

**ADMINISTRATIVE LIABILITY**

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**1. INTRODUCTION**

As this is my first post, I shall begin by giving a general outline of the way in which administrative liability works in the UK. The account is up to date at the time of writing. In

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subsequent reports, I shall describe later developments. Strictly speaking, there are three distinct legal systems in the UK: that of England and Wales, that of Northern Ireland and that of Scotland. Northern Ireland has its own governing institutions and as a result of the political situation there, aspects of its criminal law and its law relating to civil liberties have historically differed from the equivalent law in England. There are also other minor differences in parts of its statute law. These factors apart, however, the general law of Northern Ireland is barely distinguishable from English law and there is no difference, in particular, in relation to the tort liability of public authorities. For this reason, I say no more about it in this report. The Scottish legal system, by contrast, differs significantly from the English and, of particular relevance in the present context, its law of non-contractual liability, or “delict”, as it is called, has historically been quite different from the English law of non-contractual liability or “tort”. Nonetheless the general principles that govern administrative liability are extremely similar. I therefore proceed as follows. In part 2, I give an account of the law of England. In part 3, I note some of the features that make the law of Scotland distinct. In part 4, I describe two developments whose effect is uniform across the UK, namely the advent of EU state liability and the coming into force of the Human Rights Act 1998.

## **2. THE ENGLISH LAW OF ADMINISTRATIVE LIABILITY**

### ***2.1 General features***

In England, there is no special law of administrative liability. Instead, there is a single body of law, the law of tort, in accordance with which remedies, notably financial compensation or “damages” are awarded to claimants as a result of failure to fulfil non-contractual obligations owed to them by defendants. The principles that apply are in theory the same whether the defendant is a private person or a public authority. This supposed parity of treatment is sometimes referred to as “Dicey’s equality principle” after the great Victorian jurist who was the primary proponent of the idea that a defining feature of English law is its refusal to give a special position to public authorities.

A further crucial feature of the English law of tort is that there is no single overarching principle of liability. Instead there is a collection of “causes of action” or

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“torts”.<sup>2</sup> This means that in relation to each type of wrong recognized by the law a different set of rules – pertaining to matters such as the degree to which the defendant must be at fault, the kind of harm in relation to which a remedy is available and the legal status of claimant or defendant – applies. So, to give one example, the tort of trespass to the person comprises three sub-torts, assault, battery and false imprisonment. In order to commit the tort of assault, the defendant must perform an intentional act that produces in the claimant a reasonable belief that she is about to become the victim of immediate, unlawful force.<sup>3</sup> In order to commit the tort of battery, the defendant must intentionally and without lawful excuse or justification apply force to the person of another. In order to commit false imprisonment the defendant must imprison the claimant without lawful justification or excuse .

A case in which the claimant on the face of it deserves a remedy may quite easily fall outside the requirements of the tort. In *Wainwright v Home Office*,<sup>4</sup> a case whose facts occurred before the coming into force of the Human Rights Act 1998, the two claimants were visitors to a prison who were strip searched. One of the claimants was touched in the course of the search and was thus able to succeed in battery. But the other claimant was not touched and so despite suffering emotional distress as a result of her experience was left without a remedy. (Had the experience led her to suffer from a recognized psychiatric illness she might have been able to succeed in the tort of negligence; but for this purpose, mere emotional distress is not sufficient .)

To give another example, a claimant may bring proceedings in the tort of nuisance where the defendant’s behaviour interferes in some way with the claimant’s reasonable enjoyment of her land. Thus, for instance, the claimant may be entitled to a remedy where

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<sup>2</sup> To have a “cause of action” is to have grounds for bringing proceedings whereas the term “tort” tends to be applied to the act whose commission provides the victim with grounds for bringing proceedings. Not every cause of action arises from the commission of a tort but every tort provides the victim with a cause of action. In other words “cause of action” is a broader concept than “tort” and includes grounds for bringing proceedings in other areas of law such as contract.

<sup>3</sup> The defendant must intend that or be reckless as to whether this is the effect produced.

<sup>4</sup> [2003] UKHL 53; [2004] AC 406; [2004] UKHRR 154.

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dust from the building of a road nearby makes it impossible for her to keep her house clean. But in *Hunter v Canary Wharf*<sup>5</sup> it was held that since nuisance is, properly speaking, a tort against land rather than against persons, the claimant will only be entitled to sue if she has a proprietary or possessory interest in the land affected; the spouse or children or lodgers of a person with a proprietary or possessory interest will not be entitled to bring proceedings.<sup>6</sup>

Winning compensation for a wrong committed by a public authority is thus a matter of finding the appropriate tort. It should not be thought that the whole of the law of tort has the rigid character suggested by the examples given above. The most important tort, the tort of negligence, is much more flexible and, as I shall explain below, much of the uncertainty in this area of English law has arisen from attempts to provide a remedy for harms caused by public law wrongs by extending the boundaries of negligence. Before doing this, however, it will be useful to say something about the relationship between public law, the body of law concerned with the powers and duties of public authorities, and tort law.

Public law and tort law are distinct. At the same time, however, an authority cannot be liable in tort for something that public law authorises it to do and it is consequently a defence to a tort action for a public authority to show that it had legal authority to act as it did. Since most of the powers of public bodies derive from statute, this is usually a matter of the body demonstrating statutory authority for its actions. The policeman who arrests a citizen is usually committing what amounts to the tort of false imprisonment if carried out by another citizen. His statutory authority protects him. But if he exceeds his authority and acts unlawfully as a matter of public law he will then be liable for the tort. In similar fashion, a public body that commits a nuisance – for example, as in the case cited above, by covering a landowner’s land with dust – will be immune from suit

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<sup>5</sup> [1997] AC 655.

<sup>6</sup> The difficulties this position creates were further considered in *Dobson v Thames Water Utilities* [2009] EWCA Civ 28; [2009] HRLR19 where a group of claimants brought actions in both nuisance and for breach of their rights under Article 8 ECHR in respect of smells and mosquitos produced by the defendant’s sewage plant. Some of the claimants had proprietary or possessory interests but others did not.

