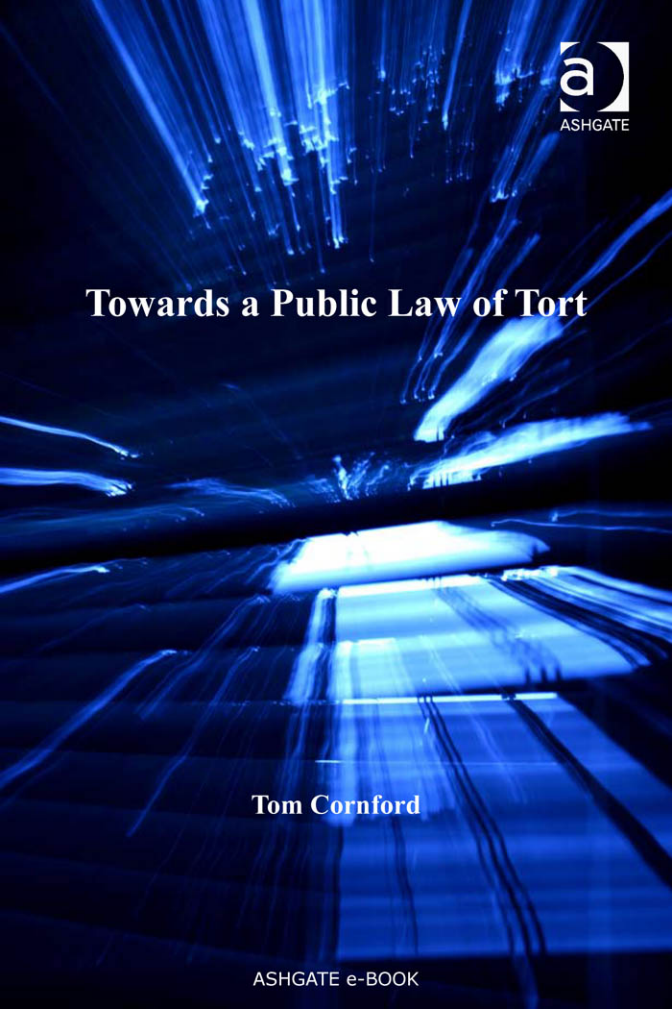
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Towards a Public Law of Tort
Tom Cornford
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TOWARDS A PUBLIC LAW OF TORT

For Sally

Towards a Public Law of Tort

TOM CORNFORD
University of Essex, UK

ASHGATE

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Preface

In this book I present an argument as to how the English law of administrative liability should be reformed. This is not therefore an expository work. For the most part I assume a basic knowledge of the relevant law, clear accounts of which are to be found in standard text books such as Craig or Wade on Administrative Law or Markesinis and Deakin on Tort. Nor do I purport to provide comprehensive coverage of all the many issues which the subject raises. There are some questions, for example that of whether judges and courts should be immune from liability for their mistakes, which I do not mention at all. I make reference, where it useful to do so, to the practice of other legal systems, but this is not a work of comparative law either.

My argument reflects a refusal to believe that a satisfactory solution to the problems in this area cannot be achieved by judicial development of the law. The techniques I use are thus largely doctrinal and theoretical. I have tried to take into account such empirical research as exists and no doubt further research of this type would be illuminating. In my view, however, the root cause of the confusion that surrounds this subject is conceptual and my main ambition has thus been to sort some of this conceptual confusion out. I hope the results are instructive even if the reader does not agree with my conclusions.

In rough outline, the plan of the book is as follows. In Part 1, I set out two principles which ought to govern administrative liability. These are entirely familiar, being the principles which were recommended by the Council of Europe when it conducted a study of the subject in 1984. I attempt to show that these principles are compatible with and implied by principles already present in English law. I also try to identify those aspects of the activity of public authorities that call for a specifically public form of liability. In Part 2, I try to show how, and the extent to which, the two principles could be implemented by means of judicial development of the law. I finish the book by explaining various implications of the proposed form of liability and criticizing rival approaches. I would like also to have included an assessment of the recommendations on administrative liability made by the Law Commission in its consultation paper on remedies against public bodies. At the time of writing, however, this has yet to appear.

I have tried to state the law as at January 31, 2008.

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Lastly, I owe a special debt of gratitude to my wife and family who have had to tolerate my ill humour and frequent absences during the period of the book's completion.

1 Each year the AHRC provides funding from the Government to support research and postgraduate study in the arts and humanities, from archaeology and English literature to design and dance. Only applications of the highest quality and excellence are funded and the range of research supported by this investment of public funds not only provides social and cultural benefits but also contributes to the economic success of the UK. For further information on the AHRC, see their website at <www.ahrc.ac.uk>.

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Glossary

In the course of this book, I use a number of expressions as shorthand for particular concepts or categories. For ease of reference, I define them here. (There is no need, however, to try to make sense of them before reading the parts of the book in which they occur.)

1) Principles of liability

Throughout the book I refer to the two principles recommended by the Council of Europe in the study of administrative liability it undertook in 1984. These are:

Principle I
Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person.

And:

Principle II
Reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered damage and the act was exceptional or the damage was an exceptional result of the act.

2) Types of public authority power

In Chapter 6, I distinguish between three types of power possessed by public authorities. I make use of this typology again in Chapter 7 and in Chapter 10. The types are:

Type 1: uniquely public powers
This category comprises special powers that go beyond those usually possessed by private persons. These are generally powers to determine what a private person's entitlements are, as in the case of licensing, or to override the private rights of

individuals as where an authority can confiscate property, arrest people or remove children from their parents.

Type 2: private law-type powers
This category comprises those legal powers that public authorities share with private persons such as being able to make contracts and own land.

Type 3: practical powers
This category comprises the powers that public authorities possess, through their employees, to perform practical activities that could in principle be performed by natural persons. The power of the fire brigade to put out a fire or of employees of a highway authority to remove hazards from the highway are examples.

3) The stable and the volatile parts of tort law

The stable part of tort law comprises all the torts except misfeasance in a public office, breach of statutory duty and the uncertain part of negligence, by which I mean negligence as it has developed from the House of Lord's decision in *Anns v Merton Borough Council* onwards.

The volatile part of tort law comprises the remainder i.e. the part of tort law excluded from the stable part.

These expressions are explained more fully in Chapter 10.

4) Classes of case in which there ought, in accordance with principle I, to be liability but which are not covered by the "stable" part of the law of tort

This typology is introduced in Chapter 10 and is used again in Chapter 12. It consists of the following classes:

Class 1: Exercises of powers to infringe or override private rights that do not involve (or are not treated as involving) acts that might be performed by private persons.
Examples would be the powers of an authority concerned with child welfare to remove a child from its parents or of a financial regulator to impose a fine on a company or bank for breach of some regulatory requirement.

Class 2: Exercises of powers to determine the right of a citizen to perform some activity or her entitlement to some benefit.
Examples of the former would include exercises of the power to grant planning permission, to approve the marketing of a drug, or to permit a person to operate

a taxi. Examples of the latter would be decisions as to whether a person was entitled to housing, to education at a particular school or to a particular medical treatment.

Class 3: Failures to confer some benefit upon a person that do not involve any formal determination as to the entitlement of the person in question, either because the authority cannot be expected to be aware of the identity of the particular persons likely to receive the benefit or because the benefit must be conferred spontaneously without the making of a formal determination.
This class can be divided into two subclasses. One comprises cases in which no formal determination is made with respect to the claimant because the authority cannot be expected to be aware of her identity at the time it performs the relevant act. In this subclass belong failures of the highway authority to improve dangerous parts of the road system, failures by the police to catch criminals who go on to cause harm to citizens and failures of authorities with powers to inspect building to ensure that buildings are safely built. The other subclass comprises cases in which no formal determination is made with respect to the claimant because the benefit must be conferred spontaneously. In this category belong failures by public authorities to protect persons from hazards such as fires, floods and drowning.

