From the Anns Principle: The Variable Nature of Proximity in Negligence" (1987) 7 L.S. 319, at 325, and Fleming's criticism of the Australian case *Chester v Waverly Corporation* (1939) 62 C.L.R. 1 in Fleming, "Remoteness and Duty", pp. 489–90.

[59] G. Williams, "The Risk Principle" (1961) 77 L.Q.R. 179, at 192–93. For further criticism of foreseeability on the grounds that it acts as a mask for policy-based reasoning, see R. Dias, "Remoteness of Liability and Legal Policy" (1962) 20 C.L.J. 178, at 189–90, 197; and R. Dias, "Trouble on Oiled Waters: Problems of *The Wagon Mound (No 2)*" (1967) 25 C.L.J. 62, at 75.

[60] See e.g. Robertson, "On the Function", p. 33; Robertson, "Policy-Based Reasoning", p. 122; Robertson, "Justice, Community Welfare", p. 371; C. Witting, "Duty of Care: An Analytical Approach" (2005) 25 O.J.L.S. 33; A. Kramer, "Proximity as Principles: Directness, Community Norms and the Tort of Negligence" (2003) 11 Tort L.Rev. 70.

[61] J. Smillie, "The Foundation of the Duty of Care in Negligence" (1989) 15 Mon.L.R. 302, at 315. For further alleged examples of principles masking policy-based reasoning, see H. Luntz, "The Use of Policy in Negligence Cases in the High Court of Australia" in Bryan (ed.), *Private Law, passim*; D. Howarth, "Public Authority Non-Liability: Spinning Out of Countrol?" (2004) 63 C.L.J. 546, at 548; D. Howarth, "Poisoned Wells: 'Proximity' and 'Assumption of Responsibility' in Negligence" (2005) 64 C.L.J. 2, at 25.

"Oddly, some Australians lawyers still believe that there is a meaningful tension between principle and policy as bases for legal reasoning .... But I have yet to hear a compelling account of the difference."[62]

Having just seen a detailed account of the difference between principle and policy, this view may seem odd. However, it must be remembered that the definitions of principle and policy given, whilst popular among private law theorists, are not universally supported.[63] Indeed, the definitions we have just seen are primarily those of advocates of the principle-based approach, which is hardly surprising given that precise and distinct definitions of the concepts are required if their position is to remain coherent. Yet not everyone accepts that defining principle and policy is so straightforward. Even Beever, one of the more notable proponents of the principle-based approach, acknowledges the difficulty in defining the content of the terms exactly.[64]

Advocates of the policy-based approach cite two primary reasons why they believe principle cannot meaningfully be distinguished from policy. The first reason is that, despite the view that arguments of principle rely on considerations of interpersonal justice and arguments of policy rely on community welfare goals, individual rights can always be traced back to some community welfare-based justification. Cane, for example, believes that "all rules and principles that state individuals' legal rights and obligations are underpinned by policy arguments".[65] Witting agrees, noting that "It seems difficult to counter the conclusion that the law *is a means* to the achievement of certain social goals".[66] Robertson, too, states that "the imposition of duties of care based on considerations of interpersonal justice ... [is based on the] policy that that wrongs should be remedied".[67] So the interpersonal right not to be assaulted by another person, for example, whilst justifiable on the ground of principle (I would not wish to be assaulted by you therefore I have no right to assault you) could be seen as *actually* justified on the policy-based grounds that permitting assault would, amongst other things, lead to higher taxes to recover the associated costs of medical treatment, could indirectly lead to more serious crimes being committed, and may make people less likely to interact with others, thereby making the world a worse place to live – in other words, on the basis that it would be bad for the community. The idea of freedom of contract gives rise to similar difficulties; as Waddams notes:

[62] Stapleton, "The Golden Thread", p. 135. See also Stapleton, "Duty of Care Factors", p. 90, fn. 116.
[63] Recall, for example, the wide definitions of Bell and MacCormick at notes 27 and 13 above.
[64] Ibid., at p. 3.
[65] Cane, "Another Failed Sterilisation", p. 192.
[66] C. Witting, "The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence" (2008) 71 M.L.R. 621, at 625, emphasis in original.
[67] Robertson, "On the Function", p. 37.

> Freedom of contract has usually been called a principle of private law, and has been justified mainly by considerations of justice between the parties. But freedom of contract is also perceived to be in the public interest, and the operation of contract law has been perceived to be for the public benefit, and has been said to be required by public policy.[68]

On this view, *all* interpersonal rights are justifiable by considerations of community welfare,[69] such that any distinction between principle and policy is non-existent.

The second reason why advocates of the policy-based approach believe principle cannot be meaningfully distinguished from policy is that, even if principle and policy are two distinct concepts, there is nevertheless a large grey area in which certain arguments appear capable of being comfortably described as both arguments of principle *and* arguments of policy. In particular, whilst we might be able to somewhat uncontroversially describe an argument that we have a right to life as one based on considerations of interpersonal justice, and, say, an argument that a police authority should not be found liable where to do so might affect the future investigation of crimes as one based on considerations of community welfare, how do we classify those arguments that do not lie so clearly on one side of the line or the other? How, for example, do we classify a concern about indeterminate liability? Is it a concern about fairness for the defendant or the effect on community welfare?[70] And what about the need to avoid creating conflicting duties,[71] or a concern that the law should not encourage abortion – are these concerns based on principle or policy?[72] Even Stevens, at least according to Cane, acknowledges the fragility of the principle/policy distinction by conceding that arguments based on the "practical consequences" of a rule are not necessarily arguments of policy.[73]

Accordingly, absent a sufficiently clear distinction between principle and policy, it is meaningless to say that arguments based on principle should be preferred to arguments based on policy (or, for that matter, that arguments based on policy should be preferred to arguments based on principle). Advocates of the policy-based approach therefore believe we should instead consider *all* relevant arguments, and focus on whether they are good or bad, and not on whether, according to a particular and controversial viewpoint, they are labelled principle or policy.

[68] Waddams, *Principle and Policy*, p. 170.
[69] Cf. Stevens, *Torts and Rights*, p. 333.
[70] Robertson, "Policy-Based Reasoning", p. 122.
[71] Ibid., at pp. 124–26.
[72] Stapleton, "The Golden Thread", p. 135.
[73] P. Cane, "Torts and Rights by Robert Stevens" (2008) 71 M.L.R. 641, at 645, citing Stevens, *Torts and Rights*, p. 312.

C. Policy-Free Accounts of the Law Are Inadequate

A third commonly advanced argument in favour of a policy-based approach is that, even if a meaningful distinction between principle and policy exists, policy-free accounts of private law are inadequate. This argument relies on two independent views: the first is that policy-free accounts of the law are not descriptively plausible and the second is that policy-free accounts of the law, even if possible, are not normatively desirable.