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if it can show statutory authority for its actions. But if it has exceeded its authority it will be liable in the same way as a neighbouring landowner who commits a nuisance.<sup>7</sup>

This is the way in which English law has traditionally provided a monetary remedy for wrongs committed by public authorities. It makes it possible for the question of whether the authority has acted lawfully as a matter of public law and the question whether the claimant is entitled to damages to be dealt with at the same time and it is generally speaking satisfactory as long as the acts impugned are of a sort that could equally well be performed by a private person. The problem, of course, is that public authorities' welfare and regulatory powers enable them to injure people in ways that private persons cannot. It is in relation to activities that lack a private counterpart and the injuries they cause that the English approach to administrative liability has often been found wanting. Debate about administrative liability tends, consequently, to focus upon those torts that offer the prospect of providing a remedy for injuries caused by such activities. The torts in question are breach of statutory duty, misfeasance in a public office and negligence. I shall say something about each of these in turn.

## ***2.2 Breach of Statutory Duty***

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<sup>7</sup> A striking recent instance of the application of this principle in relation to the tort of false imprisonment is the Supreme Court's decision in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. The claimants there were foreign nationals who had committed crimes and been convicted and imprisoned. The Secretary of State decided that after their release from prison they should be deported back to their countries of origin. Under the Immigration Act 1971, she had the power to imprison persons she intended to deport pending their deportation and in pursuance of this power she had made and published a lawful policy as to when the power should be used. But she had also made an unlawful and secret policy according to which all foreign nationals who had committed crimes and been imprisoned should be imprisoned pending their deportation regardless of the risk they posed to the public or whether it was likely to be possible to deport them in the near future. The claimants were imprisoned under the second, unlawful policy and not under the first, lawful one. They successfully sued the Secretary of State for false imprisonment. The Secretary of State held the SS liable even though she could, if she wished, have imprisoned the claimants under the lawful policy. The fact was that she had imprisoned them and that since the policy she had relied on was unlawful, she lacked a defence of lawful authority. The damages awarded, on the other hand, were only nominal.

Where A owes a duty imposed by statute to B and fails to fulfil the duty thereby causing harm to B of the sort that the duty was intended to avert, then B may sue A for breach of statutory duty and receive an award of damages. Whether the statute contains a duty of the sort alleged is of course a matter of statutory interpretation. But the method of statutory interpretation employed ensures that the kind of duty that will support a claim in damages will only be found in a small minority of cases. The duty must be very specific, leaving little room for the exercise of discretion, and owed to a small and readily identifiable class of persons. The provision in the statute of some remedy other than damages for breach of the duty will generally be taken as a sign that Parliament did not intend there to be a remedy in damages. Few statutory duties of public authorities satisfy these conditions. The broad “target” duties often imposed on public authorities – for example the duty on the fire brigade “to make provision for the purpose of extinguishing fires in its area and protecting life and property in the case of fires in its area”<sup>8</sup> or the Secretary of State’s duty to “continue the promotion in England of a comprehensive health service”<sup>9</sup>- are especially unlikely to do so. The tort of breach of statutory duty is, in fact, most likely to be made out not in relation to the duties of public authorities but in relation to the duties imposed on employers (private and public) by health and safety legislation. The typical successful action is one in which an employee sues for damages in relation to an injury caused by the failure of his employer to fulfil the statutory duty to fence dangerous machinery or provide protective goggles or gloves.

For a brief period in the late 1970s and early 1980s the courts showed themselves willing to broaden the class of duties whose breach might give rise to a successful claim for damages. *Thornton v Kirklees Borough Council*<sup>10</sup> concerned section 3(4) of the Housing (Homeless Persons) Act 1977 which provided that if a housing authority “have reason to believe that the person who applied to them may be homeless and have a priority need, they shall secure that accommodation is made available”. Clearly performance of this duty involved a significant element of discretion on the part of the authority in deciding whether or not

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<sup>8</sup> Fire and Rescue Services Act 2004 s.7(1).

<sup>9</sup> Health and Social Care Act 2012 s.1(1).

<sup>10</sup> [1979] 1 WLR 637.

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there was reason to believe that the applicant was homeless and in priority need. Nonetheless, the Court of Appeal held that breach of the duty would entitle the person affected by it to damages. In the years that followed, however, the courts quickly retreated from this position and insisted that it was not appropriate to allow the exercise of discretionary powers of the type in issue in *Thornton* to be questioned in tort proceedings. Doing so, the courts reasoned, inevitably involved arriving at a determination as to the outcome that should have been reached whereas their proper role was confined to considering the propriety of the manner of exercise of the discretion. This latter task belonged to the sphere of administrative law and was thus best undertaken in judicial review proceedings.<sup>11</sup> While breach of statutory duty might thus on the face of it appear to present a promising avenue of redress for the person who has suffered harm as the result of a public law wrong, it in practice yields little.

### ***2.3 Misfeasance in a public office***

Misfeasance in a public office is one of the few torts that applies solely to public defendants. It has two limbs. The defendant public official can be liable where he misuses his powers by deliberately setting out to injure the claimant or where he acts unlawfully and with knowledge both of the act's unlawfulness and of the probability of its causing injury to the claimant.<sup>12</sup> The focus on the defendant's state of mind means that liability naturally attaches to the individual official rather than to the authority for which he works but the latter can be made liable via the doctrine of vicarious liability.<sup>13</sup> The same feature means that, as with breach of statutory duty, the tort is seldom much help to the claimant injured by a public authority's wrongdoing. The number of cases in which public officials knowingly act unlawfully is a very small proportion of those in which they simply act

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<sup>11</sup> This position was affirmed most emphatically by the House of Lords in *O'Rourke v Camden Borough Council* [1997] 3 WLR 86.

<sup>12</sup> Knowledge includes constructive knowledge. For a detailed elaboration see *Three Rivers D.C. v. Bank of England (No 3)* [2000] 2 WLR 1220.

<sup>13</sup> *Racz v Home Office* [1994] 2 AC 45.

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unlawfully, and the number in which they can be proved to have known that they were acting unlawfully is smaller still. A further limitation is that the claimant cannot succeed unless she can show that she suffered financial loss, physical injury or mental injury in the sense of a recognized psychiatric illness.<sup>14</sup>

## ***2.4 Negligence***

This brings us to negligence. Negligence is by the far the most important of the torts and also the most flexible but it too is subject to significant restrictions. To prove negligence it is not enough to show that the defendant acted with fault so as to harm some recognized interest of the claimant. It must first be shown that the claimant suffered loss of a kind recognized in the law of negligence. Traditionally this was confined to physical damage to either person or property. The categories of loss have been expanded to include the case in which the claimant suffers a recognized psychiatric illness and, in certain restricted circumstances, financial loss not consequent upon physical damage. But the categories of loss are only expanded by the courts very gradually and with great caution.