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PART 1
Theoretical Foundations

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Chapter 1
Introduction

The fundamental principle governing administrative liability in English law is what has been referred[1] to as Dicey's equality principle. This is the principle that public persons are to be treated in the same way and in accordance with the same rules as private persons.[2] In relation to those parts of the law concerned with questions other than liability to pay damages or compensation, the principle has effectively been abandoned. What the powers of public authorities are, how they can be exercised, whether particular acts of public authorities are unlawful and what consequences (apart from the award of damages) must follow if they are: these are all questions dealt with by a specialized body of administrative law that applies exclusively to persons and bodies deemed to belong within the public sphere. By contrast, the litigant who seeks compensation[3] for a wrong suffered at the hands of a public authority may only do so if they can bring their case within a private law cause of action.[4] Where the wrong is of a sort to give rise to one of the more traditional torts, such as trespass or nuisance, the Diceyan approach appears to provide a satisfactory solution. If public officials commit what would be a trespass if committed by a private person but have statutory authority for doing so, the officials' behaviour is lawful and no action lies against them. However, if they exceed their authority, their behaviour is unlawful and they can be sued. Likewise, if a public body owns land and commits what would be a nuisance if committed by a private landowner, the neighbouring landowner's ability to sue is determined by whether or not the public body is acting within its lawful authority. In both cases, the Diceyan approach offers at least the possibility of a reasonable balance between the rights of the individual and the public interest that the authority seeks

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1 By Peter Cane in "Damages in Public Law" (1999) 9 Otago Law Review 489, 490.

2 Cane defines the principle as follows: "government should enjoy no immunities from or defences to liability not also enjoyed by citizens; and government should be subjected to no liabilities which do not also rest on its citizens." He distinguishes this from what he calls "the fundamental tenet" that "whereas damages are the basic remedy for torts and breaches of contract, they are, by contrast, not available as a remedy for breaches of public law rules as such."

3 There are of course ways of seeking compensation outside the court system e.g. by applying to the ombudsman.

4 Historically, the common law has made no clear distinction between public and private law and hence causes of action do not belong exclusively to the realm of private law. For the sake of convenience, however, and in accordance with widespread modern usage, I shall speak of that part of the law dealt with by the courts in civil as opposed to crown proceedings – the ordinary law of tort, contract etc – as private.

by its actions to attain.[5] The difficulty arises where public authorities perform functions that have no clear analogue in the private sphere.

Public authorities distribute welfare benefits such as housing and social security; they provide education and medical care on the basis of need (rather than on the basis of preparedness to pay); they protect members of the public from evils such as crime, child abuse, fire, and unsafe transport systems and places of work; they investigate crimes and prosecute criminals; they raise taxes; and they regulate all manner of activities, in doing so exercising coercive powers to licence, confiscate, acquire compulsorily and so on. Private persons do not do these things.[6] Since the law of tort has been largely developed to deal with the activities of private persons, the extent to which it can apply to the activities of public authorities is unclear in some cases while in others it is clear that it cannot. The traditional trespass and property-based torts are of little relevance to most of these governmental functions and this is why discussion of governmental liability has often focused on the trio of misfeasance in a public office, breach of statutory duty, and negligence.[7]

However, the first two of these are extremely narrowly drawn. Misfeasance in a public office is available only where the defendant has deliberately acted so as to cause injury to the claimant or has acted unlawfully and with knowledge both of the act's unlawfulness and of the probability of its causing injury to the claimant.[8] Breach of statutory duty only applies where the public authority in question can be said to owe the claimant what used to be called a "ministerial" duty i.e. a duty expressed in very precise terms to deliver a specific outcome to a narrowly restricted class of person.[9] This leaves negligence. The boundaries of this tort are constantly fluctuating but, in general terms, it remains true to say that various factors render problematic its relation to the welfare and regulatory functions of public authorities. Thus discharge of these functions typically involves a large

5 I explore further below the question whether the Diceyan approach to such cases is as satisfactory as is often assumed: see p.134–5.

6 This sweeping assertion is refined in Chapter 2 below.

7 See e.g. *Administrative Justice: Some Necessary Reforms*, Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the UK (1988) Ch.11; Amos, "Extending the liability of the State in damages" (2001) 21 Legal Studies 1; Public Law Team, Law Commission *Monetary Remedies in Public Law: A Discussion Paper* (11 October, 2004).

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

9 A very clear exposition of the traditional restrictive position is Cane, "Ultra Vires Breach of Statutory Duty" [1981] PL 11. At present, the leading authoritative statement of the law is Lord Browne-Wilkinson's in *X (Minors) v Bedfordshire CC* [1995] AC 633. In a line of cases beginning with *Thornton v Kirklees MBC* [1979] 1 WLR 637 the courts took a more expansive approach to the tort but this was definitively brought to and end in *O'Rourke v Camden BC* [1997] 3 WLR 86. For a critique of the *Thornton* line of cases see Weir n.18 below. For a critique of *O'Rourke* and the retreat from *Thornton* see Carnwath, "The Thornton Heresy Exposed" [1998] PL 407.

degree of discretion; where such discharge results in harm to the interests of citizens it is often caused by omissions rather than acts on the part of the authority concerned; the loss inflicted is often purely economic in nature; and it may be inflicted in ways which, generally speaking, private law does not recognize as involving breach of any duty, for example by delay.

The present law seems most open to criticism in cases involving a public authority's power to determine the rights of individuals. Thus, to take a well-worn example, the person who is unlawfully denied or deprived of a licence and who suffers loss of livelihood in the interval between the unlawful decision and its reversal has no remedy in English law.[10] Nor does the person who, through no fault of her own, is deprived of the opportunity to challenge unlawful administrative action by a time limit or exclusion clause.[11]

The very general account just given might have served as a description of the law at any time in the last fifty years. More recently, however, the picture has been complicated by the influence of European Community law and the law of the European Convention on Human Rights. Each has brought into English law a mode of redress that attaches liability directly to breach of public law norms. As a consequence, the question whether it would be desirable to have a similar form of liability for English law as a whole has been raised more acutely than before.

There is no consensus in the literature as to what reforms might be necessary or indeed as to whether any reforms are necessary at all. For many years there have been calls from some public lawyers for a system that attaches liability directly to public law wrongs. In the middle of the last century, before the creation of the modern judicial review procedure and the House of Lord's decision in *Anns v Merton Borough Council*,[12] a number of writers advocated a separate regime

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10 See *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716; *R v Knowsley MBC ex p Maguire* (1992) 90 LGR 653; *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743 especially at [20]. See also *Banks v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 416 especially at [117] (where the wrong in question consisted in the imposition of a restriction on the movement of cattle, issued without observing principles of procedural propriety) and *Chagos Islanders v Attorney General, Her Majesty's British Indian Ocean Territory Commissioner* [2004] EWCA Civ 997 especially at [20] (where the wrong was the removal of the islanders from their home on the basis of an unlawful ordinance).

11 As e.g. in *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122; *R. v Dairy Produce Quota Tribunal for England and Wales, ex p Caswell* [1990] 2 AC 738. See also: the remarks of Lord Wilberforce in *Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295, 358–359; Gravells, "Time Limits Clauses and Judicial Review – The Relevance of Context" (1978) 41 MLR 383; Harlow *Compensation for Government Torts* (London 1982) p.90.

12 [1978] AC 728.

of administrative liability on the French model.[13] Subsequently, it has been more common to propose the introduction of a statutory remedy in damages as a kind of adjunct to judicial review,[14] the assumption being that wrongs committed at the "operational" rather than the "policy" level can be left to be dealt with in negligence.[15] Since the European Court of Justice's decisions in the *Francovich*[16] and *Factortame/Brasserie du Pecheur*[17] cases, there have been suggestions that the English courts should adopt the "serious breach" test used by the ECJ. While the proponents of this view[18] do not spell out in detail how this change in the law might be brought about, it is clear that, conceptually, acceptance that breach of public law duties entails a remedy in damages is a prerequisite to the use of the "sufficiently serious" test of breach.

Scholars of tort, for their part, are divided on the question of the extent to which existing torts can be made to apply to public authorities. Some are largely motivated by the desire to preserve the integrity of the law of tort. Such scholars appear indifferent to the question of what should be done about the apparent defects in our system of administrative law remedies. They regret, however, the distortion of tortious principles that they see as resulting from the courts' attempts to extend them so as to apply to problematic cases involving public authorities.[19] Others are sanguine about the possibility of extending negligence to cover many

13 See for example Street *Governmental Liability* (1953); Hamson, "Escaping Borstal Boys and the Immunity of Office" [1969] CLJ 273; Garner, "Public Law and Private Law" [1978] PL 230.