The view that policy-free accounts of the law are not descriptively plausible is held by numerous academics. Luntz, for example, after conducting a survey of High Court of Australia cases in which policy considerations influenced the ultimate denial or imposition of a duty of care,[74] claims that, despite the members of the court claiming to prefer principle to policy, policy-based reasoning nevertheless permeates their judgments.[75] He concludes that the High Court therefore "*must* make use of policy, since principle alone is seldom sufficient, to enable it to decide the cases before it".[76] Stapleton, too, after undertaking a survey of appellate cases in an effort to identify "the complex moral and policy concerns underlying their resolution of novel claims for a duty of care in the tort of negligence",[77] concludes, like Luntz, that, whilst courts often give the pretence of relying on principle, when their reasons are unmasked, it is clear that they are, in fact, relying on reasons of policy.[78] Witting also believes that common law courts cannot describe the law of duty without acknowledging the role of policy as "There are occasions upon which it is impossible for courts to escape policy-based reasoning. Often this is so where there are significant factual features linking the parties (or classes of person), but where significant and undesirable consequences are likely to attend the imposition of a duty of care".[79]

On this view, then, policy-based reasons are integral to private law, or at least certain aspects of it, and any attempt to describe it without acknowledging this fact is either dishonest or unintelligible.

The view that policy-free accounts of the law, even if possible, are not normatively desirable is also a widely held and influential view. Advocates of this view believe that the law *ought* to promote a particular

[74] Luntz, "The Use of Policy", pp. 55–56.
[75] Ibid., at p. 83.
[76] Ibid., at p. 55, emphasis added. Luntz makes a similar claim in his textbook: H. Luntz, D. Hambly, K. Burns, J. Dietrich, and N. Foster, *Torts: Cases and Commentary*, 6th ed. (Chatswood, NSW 2009), 153.
[77] Stapleton, "Duty of Care Factors", p. 59.
[78] Despite, as we have seen, not adopting the terms "principle" and "policy", Stapleton identifies 50 "factors" (29 "convincing" and 21 "unconvincing") that courts have used in denying or imposing a duty of care, many of which are unequivocally concerned with what advocates of the distinction would describe as policy, such as the "socio-economic impact" that the recognition of a duty would have on the "budgets and/or activities of public bodies to the detriment of a specified public interest": ibid., at p. 93. Importantly, Stapleton makes explicit that her task is descriptive and not normative: ibid., at p. 89.
[79] Witting, "The House", p. 634.

policy-based goal that they deem desirable. Such people are typically referred to as "instrumentalists", as they are essentially arguing that the law should be used as an "instrument" for achieving certain goals.[80] The most well-known instrumentalist account of the law is that of the school of law and economics. The central normative claim of the school of law and economics is that judges *ought* to decide cases in a way that maximises society's total wealth.[81] Questions of fairness and other moral considerations, on this view, are simply irrelevant. Accordingly, a judge who subscribes to the school of law and economics would not find a defendant to have been negligent for failing to spend £100 on safety equipment that was only likely to prevent £50 worth of damage, as to do so would be tantamount to encouraging economic inefficiency.

Accordingly, if policy-free accounts of the law are neither descriptively plausible nor normatively desirable, policy-based arguments must therefore be permitted.

IV. Why Use the Principle-Based Approach?

Notwithstanding the apparent benefits of the policy-based approach, the use of policy-based arguments in determining the outcome of private law disputes has "recently come under sustained attack"[82] from advocates of the principle-based approach, who believe that "private law's proper, and properly exclusive, focus [is] on the interactions between the parties".[83] Beever, for example, argues that the use of policy-based arguments is both impermissible and unnecessary,[84] whilst Stevens argues that the attractions of policy-based arguments "should be resisted", as, although they make "the law of torts seem exciting and interesting … The law of torts is much more boring than is commonly supposed".[85] The implication of such views is to call the justification, and possibly outcome (assuming no convincing principle-based justification can be found), of many private law determinations into question. On what basis, however, should we eschew arguments based on policy, despite the apparent advantages associated with their use, and, instead, rely exclusively on those based on principle? According to advocates of the principle-based approach, there are four primary reasons: first, judges are not qualified to rely on policy-based arguments; second, the policy-based approach requires the balancing of

[80] See e.g. the discussion in Weinrib, *The Idea*, p. 48.
[81] See generally R. Posner, *The Economics of Justice* (Cambridge, MA 1981). The school of law and economics also makes the positive claim that "the common law is best explained as if the judges were trying to maximise economic welfare"; ibid., at p. 4. In relation to the law of negligence in particular, see e.g. R. Posner, "A Theory of Negligence" (1972) 1 J.L.S. 29.
[82] Robertson, "Constraints", p. 261.
[83] A. Robertson, "Introduction: Goals, Rights and Obligations" in Robertson and Tang (eds.), *The Goals*, pp. 5–6.
[84] Beever, *Rediscovering*, p. 29.
[85] Stevens, *Torts and Rights*, p. 307.

incommensurables; third, the policy-based approach violates the rule of law; and fourth, the principle-based approach produces a more "coherent" body of law than the policy-based approach. These arguments will now be examined in further detail.

A. Judges Are Not Qualified to Rely on Policy Considerations

The most commonly advanced argument in favour of the principle-based approach is that judges are not qualified to rely on policy considerations when resolving private law disputes – the corollary, of course, being that judges should rely exclusively on considerations of principle.[86] Advocates of the principle-based approach appear to cite three reasons for this belief: that judges lack political legitimacy, that judges lack technical competence, and that judges often lack sufficient evidence.

The argument that judges lack the political legitimacy to rely on policy-based arguments is based on the view that, in a liberal democracy such as ours, considerations of policy are most appropriately dealt with by a democratically elected Parliament, and not by the judiciary.[87] In particular, it is for the community to determine what is in its best interests and what policies it wishes for the law to reflect, and a democratically elected legislature is, at least in theory, the best way of achieving this. The judiciary, on the other hand, do not usually make their political views public and are not appointed on the basis of those views in any event (again, at least in theory). Accordingly, if judges are permitted to rely on policy considerations, there is no method of ensuring that such considerations in any way reflect the views of the public; indeed, given the limited interaction of judges with members of the public, and the small section of the "socio-economic elite" from which judges and the lawyers arguing before them are drawn, it is difficult to see how they could.[88] Judges are therefore thought to lack the political legitimacy to rely on, and thereby implement within the law, reasons of policy. None of this is to say, of course, that the judges are not well-meaning, or even to deny that what they believe to be in the best interests of the community has a more rational basis than what the community believes to be in its best interests; it is, however, undemocratic, and to suggest otherwise is, according to Beever, "incredible".[89]

[86] Though there is some disagreement among advocates of the principle-based approach about whether this objection extends to the legislature also. Stevens, for example, sees nothing wrong with the legislature creating any legal right for any reason it chooses (ibid., at p. 331), whilst Weinrib appears to suggest that policy plays no role in private law at all, whether that law is made by judges or the legislature (see generally Weinrib, *The Idea*). For a more detailed discussion of the interaction between statutes and rights and corrective justice-based theories of tort law, see J. Goudkamp and J. Murphy, "Tort Statutes and Tort Theories" (2015) 131 L.Q.R. 133.

[87] Beever, *Rediscovering*, p. 54; Stevens, *Torts and Rights*, p. 308; D. Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 A.B.R. 110; Weinrib, *The Idea*, pp. 208–09; J. Smillie, "Who Wants Juristocracy?" (2005–2008) 11 Otago L.Rev. 183. See also the discussion in Bell, *Policy Arguments*, p. 9.