It must also be shown that the defendant owed the claimant a duty of care. Where the relationship between the parties is like that in which a duty of care has been found in the past a duty of care will readily be found. Such will be the case, for example, where the defendant carries on some activity that poses a foreseeable risk of physical harm to the person or property of the claimant. But where a clear similarity with past cases is lacking the court will examine carefully the reasons for and against extending the duty of care to cover the new situation. The test that the courts currently apply in deciding whether to extend the duty of care to a new situation is known as the *Caparo* test after the case in which it was set out, *Caparo v Dickman*.<sup>15</sup> The court must ask itself firstly, whether it was foreseeable that the actions of the defendant would cause the claimant harm, secondly whether there was a relationship of proximity between defendant and claimant and thirdly,

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<sup>14</sup> *Watkins v Home Office* [2006] UKHL 17; [2006] 2 All ER 353.

<sup>15</sup> [1990] 2 AC 605, HL.



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whether it would be fair, just and reasonable to find that the defendant owed the claimant a duty of care. The meaning of the second and third elements of the test are ill-defined and really amount to no more than the requirement that the courts must decide whether, for any of a variety of reasons, it would be desirable for there to be a duty of care where a relationship exists like that between claimant and defendant.

The courts have traditionally been, and continue to be, reluctant to make defendants liable for omissions or in other words, to find that the defendant owes the claimant a duty positively to act so as to confer upon the claimant a benefit. It is notoriously a feature of English law that a citizen who sees a child drowning in a pond is under no legal duty to help the child even if she could do so without danger to herself. Exceptions are made to this basic presumption in a restricted range of types of case. No single principle unites the exceptions and to describe them all would require a long list, but to give some examples: it is well established that a duty of care can arise in the context of a professional relationship such as that between doctor and patient or teacher and pupil, and more generally any person may become subject to a duty where they undertake in some way to assist another. It is also well established that where the defendant is responsible in the first place for creating a danger, she may then owe a duty to others to take steps to prevent the harm that might occur to them as a result. The courts are as cautious in extending the list of exceptions to the presumption against finding a duty to assist others as they are in modifying other restrictions on the incidence of the duty of care.

It has for long been possible to sue public bodies for negligence and doing so presents no difficulty where the activity alleged to be carried on carelessly is one that might just as well have been performed by a private person. So there is no difficulty in holding a public authority liable where it carries on some practical activity carelessly so as to cause physical harm to the person or property of the claimant or where a professional person such as a doctor is employed by a public authority to deliver a service to the public and, having undertaken to assist the claimant, does so carelessly. The problem arises where the authority has powers or duties that have no counterpart in the private sphere and either exercises the powers so as to harm the claimant or fails to fulfil a duty thereby occasioning loss (or failing to confer a benefit upon) the claimant.

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The situation is complicated by the long standing uncertainty in English law as to the proper relationship between on the one hand, the administrative law standards that govern the exercise of statutory discretion and on the other, the duty of care in negligence. It is generally accepted that where a public authority has the power to perform a practical activity and does so carelessly (i.e. in the non-technical sense, negligently) then this must make the action unlawful as a matter of public law. What is less clear is whether the finding that some decision of a public authority is unlawful as a matter of public law can ever be a ground for finding that it has breached a duty of care in negligence (or, in other words, whether there can ever be a duty of care to conform to the principles of administrative law in making decisions). The pervasive fear is that the imposition of a duty of care on the exercise of a statutory power will somehow distort it or discourage its proper exercise. It might be thought that the solution to this fear would be to treat public law unlawfulness in itself as amounting to fault thereby avoiding tension between the two sets of standards. But this possibility has seldom been considered by the courts and when it has been considered it has been quickly dismissed.<sup>16</sup> The usual assumption is that the duty of care and the principles of administrative law belong to separate domains.

The present position with regard to the negligence liability of public authorities for the exercise or non-exercise of their discretionary powers is as follows. Possession by a public authority of a statutory power that might be used to assist a particular person, or indeed that the authority might be obliged as a matter of public law to use to assist a particular person, will not constitute a reason for finding that the authority owes that person a duty of care. After many years of equivocation, this was the position reached by the House of Lords in *Gorringe v Calderdale Metropolitan Borough Council*.<sup>17</sup> The claimant in that case was a woman who was injured after she drove her car too fast over the brow of a dangerous hill and hit a bus coming in the opposite direction. She sued the authority in negligence for its failure to maintain adequate warnings on the approach to the hill's summit. The House held that no duty of care could arise either from the simple fact that the authority possessed

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<sup>16</sup> See e.g. *Dunlop v Woollahra Municipal Council* [1982] A.C. 158, especially at p. 172; *Rowling v Takaro Properties Ltd* [1988] 1 AC 473, PC, especially at pp.500-503; *R v Knowsley MBC ex parte Maguire* (1992) 90 LGR 653; *Banks v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 416; [2004] NPC 43.

<sup>17</sup> [2004] UKHL 15; [2004] 1 WLR 1057.

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powers to provide signage and road markings or from the fact that it was arguably under a duty, as a matter of public law, to use them. Since reasons for imposing a duty of care were lacking, this was a straightforward case of omission and there could be no liability.

If, on the other hand, the exercise of an authority's powers involves it in carrying on some activity that might be subject to a duty of care if carried on by a private person and if, in performing this activity, the authority brings itself into the kind of relationship with a member of the public that might be recognized as constituting a relationship of proximity if it subsisted between two private persons, then a duty of care may arise. So, for example, in the joined appeals heard by the House of Lords and reported as *Phelps v Hillingdon Borough Council*<sup>18</sup> the defendant authorities were under statutory duties to provide for the educational needs of children with particular educational difficulties. It was held that a duty of care towards the children could arise because the teachers and educational psychologists employed to discharge the authorities' duties had entered into a relationship with the children analogous to the kind of relationships between professional persons and their clients usually held to give rise to a duty of care. Liability for any breach of the duty of care on the part of the teachers and educational psychologists would attach to the authorities by the principle of vicarious liability.

In cases like *Phelps* the fact that the authority is under a statutory duty to assist the claimant (or possesses a statutory power that could be used to assist the claimant) is not treated as a reason to impose a duty of care. The statute is treated as important, however, to the extent that the court must assure itself that imposing a duty of care will not somehow interfere with the proper exercise of the authority's discretion. In a long line of cases in the 1980s and 1990s culminating in the House of Lords' judgment in *X (Minors) v. Bedfordshire County Council*<sup>19</sup> the courts found that it was not fair, just and reasonable to impose a duty of care on the ground that to do so would, in a variety of ways, have just this effect. Typical arguments given in support of this view – usually described as “policy considerations” – were that the imposition of a duty of care might lead officials to exercise their powers in an over cautious fashion to the detriment of the people they were supposed to help, that it

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<sup>18</sup> [2001] 2 AC 619.