14 The discussion in Chapters 5 and 6 will illustrate the difference between a damages remedy available solely in respect of the kinds of wrong dealt with in judicial review and a regime, such as the French, which attaches liability to a wider class of public law wrongs.

15 This assumption is fairly explicit in the recommendations of the JUSTICE-All Souls Committee: see *Administrative Justice: Some Necessary Reforms* Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the UK (1988) Ch.11. I suggest it is *im*plicit in recommendations of some other commentators who propose a statutory remedy e.g. Amos, in "Extending the liability of the State in damages" n.6 above and Fordham in "Reparation for Maladministration: Public Law's Final Frontier" [2003] JR 104.

16 *Francovich and Bonifaci v Italian Republic* (joined cases C-6/90 and C-9/90) [1991] ECR I-5357.

17 Cases C-46 and 48/93 *Brasserie du Pecheur SA v Germany, ex p Factortame* [1996] ECR I-1029.

18 Notably Craig in "Once More Unto the Breach: the Community, the State and Damages Liability" (1997) 113 LQR 67 and "The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?" in Beatson and Tridimas eds. *New Directions in European Law* (1998).

19 Perhaps the foremost exponent of this view is Tony Weir: see "Governmental Liability" [1989] PL 40. See also Feldthusen "Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity" (1997) 5 Tort L Rev 17.

of the wrongs that public authorities commit.[20] Yet another school of thought is hostile to the law of tort which it sees as a wasteful and inefficient way of affording compensation to citizens who have suffered loss. Members of this school decry the further expansion of tort law so as to cover public authorities as likely to make existing problems worse.[21]

In the debate which these competing viewpoints make up, two questions are at issue. Firstly, what, if anything, is wrong with the law we have and secondly, how, if at all, should we reform it. The key to answering both questions is to find some rationale for administrative liability, some criterion which a system of administrative liability will have to meet in order for us to regard it as successful.[22] Doing so will enable us to judge what is wrong with English law and point the way towards a solution. To define such a rationale is the aim of the present chapter.

The two rationales most commonly proffered for administrative liability are well expressed in two of the recommendations made by the Council of Europe in 1984:[23]

> Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. (Principle I)

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20 The clearest example of this optimism is to be found in the writings of Bailey and Bowman: see "Negligence in the Realms of Public Law – A Positive Obligation to Rescue?" [1984] PL 276; "The Policy/Operational Dichotomy – A Cuckoo in the Nest" [1986] CLJ 430; "Public Authority Negligence Revisited" [2000] CLJ 85. The most recent utterances of Stephen Bailey on this topic, however, bring him closer to the commentators referred to below, see "Public Authority Liability in Negligence: the Continued Search for Coherence" (2006) 26 Legal Studies 155. Positions similar to those taken in the earlier writings of Bailey and Bowman are to be found in: Todd "Liability in Tort of Public Bodies" in Mullany and Linden eds. *Torts Tomorrow: A Tribute to John Fleming* (1998); Todd,"Liability of public bodies", section 5.6 of Todd et al. eds. *The Law of Torts in New Zealand* (3rd ed., 2001); Woodall "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 McGill LJ 83; Doyle and Redwood, "The Common Law Liability of Public Authorities: the Interface Between Public and Private Law" (1999) 7 Tort L Rev 30; Buckley, "Negligence in the Public Sphere: Is Clarity Possible" (2000) 51 NILQ 25; Brodie, "Compulsory Altruism and Public Authorities" in Andenas, Fairgrieve and Bell, *Tort Liability of Public Authorities in Comparative Perspective* (2002).

21 The outstanding representative of this way of thinking is Patrick Atiyah in his book *The Damages Lottery* (1997). Carol Harlow can also be assigned to this school, although in her case scepticism about tort is combined with a general distrust of court-centred approaches to problems of administration: see *State Liaibility: Tort Law and Beyond* (2004); see also *Compensation for Government Torts* (1982).

22 A rationale is not the same thing as a criterion but the two are closely related. A rationale will justify a particular system. If the rationale is the right one, a criterion of the rightness of any system will be whether it can be justified in terms of the rationale.

23 Recommendation No. R (84) 15 of the Committee of Ministers to Member States Relating to Public Liability.

And:

> Reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered damage and the act was exceptional or the damage was an exceptional result of the act. (Principle II)

In what follows, I shall endorse both of these principles as being normatively correct. However, since my concern is with the reform of English law, normative correctness alone is not sufficient. I must also ask both whether the principles are consonant with English political and constitutional culture and more narrowly whether they are consonant with principles of English law. In Chapter 3, I shall argue that, considered at a sufficient level of generality, principle I is indeed consonant with and is to some extent implied and required by principles of English law. In Chapter 5, I shall make a similar argument in relation to principle II. The arguments of these two chapters form the foundation for the second part of the book in which I shall argue that the common law might be developed so as to create a form of liability that fully satisfies principle I but that there are formidable obstacles to doing the same in relation to principle II.

The other chapters in Part 1 contribute to the task of providing criteria by means of which to judge the adequacy of our law of administrative liability. In Chapter 2, as a prelude to considering the Council of Europe's two principles, I examine Dicey's notion of equality. In Chapter 4, I take a detour to describe and refute a rival theory of administrative liability, Cohen and Smith's theory of entitlement. A corollary of my argument concerning principle I in Chapter 3 is that public authorities owe public law duties to individual citizens. Chapters 6–8 are devoted to working out what this means in greater detail.

Chapter 2
Dicey's Equality Principle and the State

Dicey's equality principle must be examined prior to considering other rationales for administrative liability because if it is correct it supplies us with our answer and any further inquiry must be at an end. The principle concerns more, of course, than the mere question of liability. It is the expression of a general conception of the relationship between state and citizen and part of Dicey's wider notion of the rule of law. It will be recalled that this comprises three components.

> "It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government … It means again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts … The 'rule of law,' lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts: that, in short, the principles of private law have been with us so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."[1]

This account is both normative and descriptive. On the one hand, it sets out an ideal; on the other, it is intended as a description of the practice of English law at the time it was written. In both respects it is now discredited. In normative terms, it is the expression of an ideology, classical liberalism, whose day has passed. Almost no one now believes that the state's role in domestic affairs should be restricted to the protection of the private rights traditionally recognized in the common law. Even in the present epoch of "neo-liberalism" it is generally accepted that the state may intervene in the market and, in certain circumstances, override the rights of private persons in pursuit of public goals. And this is reflected in our law which, since the first edition of Dicey's book (if not before), has developed a special branch of law, distinct from private law and concerned with the peculiar powers and duties of government and their relationship to the citizen.

If we reject the Diceyan orthodoxy, we are then left with the question of how to go forward. What principles should govern administrative liability if Dicey's do not? A natural starting point is to ask: how ought the state to treat its citizens

1 A.V. Dicey *Introduction to the Study of the Law of the Constitution* (8th ed., Macmillan, 1915) pp.198–199.

if they are to regard its power over them as legitimate? The rest of part 1 of this book is an attempt to answer that question, but there are two obvious objections to the way it is put.

One objection is that, partly as a result of Dicey's legacy, English law has no conception of the state. This is true in the sense that English law recognizes no single entity as representing citizens as a collectivity. We have the concept of the Crown but this has never been clearly distinguished enough from the person of the monarch to play the role that in another system might be assigned to the state or "the people."[2] Moreover, as Sedley LJ recently had occasion to emphasize, the Crown cannot be made liable for the wrongful acts of government where they cannot be ascribed to any of the Crown's servants.[3] What we do have is the notion of public authorities as a distinct class. This idea was rejected by Dicey. He recognized Parliament and the Crown as special legal entities able to confer special powers on others, but the persons upon whom they conferred the powers remained, in his view, ordinary legal persons bound by ordinary rules of private law.[4] The modern view is different. The development of administrative law means that public authorities are not differentiated from other legal persons solely on the basis that they have powers that other legal persons do not have; the identification of public authorities and their powers as public entails that those powers are interpreted, structured and limited in accordance with principles different from those that apply to private persons. For present purposes, it is sufficient to identify the state with this distinct class of public authorities and to ask how they, as a class, should behave towards citizens.[5]

A second objection is that we do not need to begin at such a high level of abstraction. This is for the most part also true and it is not my aim to redesign our institutions from the bottom up. The present work is concerned only with the question of compensation for government wrongs and for that purpose the rest of constitutional and administrative law can be largely accepted as it is. The rejection

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2 An especially informative account of this is Loughlin, "The State, the Crown and the Law" in Payne and Sunkin eds. *The Crown: A Legal and Political Analysis*.