[88] Beever, *Rediscovering*, p. 54.

[89] Ibid., at p. 54.

The argument that judges lack the technical competence to rely on policy-based reasons is based on the view that they do not have the necessary training or educational background to properly assess the legitimacy of policy-based concerns or how best to implement them. They should, therefore, not base a decision on, say, the potential economic consequences of that decision, as they are not only unqualified to determine whether such economic consequences are good or bad, but they are also often not qualified to determine the likely consequences of the decision in the first place; after all, judges, and the lawyers on whose arguments they rely, are trained in the law, not in social policy or economic theory.[90] Parliament, on the other hand, employs and is able to rely on specially trained policy advisers, with expertise in economics, social welfare, etc. As Beever notes:

> Why would [the public] be prepared to spend considerable effort and taxpayers' money setting up ministries containing expert policy analysts in order to ensure that ministers get the best advice possible, and yet be prepared to allow judges with little or no social policy training, advised by lawyers with little or no social policy training, to make social policy choices.[91]

Without the necessary technical competence to assess policy concerns, it is thought that courts should therefore avoid relying on them altogether.

The argument that, even if judges did have the necessary political legitimacy and technical competence, they nevertheless often lack sufficient evidence to properly assess policy concerns is principally based on the limitations of the forum. Indeed, courts are subject to significant institutional limitations, including the rules of evidence and the adversarial nature of proceedings – the advocate's role being to win his or her case rather than to present relevant facts or to find the truth.[92] Relevant evidence may also not be presented because it is too expensive for the parties to justify, too time-consuming for a trial between two parties, or too complex for a single judge to consider. In the absence of such evidence, it is argued that courts may therefore resort to "speculation",[93] which comes with the "associated risk of errors".[94] In *Hill v Chief Constable of West Yorkshire*,[95] for example, the claimant, acting on behalf of her daughter's estate, sued the police for their failure to apprehend the Yorkshire Ripper before he murdered her daughter. In finding that no duty of care existed, Lord Keith refused

[90] Stevens, *Torts and Rights*, p. 309; Weinrib, "The Disintegration of Duty", p. 167; Weinrib, *The Idea*, pp. 208–09; Witting, "Tort Law", p. 580.
[91] Beever, *Rediscovering*, p. 173.
[92] Witting, "Tort Law", p. 580.
[93] N. McBride and R. Bagshaw, *Tort Law*, 3rd ed. (Harlow 2008), 202. See also P. Cane, "Consequences in Judicial Reasoning" in J. Horder (ed.), *Oxford Essays in Jurisprudence* (Oxford 2000).
[94] Witting, "The House", p. 633. See also K. Burns, "The Way the World Is: Social Facts in High Court Negligence Cases" 12 T.L.J. 215, at 232.
[95] *Hill* [1989] A.C. 53 (HL).

to exclude the possibility that a finding of liability could encourage "detrimentally defensive" policing, despite no evidence being given on this point.[96] Similarly, in *Macfarlane v Tayside Health Board*,[97] a wrongful birth/conception case, despite all their Lordships disclaiming any reliance on policy, one of the reasons the court found that no duty existed was, at least according to Lord Bingham in a later case, that such a decision would "offend the community's sense of how public resources should be allocated".[98] Again, the court had heard no evidence on the consensus of public opinion, and so such a conclusion was merely the judge's best guess.[99] It goes without saying that courts should not be basing decisions on speculation as to the consequences of a decision on the community and, on the basis that courts often do not have sufficient evidence to do otherwise, advocates of the principle-based approach believe they should therefore avoid relying on considerations of policy altogether.

It would therefore seem that judges are neither politically legitimate nor technically competent to assess policy-based arguments and, in any event, often lack sufficient evidence to properly assess such concerns. Yet, not everyone accepts these conclusions and numerous objections to the above arguments have been raised. As to the claim that judges lack the necessary political legitimacy, both Cane[100] and Dworkin[101] have questioned why the same objection is not raised to judicial consideration of questions of interpersonal justice. In particular, why is it undemocratic for unelected judges from a small and unrepresentative small section of society to determine our legal rights based on their personal political views, but not undemocratic for those same judges to determine and prioritise our legal rights on the basis of their personal views on interpersonal justice? It might be objected here that it is because judges are experts in the former but not in the latter.[102] But, as Priel points out, this response simply begs the question; in particular, what is it that makes judges experts on questions of principle but not experts on questions of policy? It cannot be because they are exposed to the former and not the later because not only *are* judges exposed to questions of policy in public law, but even if they were not, given there is apparently no objection to judges becoming experts to issues interpersonal

[96] Ibid., at p. 63, per Lord Keith. Similar concerns were expressed by Lords Carswell, Hope, and Brown in *Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225 (HL), at [108], [76], [132]. Compare the views of McLachlan C.J. in *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, at [57]–[58]. See also Stevens, *Torts and Rights*, pp. 309–10; Robertson, "Rights, Pluralism and the Duty of Care", pp. 454–55; Morgan, "Policy Reasoning", p. 215.

[97] *Macfarlane* [2000] 2 A.C. 59 (HL).

[98] *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 A.C. 309 (HL), 316, per Lord Bingham.

[99] Stevens, *Torts and Rights*, p. 311.

[100] P. Cane, "Rights in Private Law" in Nolan and Robertson (eds.), *Rights and Private Law*, p. 55.

[101] R. Dworkin, *A Matter of Principle* (London 1985), 23–28.

[102] See e.g. A. Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford 2013), 306; P. Birks, "Equity in Modern Law: An Exercise in Taxonomy" (1996) 26 W.A.L.R. 3, at 97.

justice through exposure, the principal objection would be overcome by simply exposing judges to policy in the same way as they are exposed principle, thereby making them experts in questions of policy too.[103] The second claim, that judges are not technically competent, is also disputed. Robertson, for example, questions whether it is correct that policy decisions should only be made *by* experts rather than *on the advice of* experts.[104] Many members of Parliament, for example, have no training at all in matters of public policy, whilst those who do are invariably required to make decisions outside their individual areas of expertise, and so often have no choice but to rely on the advice of experts. If Parliamentarians are able to rely on experts, despite not being experts themselves, then it is not clear why the judiciary cannot do the same. The third claim, that judges rarely have sufficient evidence on which to appropriately assess policy-based concerns, has also been questioned. First, it has been doubted how often this problem actually arises. As Robertson points out, matters of policy, such as the content of community values, can often be informed by readily available evidence, including reports of Royal Commissions and Law Reform Commissions.[105] Second, even if *some* cases exist in which judges lack sufficient evidence to appropriately assess policy-based concerns, it does not follow that judges should be prevented from assessing policy-based concerns in *all* cases, including those where sufficient evidence *is* available. Third, as pointed out by Morgan, Law Commissions, government, and Parliament are *themselves* often required to undertake law reform on a "speculative basis" because certain evidence may be too expensive to obtain (on a cost–benefit analysis)[106]; again, it is not clear why this only becomes objectionable when done by the judiciary.[107] It may be objected here that Parliament is nevertheless in a better position than courts to assess policy concerns because of their superior resources. Whilst it is certainly true that courts have fewer resources than Parliament, and so access to *less* evidence, it does not follow that they have access to *insufficient* evidence.