<sup>19</sup> [1995] AC 633.

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might upset the balance that the authority had to strike between helping those people and harming others who were foreseeably affected by the exercise of the powers, that imposing a duty could lead to costly and unnecessary litigation, and that there existed other avenues of redress for the claimants. The use of these policy considerations, with their underlying assumption that the courts were in a position to know a priori what the practical effect of imposing duties of care on public authorities would be, was subject to a fair amount of academic criticism. It was also disapproved by the European Court of Human Rights in *Osman v UK*.<sup>20</sup> In this case, the family of a man killed by a mentally disturbed acquaintance had sued the police in negligence. The police, the family alleged, had known about the killer's threatening behaviour but had not done enough to prevent the crime. The English courts held, for policy reasons like those outlined above, that there could be no duty of care. The ECtHR held that to exclude the possibility of liability without full consideration of the facts, as the English courts had done, was a breach of the applicants' Article 6 entitlement to have a claim relating to their civil rights determined by a court. This ruling was criticised by many commentators on the grounds that the ECtHR had overstepped the bounds of its authority by treating a substantive feature of English law – the ability of the courts to determine on the basis of assumed facts whether a duty of care existed in a particular type of case – as a procedural bar to the determination of a civil right. Nonetheless, the immediate effect of the judgment, perhaps combined with the academic criticism referred to, was to make English courts more circumspect about denying the existence of a duty of care on the basis of policy considerations. They have continued to be so despite the fact that in a later case,<sup>21</sup> the ECtHR withdrew its earlier criticism of the nature of the reasoning in *Osman*.

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<sup>20</sup> (2000) 29 EHRR 245; [1999] FLR 193. The *X* case, *Osman v Ferguson* [1993] 4 All ER 344, CA, the case before the English courts that gave rise to *Osman v UK*, and many other cases about whether public authorities owe a duty of care involved applications to strike out the claimant's case as disclosing no cause of action. Such an application invites the court to terminate proceedings without full examination of the facts on the ground that even if all the factual allegations made by the claimants are true, they cannot succeed as a matter of law.

<sup>21</sup> *Z and others v UK* [2001] 2 FLR 612.

On the other hand, except for a brief period in the wake of *Osman*, the courts have not become noticeably more enthusiastic about imposing duties of care on public authorities. In place of the policy considerations that were used in the 1980s and 90s to justify the finding that it was not fair, just and reasonable to impose a duty of care, the courts have begun to rely on somewhat more formalistic means to achieve the same end. The ruling in *Gorringe*, described above, is one example of this shift. The courts have also begun to rely increasingly on the claim that where a statutory power is conferred for the purpose of protecting some particular class of person it is inappropriate to impose a duty of care towards some other class of person who might be harmed by the power's exercise. In *D v East Berkshire Community Health NHS Trust*,<sup>22</sup> the House of Lords considered a number of appeals in cases in which public authorities had wrongly removed children from the family home on the suspicion that their parents had been abusing them. The House held that since the authorities' powers were for the purpose of protecting the children, a duty of care was owed to the parents and not to the children. In *Jain v Trent Strategic Health Authority*,<sup>23</sup> Lord Scott, with whom the other members of the House of Lords agreed, set out the general principle that:

“...where action is taken by a state authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortious duty of care will not be held to be owed by the state authority to others whose interests may be adversely affected by an exercise of the statutory power. The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and be potentially adverse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose.”

### **3. THE SCOTTISH LAW OF ADMINISTRATIVE LIABILITY**

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<sup>22</sup> [2005] UKHL 23; [2005] 2 AC 373.

<sup>23</sup> [2009] UKHL 4; [2009] 2 WLR 248.

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The history of non-contractual liability in Scotland is quite different from that of its English equivalent. Scottish law draws much more heavily than does English law on the concepts of Roman law and it continues to have a distinct terminology and procedure. Scots courts are not bound by the decisions of English ones nor, strictly speaking, are they bound by decisions of the Supreme Court except where it is hearing appeals in Scottish cases or deciding questions relating to the devolution of powers from Westminster to Scotland. The two systems have become so closely intertwined, however, that in practice there is very little difference of substance between the English law of tort and the Scottish law of delict. The concept of a “cause of action” does not exist in Scots law but it recognizes a variety of heads of liability, each governed by its own rules. As in English law, the most important head of liability is that for negligence or, as it is called in Scottish textbooks, “unintentional delict”.<sup>24</sup> The concept of the duty of care is sometimes said to be alien to Scottish law just as it is to civil systems. Yet Scottish courts proceed just as English ones do, determining whether a duty exists in the type of situation in question before going on to determine whether there has been breach, causation, loss and so forth. A question that is asked from time to time is whether the test for the existence of the duty of care is the same in Scottish as in English law. The foundational case in both the English law of negligence and the Scottish law of unintentional delict is *Donoghue v Stevenson*,<sup>25</sup> decided in 1932. The case arose in Scotland and was heard by Scottish courts before being brought on appeal to the House of Lords. It concerned what we would now call product liability. Mrs Donoghue alleged that she had suffered shock and illness after the bottle of ginger beer a friend bought for her in a cafe turned out to contain the decomposing remains of a snail. Lacking any contractual nexus with either the cafe owner or the manufacturer Mrs Donoghue sued the manufacturer in delict. The House of Lords found that in circumstances like those in question a manufacturer could owe the ultimate consumer of its product a duty of care. The case stands, however, for the wider proposition that the existence of a duty of care is not strictly confined to those types of situation in which it has been found to exist in the past but can be extended to new ones, key criteria for its existence being that it is foreseeable that the defendant’s actions will cause harm to the claimant and that there exists between

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<sup>24</sup> See e.g. J. Thomson *Delictual Liability* (4<sup>th</sup> ed, Hayward’s Heath: Tottel Publishing, 2010).

<sup>25</sup> 1932 SC (HL) 31; 1932 SLT 317; [1932] AC 562, HL.