3 *Chagos Islanders v Attorney General, Her Majesty's British Indian Ocean Territory Commissioner* [2004] EWCA Civ 997 at [20].

4 The idea that on the one hand officials may derive their powers from a sovereign Parliament, unlimited in its power, while on the other, they are limited in what they may do by private law, seems to create an insoluble contradiction, one that has been pointed out by many commentators. One way to resolve the contradiction is to assume that Parliament will never confer powers which enable officials to make serious inroads into private rights. Another, more plausibly attributed to Dicey, is that the courts will use their powers of statutory interpretation to ensure that important private rights always prevail: see e.g. Hunt "Constitutionalism and the Contractualisation of Government" in Taggart ed. *The Province of Administrative Law* (1997). Fortunately, this is not a debate I need for present purposes to take sides in.

5 I will however return to the question of the immunity of the Crown from liability for public law wrongs in Chapter 12.

of Dicey's equality principle does not in itself entail major revision of our public law because, as I noted above, the fact that a distinct body of law devoted to controlling the power of government is generally recognized shows that the equality principle has already been abandoned. Its influence lingers in those areas – principally, tort, contract and restitution – in which citizens with a grievance against the state must use private law forms of action. But it cannot be seriously maintained that the position of public authorities is determined solely by private law. In what follows, I try to justify my claim that our law of administrative liability should satisfy principles I and II by demonstrating that those principles are consistent with and implied by principles that are already present in our administrative law. This entails putting forward interpretations of existing law – some of which are controversial; and later in the book the insights gained in trying to work out the best form of administrative liability also lead me to argue that certain aspects of administrative law not solely concerned with compensation should be modified.[6] Nonetheless, nothing I propose is intended to challenge the basic structure of our law except in so far as it relates to liability to pay compensation. On the other hand, there *are* points at which it will be useful to shift the focus from principles that can be readily discerned in existing law and to ask how the state should treat its citizens. This will be so, for example, where I discuss why private persons should not be expected to bear the exceptional burdens which result from state activity and, later, why public authorities owe duties to citizens that private persons do not.

To sum up then, once we reject Dicey's equality principle and the philosophy that underpins it, we are left with the following position. Public authorities are different from private persons and we should not expect them to be subject to all and only the same rules. In order to work out when private persons should be compensated for harm caused by unlawful government action we need to reflect on the principles already contained in our public law, but at the same time we must keep in mind the question of how the state should behave towards its citizens if they are to regard its power over them as legitimate. At the practical level, this does not commit us to rejecting the idea that a satisfactory solution to the problem of administrative liability might be fashioned from existing private law causes of action. It could even turn out that the best solution is one that makes public authorities liable only where they commit private law torts without statutory authority. In other words, the rejection of Dicey's conceptual framework does not by itself rule out practical prescriptions similar to Dicey's. But it does mean that we are not *obliged* by our conceptual framework to accept such prescriptions, as we would be if Dicey's framework remained intact.

This is not the end of what needs to be said about Dicey's equality principle however. Even if one rejects both Dicey's underlying rationale and his detailed prescriptions as to how the law should deal with harm-causing conduct on the

6 Thus, for example, I argue in Chapter 8 that greater respect needs to be given to public authorities' own interpretations of the statutory provisions that empower them than often has been.

part of public authorities, there remains something attractive about the equality principle, and this requires explanation. The combination of rejection of underlying rationale and detailed prescription on the one hand with acceptance of some aspect of the equality principle on the other can be seen in a number of recent discussions of administrative liability. One example is to be found in Hogg and Monahan's introduction to their *Liability of the Crown*.[7] There they assert "that the application of the ordinary law by the ordinary courts to the activities of government conforms to a widely-held political ideal and preserves us from many practical problems. Moreover, our review of the law leads us to the conclusion that, for the most part, the 'ordinary' law does work a satisfactory resolution of the conflicts between government and citizen … Dicey's idea of equality provides the basis for a rational, workable and acceptable theory of governmental liability."[8] At the same time, they enter an important caveat: "[l]ater chapters will show that the ordinary private law typically undergoes some modification in its application to government."[9] Later on, in their chapter on the general principles governing the application of tort to the Crown, we find the following. "Now that the Crown itself is vicariously liable for the torts of Crown servants, this idea makes the Crown itself subject to the same law as a private person. (It should be noticed, however, that considerable adaptation is required to make the Crown subject to the 'same' law as a private person, and there is inevitably a distinctive 'public' element to the law of torts.)"[10] On the same page, the authors set out their main reason for adhering to the equality principle. "But the principal appeal of the ideal of equality has not to do with the allocation of losses, but with the control of government. It is a political idea, reflected in the proposition that 'government is under law.'"

Cane endorses the principle in an even more equivocal fashion. The principle, he tells us "is typically qualified by the words 'as nearly as possible,' or the like. The basic reason for the qualification is that government may legitimately coerce citizens to act or refrain from acting in ways determined by the government in order to further community goals at their expense." The equality principle "instructs us to treat government in the same way as citizens are treated to the extent that government is the same as its citizens; but beyond that, to treat it differently. Under the equality principle, actual equality of treatment is not the ideal to be aimed at. The goal is the 'right' mix of similar and dissimilar treatment."[11]

Bell argues along the similar lines: "… the kinds of actions which the state undertakes and the situations in which it is placed, e.g. as regulator or expropriator, by themselves, create a liability which is different from most private individuals. But I see nothing basically in the principles of justice which apply

7 Third edition, 2000.

8 Ibid. p.3. The same point is made in Hogg's article "Compensation for Damage Caused by Government" (1995) 6 NJCL 7.

9 Hogg and Monahan, p.4.

10 Ibid. p.156.

11 See Cane, "Damages in Public Law" (1999) 9 Otago Law Review 489 pp.490–491.

to state responsibility which are, in themselves, distinctive. Indeed in a world of privatization and contracting out of state activities, there is a lot to be said in favour of a fundamental similarity of treatment."[12]

None of these authors endorse the underlying rationale of Dicey's equality principle: to accept that functions unique to public authorities require special rules of liability is to reject Dicey's vision of a private sphere guarded from the intrusion of the state by sacrosanct private rights. At the same time, each of them wishes to preserve the principle in some form, or something analogous to it. This can be partly explained simply by their adherence to the idea that government must be under law. I think we can distil, however, two further ideas from these partial defences of the equality principle which do justice to the intentions of their authors and which are also compatible with the recognition that public authorities are governed by special rules. Firstly, the legitimacy of the state depends upon its observing certain principles of justice which also apply as between private persons. Thus we would wish, for example, to see the state keep its promises and return property wrongfully acquired. Respect for such principles does not entail that the state must follow exactly the same legal rules as apply to private persons but only that it follow legal rules that embody those principles. Secondly, it is desirable, where the state performs some function or exercises some legal power that might equally well be performed or exercised by a private person, that, other things being equal, the same legal rules should apply. Thus if some public authority owns land or employs workers, the same legal rules should apply to the authority as would apply to a private land owner or employer unless there is some good reason why they should not. The first of these principles is of great constitutional importance, concerning as it does the legitimacy of the state. The second, which works to exclude both rules which are more and rules which are less favourable to public authorities than ordinary rules of private law,[13] partly serves the function of preventing unwarranted privileges and immunities on the part of the state. It also, however, supports a value especially associated with post-Diceyan, minimalist versions of the rule of law[14] – that of creating a stable pattern of expectations.