As well as the above responses to the specific claims made by advocates of the principle-based approach, numerous other, more general, objections have been made to the claim that the judiciary is unqualified to consider policy-based arguments. First, under the Human Rights Act 1998, judges are *required* to take policy considerations into account when determining the scope of certain rights and any limits that ought to be placed upon them.[108] Accordingly, as Morgan points out, "If in such cases judges can

[103] D. Priel, "Private Law: Commutative or Distributive?" (2014) 77 M.L.R. 308, at 323–24.
[104] Robertson, "Rights, Pluralism and the Duty of Care", pp. 455–56.
[105] Ibid., at p. 454.
[106] Morgan, "Policy Reasoning", p. 218.
[107] Though see note 87 above.
[108] E.g. the "Right to respect for private and family life", recognised in Article 8.1 of Sch. 1 may, by virtue of Article 8.2, be "interfered with" where it is "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

be trusted to weigh the costs (to the individual) against the benefits (to society) of the challenged legislation, why should the same judges become incapable of a similar exercise when deciding tort cases?"[109] Second, the legislature often leaves the content of large areas of private law to be determined entirely by the courts, so that, if considerations of community welfare are to be taken into account in these areas of law at all, it must *necessarily* be done by the courts.[110] Third, even if courts do occasionally get it wrong, whether because the decision does not reflect the views of the wider community or because the court did not have the appropriate resources or evidence, ultimate control rests with the legislature anyway, and so the legislature can always substitute a court's decision with their own.[111] Fourth, even if the problems with judicial use of policy-based arguments are conceded, it is debatable whether judges ignoring the potentially undesirable social consequences of their decisions is a better alternative[112]; indeed, as noted by Pollock L.C.B. in *Egerton v Brownlow*: "My Lords, it may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it."[113]

The argument that judges are not qualified to rely on policy is therefore problematic and, quite aside from these problems, there exist a number of arguments why judicial use of policy considerations is nevertheless desirable.

B. The Policy-Based Approach Requires the Balancing of Incommensurables

A second, and very common, argument in favour of the principle-based approach is that, unlike the policy-based approach, it does not require the balancing of "incommensurables". In particular, it is thought that by failing to exclude policy-based arguments, the policy-based approach can require judges to weigh considerations of interpersonal justice against considerations of community welfare. Advocates of the principle-based approach, however, object to this on the grounds that such considerations are fundamentally different and so incommensurable. Weinrib, for example, argues that there is a "disjunction between justice and policy considerations" and so queries how judges are "to determine whether in a given case the

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"; such considerations are clearly considerations of policy. The rights protected by Articles 9–11 of Sch. 1 are similarly limited (though the exact wording of the grounds for limiting the rights varies).

[109] Morgan, "Policy Reasoning", p. 221.

[110] Waddams, "Private Right", p. 19; P. Cane, "Taking Disagreement Seriously: Courts, Legislatures and the Reforms of Tort Law" (2005) 25 O.J.L.S. 393, at 411.

[111] Luntz, Hambly, Burns, Dietrich, and Foster, *Torts*, p. 148. Cf. Dworkin, *A Matter of Principle*, p. 18.

[112] Morgan, "Policy Reasoning", p. 221; Robertson, "Rights, Pluralism and the Duty of Care", p. 456.

[113] *Egerton* (1853) 4 H.L.C. 1, 151; 10 E.R. 359, 419.

policy considerations are more important than the justice considerations that they can displace. How is this balancing of incommensurables to be done? . . . [Requiring courts to balance such incommensurable considerations] puts into circulation two different normative currencies between which no rate of exchange exists".[114]

Stevens agrees, believing that asking courts to balance incommensurables is like asking a judge "which is the greater of three kilos or six metres" or "to determine whether Mozart or chocolate is better. The goods are incommensurable".[115] According to this argument, then, a court cannot determine that the public interest in refusing to enforce a particular type of "illegal" contract outweighs the individual parties' interest in having the contract upheld, as it would require the court to balance incommensurables.

Whilst it is clear that advocates of the principle-based approach are against the balancing of incommensurables, it is not entirely clear whether this is because they believe incommensurables *cannot* be balanced or that they *should not* be balanced. If the objection is that incommensurables *cannot* be balanced, then it is not clear why the same objection is not made to Parliament regularly doing exactly that.[116] In the absence of such an objection, the argument that incommensurables *cannot* be balanced is difficult to maintain. And, even if that *is* the objection, then, as Urbina notes, it does not follow that it is unreasonable or irrational to choose between the two in any event; just that one cannot commensurate them, and so must choose between them on other grounds.[117] If, on the other hand, the objection is that incommensurables *should* not be balanced, the similar absence of any objection to such balancing being undertaken by Parliament surely means that what is really being objected to is the balancing of incommensurables *by judges*, rather than the balancing of incommensurables per se. But, if this is the case, then the objection to the policy-based approach on the grounds that it requires the balancing of incommensurables is simply the objection about the competence of the judiciary in disguise.

The argument that the policy-based approach requires the balancing of incommensurables therefore appears to be little more than a rewording of the argument that judges are unqualified to rely on policy considerations. Accordingly, it must also be subject to the same problems and limitations.

C. The Policy-Based Approach Violates the Rule of Law

A third argument in favour of the principle-based approach is that the policy-based approach violates one of the most fundamental tenets of the

[114] E. Weinrib, "Does Tort Law Have a Future?" (2005) 34 Val.U.L.Rev. 561, at 567.
[115] Stevens, *Torts and Rights*, p. 310.
[116] The right to a fair trial, for example, is balanced against the public cost of providing such trials (in, say, increased expenditure on legal aid, funding for expert evidence, etc.): Dworkin, *A Matter of Principle*, pp. 72–73.
[117] F.J. Urbina, "Incommensurability and Balancing" (2015) 35 O.J.L.S. 575, at 581.

rule of law: that the law should be certain and predictable.[118] In particular, advocates of the principle-based approach argue that the consequence of denying any distinction between principle and policy is that *no* type of argument becomes off limits and so *any* kind of consideration may be taken into account when determining the outcome of private law disputes. As Todd, for example, writes, when questions of policy are permitted, "the question of responsibility for negligence may [therefore] be argued in an almost unlimited range of circumstances, and all kinds of considerations may be taken in to account in deciding how it ought be resolved".[119] Such an approach is, perhaps, most evident in the three-stage test for determining the existence of a duty of care, which, in addition to requiring foreseeability and proximity, allows the court to consider whether the imposition of a duty is "fair, just, and reasonable"[120] – a "test" that appears to permit the consideration of just about *any* argument. In addition to the seemingly "unlimited" number of potentially relevant arguments is the fact that, in a legal system in which judges are not required to make their political views public,[121] and in which different judges have different conceptions of what is in the community's best interests,[122] parties have no way of knowing which arguments will appeal to judges and how much weight they will assign to them.[123] The combined effect of the "unlimited" range of potentially relevant arguments and the inability to know how such arguments will be weighed mean that predicting the method of determination of private law disputes becomes extremely difficult. As Beever notes, "the problem with this . . . is that it is just not law. If judges are constrained only by their beliefs as to these and similar issues, then we have the rule of judges, not the rule of law".[124]