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the two parties a relationship of “proximity”. As noted above, what constitutes proximity is a blank to be filled in on the basis of a variety of moral, social and practical considerations. In the years since *Donoghue* the willingness of the courts to expand the categories of circumstance in which a duty of care will be found has fluctuated. The House of Lords was at its most expansive in the 1970s, the high water mark being its judgement in *Anns v Merton Borough Council*.<sup>26</sup> There Lord Wilberforce set out a two stage test for the existence of a duty of care whereby the court was to ask first whether harm of the sort suffered by the defendant as a result of the claimant’s activities was foreseeable and second whether there were any policy considerations that ought to limit the incidence of the duty. The three stage *Caparo* test, set out above, was intended to put a definitive stop to the period of expansiveness. It signals an approach often so restrictive that it is tempting to ask whether the law has reverted to the state of affairs that the House of Lords judgments in *Donoghue* were said have left behind i.e. one in which the incidence of the duty of care was confined to a limited and fixed set of types of circumstance. The Scottish courts have accepted and apply the *Caparo* test. At the same time, one finds in the case law attempts by litigants to argue that the *Caparo* test does not belong in Scottish law and that it is alien to the spirit of *Donoghue*.<sup>27</sup> Such arguments have been firmly rejected by Scottish courts<sup>28</sup> and judges yet, as I shall suggest below, Scots courts have occasionally shown a greater willingness than their English counterparts to find a duty of care in cases concerning public authorities.

Turning to the specific topic of administrative liability, the basic principle governing the relationship between the general law of delict and public authorities is the same as that governing the relationship between tort and public authorities in English law. There is no special principle of administrative liability but a public authority committing a delictual act

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<sup>26</sup> [1978] AC 728.

<sup>27</sup> See e.g. the arguments advanced for the pursuer in *Gibson v Orr* 1999 SC 420 at p.429

<sup>28</sup> See per per Lord Hamilton in *Gibson v Orr* n.27 above at pp.429-431; Lord Hope in *Mitchell v Glasgow City Council* [2009] UKHL 11; 2009 SOT 247; [2009] 2 WLR 481 at [25]. For a discussion of the relationship between English and Scottish courts’ treatment of the duty of care and a critique of the latter’s acceptance of the English approach see D. Brodie “In Defence of Donoghue” 1997 Juridical Review 65.

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will be liable in just the same way as a private person unless it can show that it was acting within the scope of its powers as a public authority, these powers being almost always statutory. Reliance on the ordinary law of delict means that in many cases in which loss is caused by the wrongful exercise of an authority's welfare or regulatory powers, there will be no remedy. Liability for breach of statutory authority operates exactly as it does in English law and the Scottish courts recognize an exact equivalent to misfeasance in a public office although it does not bear that name.<sup>29</sup> In England, negligence is the tort most likely to be invoked in relation to harm caused by a public authority's misuse of its welfare and regulatory powers and in Scotland the same is true of unintentional delict.

As noted above, however, there is occasional evidence of a less restrictive approach to the incidence of the duty of care on the part of Scots courts. A recent example is *Burnett v Grampian Fire and Rescue Services*.<sup>30</sup> There the pursuer was the owner of a flat. A fire broke out in the flat below and the fire brigade came to the scene, appeared to extinguish the fire and forced entry into the pursuer's flat in order to check that the fire had not spread upwards. Subsequently, the fire continued to smoulder and reignited causing substantial damage. The pursuer sought damages claiming that the fire brigade had breached the duty it owed him to extinguish the fire in the flat below and to take reasonable care in ensuring the safety of his flat. The leading English authority was (and is) *Capital and Counties PLC v Hampshire County Council*.<sup>31</sup> In that case, the members of the Court of Appeal based their judgment on the act/omission distinction. They laid down the general proposition that where a fire brigade exercises its statutory powers to put out a fire, it will owe a duty of care to the owners of premises affected not to make matters worse but it will owe no duty to improve matters or to use reasonable care to ensure that the fire is actually put out. In *Burnett*, Lord Macphail rejected this proposition. He questioned the idea that when a fire brigade attended the scene of a fire there could be sufficient proximity for the firemen to

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<sup>29</sup> See *Micosta v Shetlands Islands Council* 1986 SLT 193 per Lord Ross at p.198; *Watkins v Secretary of State for the Home Department* [2006] UKHL 17; [2006] 2 AC 395 per Lord Hope of Craighead at [29]; *Phipps v Royal College of Surgeons of Edinburgh* [2010] CSOH 58; 2010 GWD 27-544 per Lord Bonomy at [7]-[10].

<sup>30</sup> [2007] CSOH 3, 2007 SLT 61.

<sup>31</sup> [1997] QB 1004; [1997] WLR 358.



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owe a duty not to cause further harm but insufficient proximity for them to be under a duty to positively assist,<sup>32</sup> and, without being absolutely clear as to the analytical basis for so finding, held that in such circumstances there was sufficient proximity to found a general duty to act with reasonable care in extinguishing fire.<sup>33</sup> His lordship also rejected a number of policy arguments advanced by the defenders to show that it would not be fair, just and reasonable to impose a duty including the argument that there was some sort of tension between the duties owed by the fire service to the public at large and the duties it owes those affected by a particular emergency.<sup>34</sup>

#### **4. THE INFLUENCE OF EU LAW AND THE HUMAN RIGHTS ACT**

Two further factors complicate the picture so far as the tort liability of public authorities in the UK is concerned. The first is that as a result of the UK's membership of the European Union citizens are entitled to invoke the form of liability created by the European Court of Justice in the *Francovich* and *Brasserie du Pêcheur* cases where they suffer harm as a result of breaches of EU law by public authorities. Liability under this head is treated as a tort for the purpose of calculating damages and time limits.<sup>35</sup>

The second factor is the advent of the Human Rights Act 1998. This act, which came into force on 2 October 2000, makes the rights in the ECHR directly enforceable in UK law. Under s.3 of the Act all legislation must, so far as possible, be read so as to make it compatible with Convention rights. Where a piece of legislation cannot be made compatible then the court may declare it incompatible but this does not affect its validity. Under s.6, it is unlawful for a public authority to act in a way which is incompatible with a

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<sup>32</sup> At [49]

<sup>33</sup> At [58].

<sup>34</sup> At [70].

<sup>35</sup> See *Spencer v Secretary of State for Work and Pensions* [2008] EWCA 750, [2009] QB 358.

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Convention right. Under s.7 anyone who is a victim of an act which is unlawful under s.6 can bring proceedings against the public authority concerned. S.8 provides that in proceedings under s.7 a court may award damages where it considers it just and appropriate to do so. Courts' powers to award damages under this provision are subject to various conditions. Subsections (3) and (4) of s.8 are in the following terms:

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

Both *Francovich* and the Human Rights Act introduce into English law what is otherwise lacking, namely a form of liability for harm caused by breach of public law norms. It might have been thought that this would lead the courts towards creating a more general form of such liability, but as yet, there is no sign of it having this effect. *Francovich* liability is applied by the courts as required by EU law but it has no influence beyond EU law's remit. Nor has the introduction of the power to award damages for breach

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of human rights done much to alter the courts' overall approach to the problem of public authority liability.