12 "Governmental Liability in Tort" (1995) 6 NJCL 85, 96.

13 For examples of how this principle might exclude rules less favourable to public authorities than those of private law, see p.63–70 below.

14 E.g. the one set out by Raz in "The Rule of Law and its Virtue" (1977) 93 LQR 195.

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Chapter 3
Principle I

Corrective justice

The Council of Europe's first recommendation requires that "[r]eparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person." For a public authority "to conduct itself in a way which can reasonably be expected from it in law" entails that it conduct itself in accordance with the legal rules that apply to it in the system in question. In a system in which the behaviour of public authorities was entirely governed by a special system of public law, this would entail that public authorities should pay reparation in respect of harm-causing breaches of public law. In a system like ours in which some aspects of a public authority's behaviour are governed by public law and others by private law, it entails that reparation should be paid in respect of harm-causing breaches of either body of law.[1] However, in our system, damages are payable in respect of breaches of private law but not in respect of breaches of public law. The first step towards explaining why they should be payable in both cases is easily made once one has accepted the idea set out above that certain principles of justice which apply as between citizens must also apply to the state. One such principle is that those who are responsible for the wrongful losses of others have a duty to repair them.[2] It is not hard to see that this justifies the existing liability of public authorities for private law wrongs done to citizens. Equally, it justifies liability for harm caused to citizens by breach of the rules of public law or "public law wrongs."

This is, in essence, the kind of argument that Cane makes in the article from which passages were quoted in the previous chapter.[3] He identifies a formal structure common to causes of action in the law of obligations – protected interest,

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1 In their report, *Administrative Justice: Some Necessary Reforms*, Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the UK (1988) at 11.63, the All Souls-JUSTICE committee note certain ambiguities in the meaning of "failure of a public authority to conduct itself in a way which can reasonably be expected from it in law." These arise from the explanatory memorandum that accompanies the Council's Recommendation and need not concern us for the purpose of the present argument. In practice, however, these ambiguities are addressed in this chapter and in Chapters 6 and 8.

2 This formulation comes from Coleman "The Practice of Corrective Justice" in Owen ed. *Philosophical Foundations of Tort Law* (Clarendon Press, 1995).

3 See Cane, "Damages in Public Law" (1999) 9 Otago Law Review 489.

sanctioned conduct and sanction. Then, having rebutted various arguments against the award of damages as a remedy in public law, he concludes that there is no reason why public law wrongs should not be fitted into the structure he has identified so that the protected interests are those protected by public law, the sanctioned conduct consists of acts of public authorities that breach principles of public law, and the remedy, where the result of the sanctioned conduct is a harm to the protected interest that cannot be repaired by other means, is damages. Cane presents his argument as being negative in character: he claims that he is only rebutting the arguments made against liability for public law wrongs. Moreover, he does not set out a principle of corrective justice as such, a moral or political principle of the sort I enunciated above. The formal structure he identifies is presented as being just that. Nonetheless, the tendency of his article is to suggest that there is a principle requiring reparation for legal wrongs and that this applies as much to public as to private wrongs. It is thus, perhaps, a little disingenuous of him to claim a purely negative character for his arguments.

Be that as it may, it is generally accepted that there is a principle of corrective justice[4] and, this being so, it can be argued that it must apply to public authorities as well as private persons and in respect of public as well as private law wrongs.[5] There is, however, an obvious objection to the idea that breach of public law rules should give rise to claims for reparation. The objection arises from the view that public law does not involve duties to individuals. If this view is correct, then any harm suffered by an individual as a result of a public authority's breach of a rule of public law can only be, so to speak, a side effect of the breach: it cannot entitle the individual to reparation.

Administrative law and the rule of law

In order to rebut this objection, it will be useful to spell it out in a little more detail. Public authorities have a vast array of distinctively public powers and duties, for

4 A number of tort theorists style themselves theorists of corrective justice, each offering a different justification for the principle: see e.g. Perry "Symposium: Corrective Justice and Formalism: the Care One Owes One's Neighbours: The Moral Foundations of Tort Law" 77 Iowa L Rev 449 (1992) and the essays in Postema ed. *Philosophy and the Law of Torts* (Cambridge University Press, 2001). I do not think it necessary to choose between these justifications for the purposes of my present argument, although some justifications may lend themselves better to those purposes than others. The principle of corrective justice is also accepted by theorists who see deterrence and economic efficiency and not corrective justice as the central concern of tort law: see e.g. Posner "The Concept of Corrective Justice in Recent Theories of Tort Law" Journal of Legal Studies 10: 187–206 (1981).

5 Bell arrives at a principle of justice underpinning public authority liability like that argued for in the text – "a duty to make good harm caused by one's fault (be this failure to conform to specific obligations or to fulfil its mission)" – largely by generalizing on the basis of French law: see "Governmental Liability in Tort" (1995) 6 NJCL 85, 98.

the most part conferred or imposed by statute.[6] A few of the statutory provisions imposing duties are expressed in such precise terms as to leave no doubt that the duties are owed to individuals. Such duties (the number of which is now so few as to be negligible) may be made the subject of a private law action. These cases apart, public authorities' powers and duties are defined, and their exercise (or execution) regulated in accordance with a body of principles developed specifically for that purpose. The principles are those familiar to us from judicial review, principles which ensure that public power is exercised on the basis of proper procedures and in a fashion that is reasonable and faithful to the purposes for which it was granted. The issue as between the view I wish to promote and the objection to it concerns the purpose of the principles which the courts apply. According to the objection, public law is concerned exclusively with ensuring that public authorities act legally – i.e. within the boundaries of the powers granted to them – and in the public interest. It follows from this that any duties arising from public law must be duties to the general public: there are, on this view, no public law duties to individuals and correspondingly no entitlement on the part of any individual to have a public authority act (in the exercise of its public law powers) in this or that way towards her. If this is so, then even if public authorities are subject to a principle of corrective justice in all that they do, it cannot avail the person who has suffered loss as a result of breach by a public authority of some rule of public law: it is not the purpose of the rule to protect the person in question and therefore the wrong committed and the loss suffered are not connected in the required sense. To advert again to the Council of Europe's first principle, the public authority has not failed "to conduct itself in a way which can reasonably be expected from it in law *in relation to the injured person*"; or, to use the language of European Community law, the harm suffered does not fall within the scope of the protective norm breached. By contrast, according to the view I wish to promote, one of the functions of public law is to protect the interests of individuals. This being so, we may think of norms of public law as, in certain circumstances, giving rise to duties to individuals. Such individuals will have, correspondingly, a species of entitlement and breach of the duties owed to them will put public authorities under an obligation to repair the harm that results. An example or two will make this clearer.

Suppose a public authority has a duty to confer a benefit, say housing, upon persons in need. The authority has significant discretion as to how to carry out its duty, so in the present state of the law, any failure to do so lawfully cannot give rise

6 As we have seen, public authorities also possess powers identical to those possessed by private persons and, in our system, governed by private law. My present concern however is with powers uniquely possessed by public authorities of the kind I referred to at the beginning of this chapter e.g. powers to provide housing, social security, education and medical care, to protect the public from crime, child abuse, fire, and unsafe transport systems and places of work, to investigate crimes and prosecute criminals, to raise taxes, regulate, licence, confiscate, acquire compulsorily and so forth.

to an action for breach of statutory duty. Suppose further that in a particular case, the authority unreasonably refuses to provide housing to an individual and there is a considerable period before the authority is compelled to rectify its original decision, during which the individual in question is homeless. Suppose alternatively that an authority is charged with issuing licences which are required to market drugs. Suppose that the authority withdraws or suspends a licence occasioning loss to its holder and it then turns out that although the authority honestly believed itself to have the power to withdraw the licence on the ground on which it purported to do so, it did not. In both cases, there is breach of a public law norm, in the first, the requirement that the authority exercise its powers reasonably, and in the second, the requirement that the authority direct itself properly as to its powers. In the view of the objector, neither norm is concerned with protecting the interests of the particular individuals who might be affected by the exercise of authorities' powers. There can thus be no duties to the individuals affected, and no entitlement to reparation for the harm suffered.[7] On the view I wish to promote a (although not the sole) purpose of the public law norms is to protect the interests of individuals affected by the powers whose exercise the norms control. Correspondingly, the housing authority owes a duty to the applicant for housing to exercise its powers reasonably in relation to the applicant's case and the licensing authority owes a duty to the licence holder to direct itself properly in law when deciding whether to withdraw the licence. The applicant for housing and the license holder have, in turn, an entitlement to be treated lawfully, although, as I shall explain, the entitlement has a peculiar conditional character. From this it follows that, in our two examples, the authorities are under an obligation to repair the damage they have caused.