There are, however, two difficulties with this argument. First, one might dispute that the policy-based approach allows consideration of an "unlimited" range of potential arguments. Certainly, the policy-based approach permits a *wider* range of arguments to be considered than the principle-based approach, but this does not mean the range of available arguments is *unlimited*. Robertson, for example, argues that there are numerous constraints on the use of policy-based arguments in resolving private law disputes, including: institutional constraints, which, by ensuring judges state their reasons publically, prevent them from relying on unorthodox

[118] "Clarity of laws" is one of Fuller's eight requirements for a legal system: L. Fuller, *The Morality of Law* (London 1964), 63.
[119] S. Todd, "Negligence: Breach of Duty" in S. Todd (ed.), *The Law of Torts in New Zealand*, 3rd ed. (Wellington 2005), 151. See also Beever, *Rediscovering*, p. 28.
[120] *Caparo Industries plc.* [1990] 2 A.C. 605, 617–18, per Lord Bridge.
[121] Compare the position in the US: Stevens, *Torts and Rights*, pp. 312–13.
[122] McBride and Bagshaw, *Tort Law*, p. 191.
[123] R. Bagshaw, "Tort Law, Concepts and What Really Matters" in Robertson and Tang (eds.), *The Goals*, p. 258.
[124] Beever, *Rediscovering*, p. 7.

justifications, as such justifications risk being overturned on appeal[125]; common law method and convention, including the doctrine of precedent, which prevents judges from departing from the outcomes of previous cases[126]; consistency and coherence, which ensures consistency between related principles and bodies of law[127]; and bipolarity and the need for justice to both parties, meaning that the judge's primary task is to do justice to both the claimant and the defendant, and not to give effect to their personal conception of the greater good by focusing *only* on considerations of community welfare.[128] H.L.A. Hart, too, in one of his recently published "lost" essays, has similarly observed that, regardless of a judge's personal beliefs, they are nevertheless always obliged to act judiciously, so that "[even] if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide a remedy if they do indulge their whim".[129]

Such constraints place significant limits on the number of arguments able to be relied upon and so on a judge's ability to give effect to their personal views, thereby reducing the ostensible capriciousness of the policy-based approach. Accordingly, a judge could not, for example, refuse to impose a duty in relation to a psychiatric injury on the basis that he or she believed that recognising such injuries would unnecessarily increase insurance premiums, as such an argument would run counter to, and undermine, existing precedent.[130]

The second difficulty, or at least limitation, with the claim that the policy-based approach violates the rule of law is that, even if this is accepted, it does not follow that the principle-based approach ought to be preferred, as is not clear to what extent the principle-based approach fares any better, given that judges are only likely to resort to policy considerations in "hard cases", where the outcome is uncertain and unpredictable in any event. In particular, whilst there may be a plethora of possible policy-based arguments at the court's disposal in novel cases, and so knowing which arguments a judge will rely on and how they will weigh them will be extremely difficult to predict, the fact that considerations of interpersonal justice can also be wide, varied, and potentially conflicting will give rise to similar difficulties. As Cane notes, it is "implausible to think that courts … may not frequently be confronted by significant conflicts of rights that may be incommensurable".[131] Whose interests are to be preferred when a

[125] Robertson, "Constraints", p. 268.
[126] Ibid., at p. 269.
[127] Ibid., at p. 271.
[128] Ibid., at p. 272.
[129] H. Hart, "Discretion" (2013) 127 Harv.L.Rev. 652, at 657.
[130] See e.g. *Page v Smith* [1996] 1 A.C. 155 (HL).
[131] Cane, "Rights in Private Law", p. 49.

person's tree branches hang over into their neighbour's property, for example, and whose interests are to be preferred when one person may be required to sacrifice another's life in order to save their own?[132] Although such questions do not raise matters of policy, they nevertheless do not give rise to obvious answers, as there is no "mathematical formula or single yardstick"[133] for the ordering of considerations of interpersonal justice.

In response to these objections, it could be argued that, whilst the principle-based approach may not give rise to a simple algorithm that can be used to resolve private law disputes, the task is nevertheless made *simpler*, and therefore *more* predictable, by virtue of the fact that the range of reasons in play is relatively restricted.[134] There are, however, three difficulties with this response. First, fewer reasons in play cannot necessarily be equated with greater certainty and predictability. In particular, whilst fewer reasons might mean that it is easier to predict *the reasons that will be relied on*, it does not follow that it will be easier to predict the *outcomes* of cases; judges will still have much discretion in how they will *apply* principles to facts, and predicting how they will do this will be far from straightforward. Indeed, given that the types of reasons relied on under the principle-based approach tend to be framed at a higher level of abstraction than the reasons relied on under the policy-based approach, predicting outcomes may actually be *more* difficult. A principle-based approach to liability in negligence, for example, as we saw above, requires that the defendant could "reasonably foresee" that their conduct would create a risk of harm to the claimant, yet what one judge thinks is reasonably foreseeable, another might think to be wildly improbable.[135] Second, even if we assume that the policy-based approach gives rise to a higher degree of uncertainty than the principle-based approach, to then conclude that the former violates the rule of law whilst the latter does not would involve arbitrary line drawing – that is, it assumes that one side of the line violates the rule of law whilst the other does not, but fails to explain why the line lies there rather than somewhere else. Third, again assuming that the policy-based approach gives rise to a higher degree of uncertainty than the principle-based approach, to conclude that the policy-based approach ought to therefore be replaced by the principle-based approach presents a false choice. As Bagshaw notes:

[132] R. Stevens, "The Conflict of Rights" in Robertson and Tang (eds.), *The Goals*, p. 142.
[133] Stevens, *Torts and Rights*, p. 337. See also Stevens, "The Conflict", p. 141.
[134] See e.g. Stevens, "The Conflict", p. 141; A. Beever and C. Rickett, "Interpretive Legal Theory and the Academic Lawyer" (2005) 68 M.L.R. 320, at 332; and Beever, *Rediscovering*, pp. 48–49.
[135] Prosser, for example, once described the foreseeability requirement as "a rope of sand" that offers "neither certainty nor convenience": W. Prosser, "Palsgraf Revisited" (1953) 52 Mich.L.Rev. 1, at 18. See also J. Gardner, "Some Rule-of-Law Anxieties about Strict Liability in Private Law" in L. Austin and D. Klimchuk (eds.), *Private Law and the Rule of Law* (Oxford 2014), 113–14, in relation to the abstractness of other popular principle-based concepts such as "morality".

> [One objection to the policy-based approach is that it carries] an unacceptably high risk of inconsistency and unpredictability. By contrast, approaches based on a number of tightly defined "rights" [i.e. the principle-based approach] require few computations .... No doubt the concerns behind these criticisms are substantial, but it seems an overreaction to respond by insisting on reversion to a minimalist law of tort chiefly celebrated for the ease for which it can be explained. Such an overreaction misses the fact that there are legal techniques for *managing and controlling* such concerns, for seeking to steer and control innovation.[136]

The claim that the policy-based approach violates the rule of law is therefore problematic. Not only is the policy-based approach not as open-ended as is claimed, but the principle-based approach also gives rise to similar uncertainty and unpredictability. Whilst it could be argued that the principle-based approach is nevertheless simpler, not only is such a claim debatable, but it does not imply that the principle-based approach is a preferable alternative in any event.