From the point of view of tortious or delictual liability, the HRA presented the courts with two opportunities. Firstly, where existing torts failed to protect human rights, the courts might have transformed the torts so to make them do so. Secondly, the form of liability created by the Act could have been developed so as to constitute in itself a kind of tort, governed by a body of consistent rules and leading to the award of damages calculated in accordance with established tort principles.

Both these opportunities have been eschewed. Existing torts have not by and large been transformed. In one major case, *D v East Berkshire Community Health NHS Trust*,<sup>36</sup> the courts found a duty of care in circumstances in which it had previously been held that there was none in order to comply with Convention rights. In *D*, the House of Lords heard three appeals all concerned with mistaken decisions by the child protection authorities to remove children from parents whom they suspected of abusing the children. At the time, the leading UK authority in this area was *X (Minors) v. Bedfordshire County Council*.<sup>37</sup> There the House had also heard a number of joined appeals. In one of these, the *Bedfordshire* case, the claimants were a group of children who sued the authority for failing to remove them from their neglectful parents. In another, the *Newham* case, the claimants were a mother and daughter whom the authority had separated in the mistaken belief that the mother's boyfriend was abusing the daughter. The House held that, for policy reasons, it would not be fair, just and reasonable to find a duty of care in any of the cases. The claimants in both the *Bedfordshire* case and the *Newham* case then made applications to the ECtHR. The application arising from the *Bedfordshire* case, was heard under the name *Z v UK*<sup>38</sup> and it was here that the ECtHR repudiated the idea that a refusal to find a duty of care prior to a full investigation of the facts of a case constituted a breach of Article 6. It also, however, found that the failure to remove the neglected children was a breach of their rights

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<sup>36</sup> N.13 above.

<sup>37</sup> N. 18 above.

<sup>38</sup> [2001] 2 FLR 612.

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under Article 2 and Article 8 and that the failure to provide a remedy amounted to a breach of Article 13. The application arising from the *Newham* case was heard under the name *TP and KM v UK*.<sup>39</sup> There the ECtHR found that the wrongful separation of the mother and daughter amounted to breach of their rights under Article 8 and the failure to provide a remedy amounted to a breach of Article 13. In *D*, faced with the question of whether the authorities owed a duty of care to children wrongfully removed, the Court of Appeal asserted simply that the decision in *X* could not survive the Human Rights Act and this conclusion was endorsed by the House of Lords. On the other hand, despite the ECtHR's finding in *TP and KM* that certain of the actions of the authority breached a duty owed to the mother as well as to the child, the House held that the child protection authorities owed no duties to parents when deciding whether to separate their children from them. The reason given was the one referred to above in the section on negligence: that it was undesirable to impose a duty of care towards a class of person which it was not the purpose of the authority's powers to protect.

The courts have also transformed the tort of breach of confidence so as to give horizontal effect to the Convention right to privacy under Article 8. Court and tribunals are included in the definition of "public authority" and thus share with other public authorities the obligation to act compatibly with Convention rights. This has been taken to mean that they must develop the common law as it applies between private persons so as to make it Convention compatible. The most conspicuous failures in the field of private law to protect the interests recognized in the ECHR have been in relation to privacy. The pre-HRA tort of breach of confidence enabled one person A to sue another B where A had disclosed information to B on the understanding that it was to be kept secret and B had sought to publicise it. The post-HRA tort of breach of confidence has become, above all, a means whereby a person in the public eye can obtain a remedy against newspapers or other media outlets that attempt to invade her privacy by publishing pictures or information about her private life. In giving the tort this role, the courts quite explicitly invoke the values

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<sup>39</sup> [2001] 2 FLR 549.

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protected by Article 8 and weigh these where necessary against the values protected by Article 10 of the Convention.<sup>40</sup>

But the *D* case and the development of breach of confidence are exceptions to the general rule. The development of breach of confidence is explained by the need to make a particular Convention right effective as between private parties and the absence of any method for achieving this in the Act. It is noteworthy in this respect that in the *Wainwright* case mentioned above, where the defendant was a public authority, the courts rejected the suggestion that they should expand the tort of trespass to the person so that it provided a remedy for invasions of the right to privacy under Article 8 ECHR. In *D*, it is significant that the facts in issue arose before the Act came into force. The general approach taken by the courts has been to insulate the law of tort from Convention rights and to insist that in so far as the claimant has suffered a breach of her Convention rights requiring damages by way of remedy, the solution lies in proceedings under the Act. In the case of negligence, this can be seen in the House of Lords judgment in the joined appeals *Van Colle v Chief Constable of Hertfordshire Police* and *Smith v Chief Constable of Sussex Police*.<sup>41</sup> In both cases, the claimants sued the police for failure to prevent a crime, in the first case, the murder of the claimants' son, and in the second the serious assault of the claimant by his former partner. In the first case, the claimants alleged that the police's failure constituted breach of their duty to protect the claimants' son from a risk to his life under Article 2 ECHR. In the second, the claimant alleged that the police had breached the duty of care they owed him in negligence. In both cases the House found against the claimants. In the first, their Lordships held that the level of risk to the claimants' son that the police knew or ought to have known about fell below the level necessary to give rise to an obligation on the part of the police. (Here the House applied the test set out by the ECtHR in the *Osman* case referred to above: that the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party.) In the second case, the House held that "it was a core principle of public policy that, in the absence of special circumstances, the police owed no common law duty of care

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<sup>40</sup> There is now a large case law in this area but the leading case remains *Campbell v Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 AC 457.

<sup>41</sup> [2008] UKHL 50; [2009] 1 AC 225.

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to protect individuals from harm caused by criminals since such a duty would encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interest of the community as a whole”. Their Lordships rejected the argument that the duty of care should be developed so as to reflect the duty owed by the police under Article 2. Both Lord Hope<sup>42</sup> and Lord Brown,<sup>43</sup> expressed the view that it would be better to allow the different remedies to develop in parallel, Lord Brown claiming that Convention claims and ordinary civil claims had different objectives since the latter were intended to compensate claimants for losses whereas the former were intended to vindicate human rights. As several commentators have pointed out, this overlooks the fact that several torts are mainly concerned with the protection of rights.<sup>44</sup> For example, the various forms of trespass to the person described above protect the rights to bodily integrity and liberty. There is no need for a claimant in trespass to show material loss in order to succeed in a claim.