Which view of the purpose or function of public law is correct is not a question which can be answered by simply describing the practice of the courts. Some features of judicial review point towards its being a remedy for wrongs suffered by individuals. One example is the fact that until fairly recently standing was confined to persons who had in some way suffered as a result of the act or decision under challenge. Another is the traditional tendency to think of the rules of procedural fairness (or natural justice) as being concerned with fairness towards the particular

7 The objectors view of these examples puts them on all fours with the following private law example, cited by Perry in "Responsibility for Outcomes, Risk and the Law of Tort" in Postema ed. n.4 above at p.116 (and drawn in turn from Seavey, "Mr. Justice Cardozo and the Law of Torts" Columbia Law Review 39: 20–55 (1939)) "The defendant kidnaps someone, and in the course of his felonious activity, quite unforseeably and non-negligently injures a third party. Does the injured party have a morally justified claim in tort against the defendant, just because her injury would not have occurred but for the defendant's violation of the moral and legal norm against kidnapping?" The answer is no, because the defendant is not under an obligation to avoid harm of the sort that occurs to the third party even though he is the cause of it. The injury is a result of the defendant's unlawful act but unforseeable and non-negligent injury is not within the protective scope of the rule against kidnapping.

individuals affected by administrative action. Yet another, related, example is the obvious orientation of the doctrine of legitimate expectations towards individual interests. At the same time, other features of the practice of judicial review are more consistent with the view of it as concerned with the general public interest in the legality of administrative action. This can be seen especially in the emphasis on fidelity to statutory purpose.

My aim is to promote a view according to which public law is concerned both with ensuring fidelity to statutory purpose and with protecting the interests of individuals. It is the objector who must insist that public law is mono-functional, concerned solely with the public interest in the lawfulness of administrative action. Thus to the extent that legal practice is plausibly interpreted as furthering both ends, my view is at an advantage over the objector's. However, I wish again to back my position up by seeking a deeper justification, here a justification for the role the courts play in defining the limits of lawful public power.

I should say as a preliminary to this that I do not wish to take sides in the long-running debate between the proponents of the ultra vires view of judicial review and the "common law constitutionalists."[8] It is true that the former tend to emphasize the function of ensuring fidelity to statutory purpose and the latter the protection of individual interests. But the debate is really one about which institution holds ultimate authority, an issue that does not concern me here, rather than about the function of public law. Which view one holds about the former question does not necessarily imply any particular answer to the latter.

To support my preferred view of public law, I propose to return to the notion of the rule of law. As we saw above, Dicey's version of the concept has been discredited. The concept continues to be used, however, in new versions and has been pressed into service to explain and justify administrative law. To compare Dicey's version with its successors is instructive. Dicey's conception of the rule of law and others like it such as Hayek's[9] – what K.C. Davis called "the rule of law, extravagant conception"[10] – entail, as we have seen, a minimal state. In such a state, administrative discretion only exists in relation to a small number of functions, roughly the conduct of foreign policy, the maintenance of law and order and the defence of the realm. For the most part the executive never intrudes into the day to day lives of citizens and citizens' entitlements are defined, their vital interests protected and disputes as to their entitlements are settled in accordance with rules of law applied by the courts. The coercive authority of the state vis-à-vis the citizen is thus exercised in accordance with clear rules, promulgated in advance

8 A selection of the contributions to this debate is to be found in Forsyth ed. *Judicial Review and the Constitution* (Hart, 2000). See also Elliot, *The Constitutional Foundations of Judicial Review* (Hart, 2001).

9 As set out in *The Constitution of Liberty* (University of Chicago Press, 1960) Chapters 9–14.

10 Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

and applied in a consistent fashion so that like cases are treated alike, one of the principle virtues of this arrangement being that a sphere of liberty is preserved for the citizen who knows what to expect and is thus able to plan his or her affairs. In the modern state, by contrast, there is a great deal of administrative discretion and what we are entitled to and what we can expect is to a very high degree determined by administrative action. It is notorious, as Davis pointed out, that where in actual fact there exists a great deal of administrative discretion while at the same time the institutions of government adhere to the "rule of law extravagant version," the practical effect is to cede untrammelled power to the administration. Because the extravagant version of the rule of law treats all administrative discretion as anathema its only response to it is to try to exclude it altogether: it offers no way of controlling or structuring it where it exists. Consequently most modern proponents of the ideal of the rule of law advance a more moderate version, one which can accommodate the existence of administrative discretion but which seeks to subject it to the rule of law by suffusing it with principles of legality. It is these moderate or modified conceptions of the rule of law that are used today to explain and justify administrative law.

There are, of course, very significant differences between the different post-Diceyan versions of the doctrine. Minimalist, procedural conceptions of the rule of law, notably that of Raz, define it as requiring no more than that state power be consistently exercised in accordance with clear, general standards, publicly promulgated in advance.[11] The accurate application of these standards in particular cases entails that standards of due process must be observed, but the doctrine has nothing to say about the rights of individuals. At the other extreme, we find substantive conceptions such as that of Dworkin[12] and, in the English context, T.R.S. Allan.[13] Allan insists that since law does not, in Fuller's phrase, involve a "one way projection of authority" but must be regarded by citizens as legitimate, conforming to the rule of law must mean observing the conditions by means of which the law's legitimacy is secured. In order to ensure their allegiance, the law must therefore accord citizens a substantive, as opposed to a purely formal, equality. It must also grant them certain rights necessary to make their basic entitlement to judge the law's legitimacy meaningful, notably rights to freedom of expression.

Again, I do not wish to take sides as between these different conceptions. Their proponents all accept the existence of administrative discretion and think that the ideal of the rule of law can somehow be made compatible with it. However, I shall base my argument on the minimal version for two reasons. Firstly, I wish to make use of the weakest and therefore most widely shared and least controversial assumptions. Everyone agrees that the rule of law must comprise at least the elements that make up the minimal version while they do not agree as to what,

11 See Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195.

12 See for example Dworkin, *Law's Empire* (Harvard University Press, 1986) Chapter 3.

13 See Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001).

if any, further elements it should comprise: the substantive versions include the minimal ones but not vice versa.[14] Secondly, I wish to show that, considered quite apart from the changes wrought by the Human Rights Act and EC law, the principle of liability I am contending for belongs in English law. Whether or not pre-HRA administrative law conformed to a version of the rule of law like Allan's – whether it contained the rights that Allan's version entails – is highly debatable. I therefore try to support the principle of liability using no more than a minimal conception of the rule of law.

The lynchpin of the argument is this. Even if we accept only a minimal version of the rule of law, we must recognize that the purpose of the ideal – its virtue – is both to further the ends of government *and*, as in the case of the Diceyan version, to provide for the citizen the benefits of knowing that public power can only be exercised in accordance with clear, published standards and that like cases will be treated alike.[15] Raz, of course, has argued that, properly understood, the rule of law is intended only to benefit those who hold power by making its exercise more effective. But to this, others, notably Finnis, have responded that governments do not always attain their ends most effectively when constrained by rules and that, if the rule of law is worth having, it must be because of the benefits it brings to citizens as well as its advantages to government.[16] This position is strengthened if we consider the importance attached, even in minimal versions like Raz's, to mechanisms such as the principles of due process, which ensure accurate and consistent application of the law in every case. If we were to strip these away, we would be left with a doctrine that was concerned with the general achievement of administrative goals and under which all that mattered in relation to individual cases was the achievement, on average, of a result congruent with the declared aims of the administration. Such a doctrine would not concern itself with how particular individuals were treated on particular occasions. Its sole purpose would be administrative efficiency, in a narrow instrumental sense, and it would belong more in the realms of management theory than jurisprudence. On any understanding, the rule of law seems to demand more.[17] In other words, we should

14 This relationship of inclusion may not hold if the rule of law really is conceived of as involving a one-way projection of authority whose benefits to the citizen are no more than accidental. But, as I argue in the next paragraph, even the minimal version of the doctrine must be thought of as intended to benefit individual citizens.