D. The Principle-Based Approach Produces a Body of Law that Is More Coherent

The final substantive argument advanced in favour of the principle-based approach, and by far the most abstract, is that it produces a body of law that is more "coherent" than the body of law produced by the policy-based approach. By this it is meant that the law will be more internally consistent and unified and so more able to "sit comfortably alongside other basic private law principles".[137] Coherence is clearly an ideal worth striving for, as the more coherent a set of rules, the easier they will be to understand and apply.

How coherent, then, is the law produced by the policy-based approach? As we have seen, the policy-based approach permits a wide variety of considerations to be taken into account when determining the outcome of a private law dispute. The result of this is that different decisions are often justified on entirely independent bases. Within the duty of care cases, for example, some decisions rely on the desire to discourage free riding,[138] others on the desire to avoid imposing a heavy financial or administrative burden on public bodies.[139] Despite, however, no single consideration explaining the outcome of *all* duty cases, when the different types of

[136] Bagshaw, "Tort Law", p. 257, emphasis in original.
[137] J. Neyers, "The Economic Torts as Corrective Justice" (2009) 17 T.L.J. 162, at 167. See also Cane, "Rights in Private Law", p. 38; Weinrib, *The Idea*, p. 12.
[138] Stapleton, "Duty of Care Factors", "Convincing factor" "countervailing to the recognition of a duty" number (11). See e.g. *Morgan Crucible Co. v Hill v Samuel & Co.* [1991] Ch. 295, 303; *Esanda Finance Corporation Ltd. v Peat Marwick Hungerfords (Reg)* (1997) 188 C.L.R. 241, 283–90, per McHugh J.
[139] Ibid., "Convincing factor" "countervailing to the recognition of a duty" number (4). See e.g. *Hill* [1989] A.C. 53 (HL); *Van Colle* 1 A.C. 225 (HL).

cases are looked at in isolation, the same types of arguments are consistently used to explain similar outcomes (i.e. like cases are treated alike) and so form reasonably rational and coherent subsets.[140] According to Smith, a set of rules that rests on independent *but non-contradictory* bases is *weakly* coherent.[141] The policy-based approach, then, at least in relation to the duty of care, despite allowing judges to rely on different considerations in different types of cases, produces a body of law that is weakly coherent, because the different considerations that are used to justify decisions in different types of cases are non-contradictory and relatively rational when looked at in isolation from one another.

According to Beever, however, weak coherence is not enough, as we should also know why a particular consideration was relied upon in one case and not another.[142] We need to know why, for example, the fact that a claimant is a free rider is important in duty cases involving pure economic loss, but not important in duty cases involving personal injuries. A set of rules that lends itself to such an explanation, and so forms a unified system, is, according to Smith, *strongly* coherent.[143] The policy-based approach, however, by allowing conceptually independent reasons to explain different types of cases, *by definition* possesses no underlying structure or logic.[144] As Weinrib explains, again in relation to the duty of care:

> The invocation of such independent policies entails the disintegration of duty as a systematic and coherent concept. Given the heterogeneity of the available policies and different weightings of the various policies in the balancing process, a systematically unified conception of duty based on (in Lord Atkin's words) "the element common to all cases in which [a duty] is found to exist" is out of the question. The variety of policies and the shifting balance among them leaves no place for a common element on which the various duties (again in Lord Atkin's words) "must logically be based." In these circumstances there can only be different specific kinds of duty, with each kind representing the particular policies or the particular balance among policies that are recognized as decisive in situations of that sort.[145]

The body of law produced by the policy-based approach, then, by relying on a diverse range of independent considerations, despite being non-contradictory when looked at in isolated pockets and so able to be described

[140] This is, of course, not to say that irreconcilable cases do not exist with almost identical fact scenarios.
[141] S. Smith, *Contract Theory* (Oxford 2004), 11. Although Smith is using "coherence" as a criterion by which to evaluate an "interpretive legal theory", as this is ultimately judged by reference to the body of law the theory would produce, his definitions of coherence are therefore equally appropriate to evaluate the body of law produced by prescriptive theories. The descriptor "weak" is actually Beever's, Smith merely refers to a "less-demanding" and "more-demanding" version: Beever, *Rediscovering*, pp. 21–22.
[142] Beever, *Rediscovering*, p. 24.
[143] Smith, *Contract Theory*, p. 11. See also note 140 above.
[144] Weinrib, "The Disintegration of Duty", pp. 145–46.
[145] Ibid., at p. 177 (footnotes omitted).

as weakly coherent, lacks any underlying or unifying structure and so cannot be described as strongly coherent.

The principle-based approach, on the other hand, produces a body of law that *can* be considered strongly coherent. Indeed, where our private law rights are determined solely on the basis of the unified conception of interpersonal justice, they will clearly be more coherent than where they are determined on the basis of a diverse range of independent policy concerns. Accordingly, Beever claims that a principle-based approach to negligence "possesses a conceptually coherent, indeed conceptually *unified*, structure . . . [and] the various stages of the negligence enquiry . . . are seen as parts of a conceptually integrated whole. . .".[146] The principle-based approach, then, produces a simpler, more unified, and more coherent body of private law than the policy-based approach.

Smith, however, at least in relation to contract law, questions whether such a high degree of coherence is actually necessary:

> [H]uman actions, including law-making actions, may be perfectly intelligible even when they are not unified in the sense just described . . .. Unless one assumes (as few people do) that all reasons for acting can, in the end, be reduced to a single master principle, it is accepted as perfectly intelligible, indeed appropriate, that people act for different reasons in different situations. Charity is an appropriate response to certain kinds of situations; in another situation, courage may be appropriate. Neither charity nor courage, however, seems reducible to the other, or to a third master value. The same must be true of legal systems . . . I conclude, then, that a requirement of perfect unity seems not only unattainable in practice, but also inappropriate in theory.[147]

Accordingly, even if the principle-based approach does produce a *more* coherent body of law, such a high degree of coherence is, at least according to Smith, unnecessary, such that the weak coherence of the policy-based approach is sufficient.