The assumption that the law of tort and the law concerning Convention rights should remain separate is also reflected in the judgment of the House of Lords in *Watkins v Home Secretary*.<sup>45</sup> There the claimant was a prisoner whose correspondence with his lawyer had been unlawfully opened by the prison authorities. The claimant sued the Home Secretary for misfeasance in a public office but the judge of first instance dismissed his claim on the ground that he had not suffered financial loss or physical or mental injury. On appeal, the Court of Appeal upheld the claim on the ground that an action in misfeasance in a public office could succeed where it was shown that the claimant’s constitutional right had been infringed but this finding was in turn reversed by the House of Lords. The HRA was not relied on by the claimant, most of the unlawful acts complained of having occurred before the coming into force of the Act. But the House took it upon itself to mention the

<sup>42</sup> At para [82].

<sup>43</sup> At para [138].

<sup>44</sup> See e.g. M. Lunney and K. Oliphant *Tort Law: Text, Cases and Materials* (4<sup>th</sup> ed., Oxford University Press, 2010) p.151; J. Steele “Damages in Tort and under the Human Rights Act : Remedial or Functional Separation” [2008] CLJ 606; Arden “Human Rights and Civil Wrongs: Tort Law under the Spotlight” [2010] PL 140 at 150

<sup>45</sup> [2006] UKHL 17; [2006] 2 All ER 353.

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Act, giving it is a reason for refusing to interpret the tort as covering infringement of constitutional rights that a remedy for infringements of rights that might be so classified was now obtainable under ss.6-8.<sup>46</sup> Similar reasoning was used by Lord Scott in *Jain v Trent Strategic Health Authority*.<sup>47</sup> The Authority had obtained an emergency order closing down the claimants' care home after an ex parte hearing (i.e. one to which the claimants were not party) before a Magistrates court. The tribunal to which the claimants appealed found that the evidence on the basis of which the authority had applied for the order was grossly inadequate and overturned the order. By this time, however, four months had passed and the claimants' business was in ruins. The claimants sued the authority in negligence. The House of Lords found on two grounds that the authority did not owe the claimants a duty of care. The first ground was the one mentioned above, namely that a duty of the kind argued for would conflict with the authority's statutory duty to protect the vulnerable inmates of care homes. The second was that it would be inappropriate to impose a duty of care in negligence in relation to steps taken in preparation for litigation. The claimants did not argue breach of their Convention rights because this was another case whose facts occurred before the coming into force of the Act. Nonetheless, Lord Scott, who gave the leading judgement, took it upon himself to consider how the case would look if argued on human rights grounds. As if to offer an excuse for the court's failure to rectify an obvious injustice, his lordship asserted that were the same facts to recur the HRA would afford the claimants a remedy for breach of Article 1 Protocol 1 and Article 6 ECHR.

Turning to the form liability under the Act has taken, the courts have adopted what might be called a minimalist approach to the matter. As the words of s.8 quoted above make clear, it was never intended that damages should be awarded for every breach of human rights. But in the leading case of *R (Greenfield) v Secretary of State for the Home Office*,<sup>48</sup> Lord Bingham, with whom the other judges agreed, set out an approach much

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<sup>46</sup> At [26] and [64].

<sup>47</sup> N.23 above.

<sup>48</sup> [2005]UKHL 14; [2005] 1 WLR 673.

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more restrictive than most observers had anticipated. He held that the Act is not a tort statute and that its objects are different and broader; that damages are not ordinarily needed to encourage high standards of compliance by the states subject to the Convention; that the purpose of incorporating the Convention into English law was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg; that the requirement in s.8(4) that the courts should take into account the principles applied by the European court under article 41 means that in deciding whether to award damages the courts should look to Strasbourg and not to domestic precedents; that the ECtHR's description of its awards as equitable means that they are not to be precisely calculated but are judged by the court to be fair in the individual case and that this should be the practice of the English courts also; and that the English courts should not aim to be significantly more or less generous than the court in Strasbourg.

The English law of tort and its Scots equivalent are far from perfect but they provide us with a well understood body of rules and principles. These govern both the incidence of liability and the calculation of damages. The ECtHR uses its powers to award compensation where this is necessary to make up for deficiencies in the remedies given in respondent states. In part because of this its jurisprudence on this point is notoriously lacking in clear principles. Moreover, no discernible method governs the calculation of the amounts it awards and these are far smaller than the damages in tort or delict awarded by UK courts in similar cases. While s.8(4) of the HRA only requires courts to *have regard* to the principles applied by the ECtHR in relation to the award of compensation under Article 41, the effect of *Greenfield* seems to be that courts and potential litigants must treat Strasbourg rulings as a definitive guide to when damages should be awarded and that litigants must expect awards that are calculated on a casuistic, ad hoc basis and are far lower than they would receive in tort. Claimants like those in *Watkins* or *Jain* who are obliged to bring proceedings based on Convention rights rather than in tort can thus expect something inferior to what they would have received if an action in tort were open to them.<sup>49</sup>

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<sup>49</sup> Recent examples of awards of damages are: £5,000 to compensate for non-pecuniary loss to the parents of a severely depressed young woman who committed suicide after the defendant health authority breached its duty under Article 2 ECHR by giving her leave from its mental hospital (*Rabone v Pennine Care NHS Trust* [2012])



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It is perhaps significant that Lord Bingham gave a dissenting judgment in *Smith v Chief Constable of Sussex* expressing his view that the common law should develop in such a way as to reflect the values of the ECHR.<sup>50</sup> The decision to adopt a restrictive approach to the question of when damages should be awarded under the HRA would be easier to defend if the approach to the development of the common law suggested by Lord Bingham were adopted. But the other members of the House of Lords have chosen to endorse his lordship's views concerning proceedings under the Act while rejecting his suggested approach to the development of tort.

## 5. ADMINISTRATIVE LIABILITY AND THE OMBUDSMAN

A spectre that hovers over many debates about administrative liability is the power of ombudsmen – in particular the Parliamentary and Health Service Ombudsman, Local Government Ombudsman and their Welsh, Scottish and Northern Irish equivalents – to recommend the award of damages to victims of maladministration. This power is relevant in a number of ways. Firstly, it provides a point of comparison because, as long as the legal systems of the UK lack a general principle of administrative liability, the ombudsman is able to recommend compensation in many cases in which the courts are impotent. The ombudsman's power cannot, of course, be an entirely satisfactory remedy for the absence of the power on the part of the courts to award damages because his recommendations are not legally binding. But it may often in practice provide an adequate remedy to victims of maladministration and its existence always serves to remind us of what the courts are lacking.