15 According to certain understandings of Dicey's conception of the rule of law, it guarantees much more than this i.e. it is a substantive conception guaranteeing various rights: See e.g. Hunt "Constitutionalism and the Contractualisation of Government" in Taggart ed. The Province of Administrative Law (1997). But on any understanding, it provides the benefits referred to in the text.

16 See Finnis *Natural Law and Natural Rights* (Clarendon Press 1980) p.264; see also the discussion in Allan n.13 above Chapter 2.

17 It would, of course, be a simplification to suggest that the rule of law does not involve any trade off between achieving accuracy in individual cases and the cost of doing so. Such a trade off must occur even in private law: there are limits to the amount society

consider it part of the point of the rule of law to benefit citizens in certain ways as well as to enable government to attain its ends.

If we relate this insight into the nature of the rule of law to its use as a justification for administrative law, it becomes clear that the principles that make up administrative law must have a dual purpose. The principles that an administrative decision maker must take into account relevant considerations and ignore irrelevant ones, act for purposes authorized by the governing statute and reach decisions that are in some sense reasonable, all ensure fidelity to statutory purpose – that is to say, they all ensure that there is some sort of predictable and comprehensible relationship between the rules of law that empower administrative authorities to act and the actual acts that they perform. Likewise, rules of procedural fairness or due process ensure congruence between the outcomes of administrative action and statutory purpose. We may think of the aim of administrative law as being to deliver these benefits to the public as a whole. At the same time, however, the same set of principles ensures – and we should think of it as part of their purpose to ensure – that those benefits are secured to each individual affected by the exercise of public power: the principle that like cases be treated alike demands as much. Thus the principles of fair procedure and the insistence that relevant considerations should be taken into account and irrelevant considerations ignored work together to ensure the same congruence between statutory purpose and the outcomes of administrative action *in every case*. From the postulate that this is part of the purpose of administrative law, it follows that we should think of the public authorities subject to administrative law as under a duty to each citizen to act in conformity with its requirements when exercising their powers in relation to him or her. Correspondingly, we should think of each citizen as possessing an entitlement that public authorities treat him or her in accordance with the requirements of administrative law.

We can see how the principle that citizens are entitled to be treated in accordance with the requirements of administrative law completes the argument for administrative liability by considering again the housing and licensing examples set out above. In the housing example, the principle means that the unreasonably treated applicant is entitled to be treated reasonably and that the authority owes her a corresponding duty to treat her reasonably. Likewise, in the licensing authority case, the license-holder is entitled not to have the licence removed except on some lawful ground, and the authority owes a corresponding duty not to so remove it. In each case, the existence of the duty combined with the principle of corrective justice set out above entails that the authority in question is obliged to repair the harm it has caused to the victim's interests.

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is prepared to pay in order to achieve justice in individual cases. But there is a still a big difference between a doctrine which puts great emphasis on achieving justice or correctness in individual cases and one solely concerned with the achievement of broad administrative aims.

I have presented my argument for liability in two steps. Firstly I have argued that the principle of corrective justice must apply in respect of public as well as private law wrongs. And secondly, I have sought to rebut the objection that the public law duties are never owed to individuals, by arguing that, on the best understanding of public law, many public law duties *are* owed to individuals and that individuals have corresponding entitlements. The two steps can equally well be presented the other way round and doing so brings out other facets of the argument. Thus one can begin with the argument that there are public law duties owed to citizens and that citizens possess a corresponding entitlement. A corollary of this is that where the entitlement is not satisfied, there must be a remedy. English public law provides a remedy in most circumstances for breach of administrative law duties owed to individuals: a citizen can have an unlawful act which affects her quashed, in some cases she can prevent such an act before it occurs, and she may also be able to compel an authority to perform some act affecting her interests which it is legally obliged to perform. But where somebody has suffered loss as a result of unlawful administrative action, public law provides no remedy. Of course, private law may provide a remedy in some cases; and it might be possible to develop it so that it provided one in all cases. To note the absence of a specifically public law remedy does not by itself prove the inadequacy of English law. The aim at this stage, in any case, is to work out a criterion of adequacy, rather than to decide whether or not English law is adequate. However, it is important to point out one implication of the criterion which is the following: if and to the extent that English law fails to provide a remedy for loss caused by breaches of public law duties owed to individuals, while providing remedies for breaches of the same duties before they cause loss, it is guilty of a form of unequal treatment. The form of inequality involved is not of some controversial substantive kind: the inequality is straightforward breach of formal, juridical equality. It involves a failure to treat like cases alike in the sense that the person who can challenge an unlawful act before it affects their interests has a remedy whereas the person who, through no fault of their own, cannot challenge the same act before their interests are harmed may be left without a remedy.

Thus, to return to the licensing example, a licence-holder whose licence was confiscated on an unlawful ground, and who sought judicial review would have a remedy. By contrast, a licence-holder whose circumstances were identical and whose licence was confiscated on the same unlawful ground but who did not seek judicial review within the time limit and consequently suffered loss would have no remedy. The reason for the difference between the two cases might be nothing more than the irrelevant one that in the second case, the licence-holder was unaware of the possibility of judicial review i.e. it might be a difference irrelevant from the point of view of the putative claimant's entitlement to redress. In real life, of course, it is very likely that no two cases will be without relevant differences. But the argument does not depend on two identical cases actually occurring. As in sex discrimination in employment cases, the comparison need only be between

the claimant and some notional comparator:[18] here, between the claimant unable to seek ex post facto redress, and a notional identical claimant who, for reasons which are irrelevant from the point of view of the protective norms involved, is able to obtain redress ex ante.

In this alternate version of the argument, the role of the second step is to specify the remedy appropriate if there is a lacuna to fill. The appropriate remedy for providing redress where harm has occurred is a monetary one and this is supported by the principle of corrective justice.

There are thus two versions of my argument for principle I. The first begins with the proposition that public authorities, like private persons, should be subject to a principle of corrective justice in their dealings with citizens. It follows that they should make reparation for harms caused to citizens by breaches of both the private and public law duties to which they are subject. This is possible because, contrary to one view of public law, it is part of its purpose to protect the interests of individuals. The duties to individuals to which this interpretation of public law gives rise are not duties to confer particular benefits or avoid infringing particular interests: they are duties, rather, to abide by the norms (largely, but not entirely procedural) traditionally enforced by means of judicial review; and the reparation which must be provided for their breach is reparation in respect of the consequences of breach for the individuals concerned. The second version of the argument begins with the proposition that public law exists, in part, to protect individuals. This entails that individuals must be furnished with a remedy where they do not receive the protection in question. Failure to provide a remedy constitutes a form of unequal treatment contrary to the rule of law. If and to the extent that English law fails in this respect by not providing a remedy where breach of public law duties owed to individuals results in loss to those individuals, it is therefore defective. The defect can only be made good by ensuring that a monetary remedy is available wherever an individual to whom a public law duty is owed suffers loss as a result of its breach.

Some ramifications

This argument (or arguments) has a number of important ramifications which should be spelled out immediately. Firstly, not every public law duty can be owed to an individual. If a form of liability were to be developed along the lines the argument suggests, it would be necessary to distinguish between the circumstances in which public law duties were and the circumstances in which they were not so owed. I state here in brief outline what making this distinction would involve.[19] The key notion is that of the public authority's powers being exercised *in relation*

18 See the Sex Discrimination Act 1975 Part I and for discussion of the cases see Deakin and Morris *Labour Law* (4th ed., 2005) Chapter 6 especially at 6.17.