V. *Via Media*: The Pluralist Approach

So far, then, there appear to be two, and only two, radically different approaches to resolving private law disputes: the policy-based approach, which permits reliance on considerations of both principle *and* policy; and the principle-based approach, which permits reliance on considerations of principle only. However, the two approaches, as we have seen, are subject to significant limitations, and this has led to some academics rejecting *both* approaches as satisfactory methods of resolving private law disputes. In particular, whilst many believe that considerations of interpersonal

[146] Beever, *Rediscovering*, p. 30, emphasis in original. See also Weinrib, "The Disintegration of Duty", p. 7.
[147] Smith, *Contract Theory*, p. 12, emphasis added. Cf. Beever, *Rediscovering*, p. 24.

justice should take "centre stage",[148] they nevertheless reject the notion that "considerations of what is in the public interest are *never* relevant to claims in tort".[149] Perry, for example, argues that, whilst reliance on considerations of interpersonal justice should be the primary method of determining private law disputes, where this would result in "indeterminacy", for example: "[W]hy should a second-tier goal [i.e. policy considerations] ... not come into play? To resolve the particular dispute and determine the future law on a basis equivalent to a coin toss rather than by reference to some non-corrective but nonetheless relevant normative consideration seems completely unjustifiable."[150]

This sort of dissatisfaction with both approaches has led to the recent popularisation of the "pluralist approach".[151] The pluralist approach claims that the law is primarily, but not exclusively, concerned with relational considerations (i.e. considerations of interpersonal justice pertaining to the *relationship* between the parties)[152] and therefore takes into account considerations of both interpersonal justice *and* community welfare.

A. Defining "Pluralism"

Prima facie, the pluralist approach seems very similar to the policy-based approach, in that it permits both considerations of interpersonal justice and considerations of community welfare to be considered in determining the outcome of private law disputes. Yet, the policy-based approach and the pluralist approach differ in two primary ways: whereas the policy-based approach resolves disputes in an indiscriminate and "all things considered"[153] type of way, weighing both principle-based and policy-based reasons against one another in one big balancing act, the pluralist approach, firstly, recognises a distinction between considerations of interpersonal justice and considerations of community welfare and, secondly, gives primacy to the former, thereby requiring the court to consider the different types of considerations in a more structured manner. In particular, considerations of community welfare may only be considered *after* the court has determined that considerations of interpersonal justice support the imposition of liability; in the event that considerations of interpersonal justice point against liability, considerations of community welfare are not considered at all. The

[148] Nolan and Robertson, "Rights and Private Law", p. 7.
[149] N. McBride, "Rights and the Basis of Tort Law" in Nolan and Robertson (eds.), *Rights and Private Law*, p. 340. See also Bagshaw, "Tort Law", p. 249; S. Perry, "Duty of Care in a Rights-Based Theory of Negligence" in Robertson and Tang (eds.), *The Goals*, p. 91; S. Perry, "Professor Weinrib's Formalism: The Not-So-Empty Sepulchre" (1993) 16 Harv.J.L.& PubPol'y 597, at 618–19; McBride and Bagshaw, *Tort Law*, pp. xvii–xx.
[150] Perry, "Professor Weinrib's Formalism", pp. 618–19 (footnotes omitted). See also Perry, "Duty of Care", p. 91 (fn. 42). Cf. Stevens, "The Conflict", pp. 140–42.
[151] Robertson, "Rights, Pluralism and the Duty of Care", p. 436.
[152] Ibid., at p. 437.
[153] McBride and Bagshaw, *Tort Law*, p. xviii. See also Robertson, "Rights, Pluralism and the Duty of Care", p. 444.

pluralist approach, therefore, provides a "*via media* between unconstrained instrumentalism and entirely policy-free rights-based or corrective justice approaches to private law"[154] by recognising the primacy of considerations of interpersonal justice but also recognising that considerations of community welfare can play a role, albeit "in a secondary or ancillary manner".[155]

Although the pluralist approach can be applied to private law generally, most of the literature on pluralism concerns the pluralist approach to the duty of care. Robertson, for example, presents a pluralist view of the duty of care in the form of a two-stage test, essentially a modified version of that suggested by Lord Wilberforce in *Anns v Merton LBC*.[156] The test requires, firstly, that the court determine whether, as a matter of interpersonal justice between the parties, it is fair for a duty of care to be owed. The first question is therefore essentially a principle-based approach to the duty of care. If considerations of interpersonal justice require that a duty of care be denied, the duty enquiry is over and the court must find that no duty of care exists no matter how strong the considerations of community welfare may be. If, on the other hand, considerations of interpersonal justice require that a duty of care *is* owed, a prima facie duty is held to exist. The court may then, *and only then*, move on to the second stage of the enquiry, where they will consider any relevant community welfare considerations, both in favour of and against the recognition of a duty of care[157]; in particular, the court will balance anti-duty community welfare considerations against pro-duty community welfare considerations, a duty of care only being recognised only where the former are outweighed by the latter.

B. Benefits of the Pluralist Approach

The general aim of the pluralist approach is to retain the benefits of the policy-based approach, whilst overcoming the objections made to the use of policy-based arguments.[158] Indeed, by not prohibiting policy-based arguments outright, the pluralist approach is able to maintain much of the openness and transparency of the policy-based approach, as well as benefiting from the descriptive and normative value of such arguments. According to its advocates, the pluralist approach is also able to overcome, or at least lessen the force of, some of the objections made to the use of policy-based reasoning in two primary ways. Firstly, the pluralist approach

[154] Robertson, "Rights, Pluralism and the Duty of Care", p. 436.
[155] Perry, "Duty of Care", p. 91.
[156] *Anns v Merton LBC* [1978] A.C. 728. See generally Robertson, "Justice, Community Welfare"; and Robertson, "Rights, Pluralism and the Duty of Care". A similar two-stage approach to duty questions can be found in Smillie, "The Foundation", pp. 322–34. It is also closely analogous to the current Canadian approach: see in particular the comments of McLachlin C.J.C. in *Childs v Desormeaux* (2006) 266 D.L.R. (4th) 257, 263, at [12].
[157] Robertson, "Rights, Pluralism and the Duty of Care", p. 444.
[158] Stevens, for example, says that the pluralist approach is "polite", "sexy", and "avoids difficult choices": Stevens, "The Conflict", p. 140.

places considerable constraints on the use of policy-based reasoning by relegating it to a subsidiary role.[159] In particular, community welfare considerations may only be considered if considerations of interpersonal justice support the imposition of liability[160]; otherwise, they are rendered entirely irrelevant. Private law obligations will therefore not be imposed for reasons of community welfare alone and so, in many cases, the pluralist approach will produce identical results to the principle-based approach. Secondly, by recognising a distinction between considerations of community welfare and interpersonal justice, and requiring them to be considered separately, the courts are said to be not required to balance incommensurables. As Robertson explains, in relation to the duty of care:

> [I]t avoids the need for courts to weigh justice considerations against welfare considerations. Under the two-stage approach these incommensurable sets of considerations are dealt with entirely separately, with each being reduced to a yes or no question. If considerations of justice between the parties justify the recognition of a particular duty, then such a duty will be recognised unless considerations of community welfare require otherwise. The court is not required to weigh the two sets of considerations against one another because the second stage of the inquiry takes as a given the fact that, as between the parties, the duty is justified. Thus, properly understood, the two-stage approach to duty cannot be criticised on the basis that it "calls for a balancing of incommensurables". Indeed, the defining feature of the two-stage test is its avoidance of the need for judgment as to the relative strength of justice and welfare factors through its separate and sequential treatment of those two sets of considerations.[161]

By allowing a *limited* use of policy-based arguments, the pluralist approach is thought to be able to enjoy the principal benefits of the policy-based approach, whilst also lessening the impact of some of the criticisms directed against it.