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UKSC 2; [2012] 2 WLR 381); a total of £10,500 for a Sri Lankan family of five who were unlawfully denied asylum, unlawfully removed from the country and in relation to whom the Secretary of State refused to admit her mistakes over a number of years, the events in question constituting breaches of Articles 5 and 8 ECHR (*R(M) v Home Secretary* [2011] EWHC 3667 (Admin); [2012] ACD 34); £5,000 each to a group of Nigerian women brought unlawfully into the country and forced effectively to work as slaves after the police breached their duties to the women under Articles 3 and 4 ECHR by failing to investigate their cases over a number of years (*OOO v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB); [2011] UKHRR 767).

<sup>50</sup> N.41 above at [58].

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Secondly, it was suggested by Sullivan J in *R (Bernard) v Enfield LBC*<sup>51</sup> that the Local Government Ombudsman's awards should serve as a guide to the level of damages to be awarded in claims under the HRA. The claimants in this case were a family with six children and a severely handicapped mother. They alleged successfully that the defendant authority had breached their Article 3 rights by failing to fulfil a statutory duty to provide them with adequate accommodation. The case was thus of exactly the sort in which pre or extra-HRA law provided no remedy and hence little detailed guidance as to the appropriate level of damages. The approach was approved when the case was heard by the Court of Appeal as one of a number of joined appeals in *Anufrijeva v Southwark LBC*.<sup>52</sup> It now seems, however, that as a result of the House of Lords' judgment in *Greenfield*, recommendations of the ombudsman are no longer considered in this context.

Thirdly, the fact that a litigant might receive compensation as a result of a recommendation of the ombudsman has been advanced in the past as a policy consideration militating against the finding that it would be fair, just and reasonable to impose a duty of care. It was, for example, one of the considerations mentioned by Lord Browne-Wilkinson in his judgment in *X (Minors) v Bedfordshire CC*.<sup>53</sup> In the years after the ECtHR's ruling in the *Osman* case<sup>54</sup> it seemed to have ceased to play this role but it reappears in the *Mohammed* case I discuss below.

## 6. SUMMING UP

In 2008, the Law Commission published a consultation paper proposing a new form of liability roughly similar to state liability in EU law.<sup>55</sup> The details of this proposal

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<sup>51</sup> [2002] EWHC (Admin) 2282; [2003] HRLR 4.

<sup>52</sup> [2003] EWCA Civ 406; [2004] QB 1124 at [78].

<sup>53</sup> N.19 above.

<sup>54</sup> N.20 above.

<sup>55</sup> Law Commission *Administrative Redress: Public Bodies and the Citizen* Consultation Paper No.187, available on the Law Commission's website at

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were much criticised by academics<sup>56</sup> but it was, in any case, strongly opposed by the government and was consequently abandoned.<sup>57</sup>

In his judgment in *Mohammed and others v Home Office*<sup>58</sup>, Sedley LJ makes reference to this fact in a case that encapsulates many of the salient features of administrative liability in the UK. His lordship described the facts of the case as follows: “[t]he eight claimants...are Iraqi Kurds who reached the United Kingdom between 1999 and 2001 and who were eventually found to be entitled to be granted indefinite leave to remain (“ILR”). None of them was, however, granted ILR until 2007, and the last of them was not granted it until 2009. In some cases this was because the applications had been put on hold pursuant to a priority policy which was subsequently held to be unlawful... In the remainder it was because the Home Office failed to implement the appropriate ministerial policy.” The claimants sought damages for breach of statutory duty, negligence, and breach of Articles 5 and 8 ECHR. The Home Office applied to strike out the proceedings<sup>59</sup> and at first instance succeeded in relation to the claims of breach of statutory duty and under article 5. The Home Office appealed to the Court of Appeal against the first instance judge’s refusal to strike out the claims based on negligence and article 8.

Giving the judgment of the court, Sedley LJ held that the Article 8 claim could proceed but that the negligence claim could not. A duty of care could not be imposed upon the exercise of the Secretary of State’s statutory power under s.4(1) of the Immigration Act 1971 especially since “practically everything [the Home Office] does in the exercise of the large section 4(1) function is dictated by policy, whether in the form of immigration rules

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[http://lawcommission.justice.gov.uk/docs/cp187\\_Administrative\\_Redress\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp187_Administrative_Redress_Consultation.pdf)

<sup>56</sup> The criticisms are summarized by the Law Commission in its *Analysis of Consultation Responses* at [http://lawcommission.justice.gov.uk/docs/lc322\\_Administrative\\_Redress\\_responses.pdf](http://lawcommission.justice.gov.uk/docs/lc322_Administrative_Redress_responses.pdf)

<sup>57</sup> See Law Commission *Administrative Redress: Public Bodies and the Citizen* Law Com No.332, available on the Law Commission’s website at [http://lawcommission.justice.gov.uk/docs/lc322\\_Administrative\\_Redress.pdf](http://lawcommission.justice.gov.uk/docs/lc322_Administrative_Redress.pdf)

<sup>58</sup> [2011] EWCA Civ 351; [2011] 1 WLR 2862.

<sup>59</sup> I.e. to terminate proceedings without full examination of the facts on the ground that even if all the factual allegations made by the claimants were true, they could not succeed as a matter of law.

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or of departmental policies or instructions.”<sup>60</sup> Having mentioned the abandonment of the Law Commission’s project, his lordship went on:

“...whatever the reason, a *faute lourde* system of state liability in damages for maladministration, of the kind that has worked well in France for more than a century <sup>6</sup>, is not on the cards in the United Kingdom. Apart from the limited private law cause of action for misfeasance in public office and the statutory causes of action in EU law and under the Human Rights Act 1998, there is today no cause of action against a public authority for harm done to individuals, even foreseeably, by unlawful acts of public administration. The common law cause of action in negligence coexists with this doctrine and may on occasion arise from acts done or omissions made in carrying out a public law function; but it may not impinge on the discharge of the function itself, however incompetently or negligently it is performed.”<sup>61</sup>

His lordship finished by noting the possibility that the ombudsman might recommend the award of compensation and appeared to endorse counsel for the Home Office’s suggestion that this might constitute a reason for holding that it would not be fair, just and reasonable to impose a duty of care.

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<sup>60</sup> [17].

<sup>61</sup> [24].