C. Criticisms of the Pluralist Approach

Perhaps the most obvious criticism of the pluralist approach is that it is attempting to achieve inconsistent objectives. That is, it seeks the benefits that flow from both the use of and prohibition of policy-based arguments. It is therefore much like Justinian's attempt to both preserve the best of the classical Roman literature *and* set out the current law in his Digest, and "In seeking to achieve both … fail[s] to fully achieve either".[162]

First, although the restrictions on the use of policy-based arguments overcome some of the criticisms of the policy-based approach, they also

[159] Robertson, "Rights, Pluralism and the Duty of Care", p. 449.
[160] See also Robertson's discussion of "trump factors": Robertson, "Justice, Community Welfare", p. 394.
[161] Robertson, "Rights, Pluralism and the Duty of Care", p. 447. See also Robertson, "Justice, Community Welfare", p. 394.
[162] B. Nicholas, *An Introduction to Roman Law* (Oxford 1962), 42.

result in the pluralist approach forgoing some of the policy-based approach's primary benefits. Perhaps most significantly is that use of the pluralist approach potentially leads to decreased openness and transparency in certain cases. In particular, in a case in which considerations of interpersonal justice favour the denial of liability and considerations of community welfare favour the imposition of liability, a judge who nevertheless wished to find for the claimant would be required to mask their true motivations; that is, in order to adhere to the pluralist approach, they would be required to provide poor and unconvincing reasons why a prima facie duty should be found to exist, resulting in the law being less transparent and accessible – precisely what the use of policy-based arguments seeks to avoid. Similarly, whereas the policy-based approach is able to simply ignore the problematic distinction between arguments of community welfare and arguments of interpersonal justice, the pluralist approach necessarily relies on it. This is not to say that such a distinction does not exist (advocates of both the pluralist and principle-based approach clearly believe it does), just that it is undeniably unstable[163] and relying on an unstable distinction is clearly more problematic than ignoring it.

Second, despite the restrictions, the failure to prohibit policy-based arguments entirely ensures that the pluralist approach attracts the same objections as the policy-based approach. For example, as the pluralist approach permits our private law rights to be determined on the basis of a diverse range of independent policy considerations, it thereby produces law that suffers from the same lack of strong coherence as that produced by the policy-based approach. Similarly, by allowing judges to rely on policy-based reasons, the pluralist approach permits judges to rely on arguments that, so the argument goes, they are unqualified to assess; indeed, for advocates of the principle-based approach, this is the primary objection to the policy-based approach, and the pluralist approach would appear to be equally subject to it. It could also be argued that, whilst the pluralist approach appears to avoid the problems associated with the discretionary balancing of incommensurables *by judges*, which we will recall was the principal objection to the balancing of incommensurables, the way in which the pluralist approach *itself* balances arguments based on principle against arguments based on policy is even *more* objectionable. Take, for example, a case in which considerations of interpersonal justice only marginally favour the denial of liability, whilst considerations of community welfare strongly favour an imposition of liability. Similarly, consider a case in which considerations of interpersonal justice strongly favour the imposition of liability, but considerations of community welfare only marginally favour a denial of liability. Under the pluralist approach, which treats

[163] As we saw above, even Beever and Robertson acknowledge this.

the second stage independently of the first, the court would be bound to find that no duty of care exists in the first case and a duty of care does exist in the second case, despite the massive disparity in the strength of the respective types of arguments. In other words, marginal anti-duty arguments based on considerations of interpersonal justice trump powerful pro-duty arguments based on considerations of community welfare, whilst powerful pro-duty arguments based on considerations of interpersonal justice are trumped by marginal anti-duty arguments based on considerations of community welfare. The pluralist approach therefore balances arguments based on principle against arguments based on policy in an inconsistent manner; sometimes priority is given to the former, sometimes it is given to the latter – something that clearly undermines the claim that the pluralist approach gives primacy to considerations of interpersonal justice?[164] Further, it is not clear why the different types of arguments are balanced in such a way. Whilst priority of one type of argument over another could conceivably be justified where there is a disparity in the strength of the respective arguments, as the examples demonstrate, this is not the method adopted by the pluralist approach, which ignores the weight of the respective types of arguments entirely. The way in which the pluralist approach balances arguments based on principle against arguments based on policy therefore appears both arbitrary and inconsistent, and so is arguably more objectionable than allowing judges to consider and weigh incommensurables in the first place.

The pluralist approach, then, in allowing the use of policy-based arguments, attracts the objections made to the use of such arguments and, in restricting the use of policy-based arguments, forgoes many of the benefits associated with unrestricted use.

VI. CONCLUSION

The terms "principle" and "policy" have no universally accepted definition, and so have given rise to a variety of different meanings in different contexts. In the private law context, as a wide understanding of the terms is of limited use, the terms tend to be understood quite narrowly; in particular, policy is typically understood to refer to considerations of community welfare, whilst principle is typically understood to refer to considerations of interpersonal justice.

Using these definitions, there appear to be three primary arguments for a policy-based approach to resolving private law disputes: it encourages openness and transparency, it avoids the problematic distinction between principle and policy, and policy-free accounts of the law are, at least

[164] Though note Robertson, "On the Function", where Robertson argues that primacy is given to considerations of principle only to the extent that the considerations of policy support it – an argument that was recently adopted by the Court of Appeal of Singapore in *Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd.* [2013] 3 SLR 284, at [87].

according to some, neither descriptively plausible nor normatively desirable. Even if these arguments are accepted, the policy-based approach is nevertheless subject to a number of objections, and these objections form the central arguments in favour of the principle-based approach. In particular, advocates of the principle-based approach argue that the policy-based approach requires judges to act beyond what they are qualified to do, requires the balancing of incommensurables, violates the rule of law, and produces a body of law that is less coherent than the body of law produced by the principle-based approach. But the case for the principle-based approach is subject to a number of objections also, not least of which is that it appears to give rise to a number of the same problems it is trying to overcome, albeit seemingly to a lesser degree. By way of a compromise, the pluralist approach aims to achieve the best of both worlds, by giving priority to arguments based on principle, yet not ignoring arguments based on policy altogether; in doing so, however, not only does the pluralist approach attract many of the criticisms directed at the policy-based approach, but it forgoes a number of its benefits too.

The debate about the appropriate role of principle and policy in private law reasoning is therefore a complex one; not only is the meaning of the terms "principle" and "policy" often misunderstood, but the arguments that are relied on in favour of both a principle- and policy-based approach are not as unproblematic as they are often made out to be. The aim of this article has not been to advocate one position over another, but simply to provide a balanced overview of the principal arguments for and against the various approaches. Notwithstanding this, in light of what appear to be considerable limitations with the standard objections to policy-based reasoning, the case for the principle-based approach must be less about *eliminating* the perceived problems with the policy-based approach than *reducing* them, as, even if policy-based reasons are prohibited, many of the difficulties associated with their use will remain. It is far from clear whether this reduction in problems justifies prohibiting the use of policy entirely, but ultimately this is what must be established if it is to be shown that principle ought to be preferred to policy. Regardless of which view is preferred, however, it is hoped that a better understanding of the nature of the debate will lead to more informed opinions and will help to improve the discussions about the appropriate use of principle and policy in private law reasoning in the future.