19 The distinction is developed more fully in Chapter 8.

to some individual or class of individuals. This might mean that the authority's overarching duty in exercising the powers in question is to benefit some class of individuals, as seems obviously to be the case in the homelessness example. Or it might mean simply that the exercise of the power in question will impact in a foreseeable fashion upon the interests of some individual or class of individuals whom the authority is therefore bound to have in contemplation, as seems to be the case in the licensing example. In either case, the fact that the authority is exercising its powers in relation to the individuals concerned puts it under a duty to those individuals to do so in a way that conforms to the general principles whose breach constitutes grounds for judicial review. Either case can be contrasted with some other case in which there is no reason to think of the authority as obliged to have in contemplation the effects of its actions on particular individuals. Thus were an authority under some general duty to enhance the environment rather than to house people, we would be less inclined to speak of the authority's powers being exercised in relation to individuals (unless attaining the environmental end involved interfering with some interest of individuals). Likewise, the effects of the Bank of England's power to fix interest rates are too widespread and diffuse for it to be plausible to say that the Bank should have in contemplation the interests of particular individuals when exercising the power.

Secondly, not every breach of a public law duty owed to an individual will cause loss to that individual of a sort that could be made the subject of a monetary remedy. The duties to individuals postulated here are duties of the sort whose breach is presently dealt with in judicial review i.e. they are mainly procedural duties. It is often impossible to say that breach of such a duty adversely affects an individual's interests because if the decision were to be taken again without the procedural defect in question the result might be the same. However, a judgment that an authority has acted unlawfully *may* entail a different outcome. This is most obviously the case where a particular decision or act is unreasonable but the same might be true where, for example, it is held that the authority simply did not have the power to act as it did or was not empowered to act for the purpose it was seeking to attain. Moreover, failure to observe procedural norms may have an adverse effect on an individual's interests even if the eventual decision reached is never shown to be unlawful. Thus, for example, delay in the making of a decision may cause loss of economic opportunities;[20] wrongful deprivation of the right to participate in the making of a decision may lead to the loss of the opportunity to influence its outcome, especially when the right of challenge is subject to some strict time limit;[21] and procedural wrongs such as delay, the refusal to allow affected persons to participate, the failure to give reasons and so on may cause anxiety and distress to the persons affected.

Clearly, in working out a form of liability based on breach of public law duties, various difficult decisions would have to be taken as to the kinds of harm

20 As in *Rowling v Takaro* [1988] AC 473.

21 As in *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122.

in relation to which it was desirable to award a monetary remedy. The likelihood that a high proportion, perhaps the vast majority, of public law wrongs would not be classifiable as causing harm to a claimant has been cited as an objection to this form of liability.[22] It is, however, much more plausible to see it as a factor in its favour since it tends to allay the fear that it will impose an overwhelming burden on public authorities.

This brings me naturally to a third ramification of the argument made above. The monetary remedy that the argument demands would not be awarded in every case in which breach of a public law duty owed to an individual had caused loss of a sort that money could repair. The remedy could be withheld where to grant it would harm unduly either the public interest that the authority in question existed to attain or interests of other citizens affected by the exercise of the power in question. In other words, the entitlement to a monetary remedy would have the same qualified and conditional character as the entitlement to existing public law remedies. This requires further explanation since the idea of an entitlement that is qualified or conditional in this way may inspire scepticism. A first step is to remind readers of the methodology of my argument. The argument is both normative and descriptive. It advances a particular interpretation of our public law as morally the best one but also as an explanation of the courts' legal practice. The discretionary nature of existing public law remedies – the fact that they can be withheld in certain circumstances – is thus something to be explained by my interpretation rather than something that I mean to criticise when I speak of "entitlements." The picture of public law put forward is not of something solely concerned with protecting the interests of individuals. To an equal degree, its purpose is to secure the fidelity of the administration to legitimate public purposes while leaving a degree of freedom to the administration as to how those purposes are to be attained. At the same time, public law *is* concerned with protecting the interests of individuals and the obligations it imposes on public authorities thus involve a compromise or trade off between the two purposes. The public law duties that, in my view, public authorities owe to individuals – and the corresponding entitlement of citizens – are themselves the result of this compromise: the public interest and the interests of other citizens have already been taken into account in determining what an authority owes an individual citizen. Nonetheless, if the duty is breached and the citizen seeks a remedy, the importance of the public interest and the interests of other citizens mean that they must be taken into account again and this may result in the remedy being withheld. This does not mean however that the original duty is extinguished. It remains the case that there was a duty and that it was breached; and to this extent it remains meaningful to talk of an entitlement although the entitlement has been overridden by the public interest (or the interests of other citizens) at the remedial stage and therefore has not been satisfied. This will be made clearer by another example.

22 By Harlow in *Compensation for Government Torts* (1982) at p.92.

Suppose an authority has the task of allocating some scarce resource, say fishing quotas. The authority is under a duty to each of the applicants to observe the various public law principles in making the allocation.[23] Even when considered in the abstract, these principles are framed in such a way as to allow authorities considerable freedom to pursue their conception of the public interest. Their application in the context of the particular case entails a calculation in which various interests are weighed against each other. On one side of the scales there are interests, both public and individual, in legality or regularity. Thus both the public and the particular individuals affected, have an interest in seeing that the power is exercised in accordance with statutory purpose, and the individuals affected have a special interest in seeing that the authority enquires closely into the circumstances of each case and in being allowed to participate in the decision-making process. On the other side of the scales are the public interests in a cheap and speedy decision-making process, in allowing the authority the freedom to decide as it sees fit and in a decision being arrived at, whether or not the result of scrupulous observance of procedural propriety. What level of protection the individuals affected are entitled to is determined by striking this balance. Thus in our fish quota example, the court, in considering a challenge, might have to decide whether and the extent to which the authority is under an obligation to publish any policy it might have in relation to the allocation of quotas; whether it is obliged to give applicants the opportunity to comment on any information that it proposes to take into account in making the decision with respect to that applicant; whether it is obliged to give a full statement of reasons for any decision it might make; and so on. And in deciding each of these issues, the court will have to weigh in the balance the cost that each possible constraint will impose on the authority's ability to pursue its objectives effectively. The court's decision will determine what duties the authority owes to each applicant; and the public interest will already have been taken into account in reaching that decision. However, as outlined above, the entitlement corresponding to the duty will only be a conditional one because the question of the public interest will arise again at the remedial stage. Suppose the authority has granted all the quotas for a particular year but has done so on the basis of a flawed fact finding procedure. Suppose, for example, that it has adopted a policy according to which the past conduct of applicants is a factor in determining whether they should receive a licence; but that the method it has adopted for discovering applicants' past conduct is bound to lead to serious inaccuracies. Suppose further that the flaws in the process appear to have benefited some and disadvantaged others and also that the allocation has effects not only on the applicants but on the wider community; for example, because the number of recipients of quota to be found in any given port has an effect on the local economy. In such circumstances, a

23 I am imagining that the case is governed by principles of English law although in this country today fishing quotas are generally a matter of EC law. See however *R (Quark Fishing Ltd.) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743.

challenge by an applicant who has apparently received less than their due creates a conflict between, on the one hand, the duty originally owed by the authority to the applicant in question and, on the other, the settled expectations and economic welfare both of those content with their allocations and the wider communities to which they belong. The conflict may well be settled in favour of the latter so that compulsory remedies are withheld. The claimant's entitlement to a remedy is thus a conditional one that can be defeated at the remedial stage by considerations of the public interest and the interests of others. Nothing, however, effaces the original finding that the claimant was owed certain duties. It is simply that the duty is unfulfilled.

From this follows the third ramification, set out above. If the argument only supports a conditional entitlement to the traditional public law remedies then it can only support a conditional entitlement to a monetary remedy. A citizen who, as a result of the breach of a public law duty owed to her, has suffered loss is entitled to a monetary remedy. But the entitlement can be defeated where it can be shown that to grant it would cause undue harm to the public interest. In strict consistency with the other remedies, I should add that the likelihood of harm to the interests of other individuals would also be a reason for withholding the remedy, but it is hard to envisage circumstances in which such harm would result.[24]

To assess the significance of this, one needs to ask what kinds of public interest considerations are likely to defeat a monetary remedy; for the remedy being different from traditional public law remedies, the kinds of considerations likely to lead to its being withheld are different, as the apparent irrelevance in this context of the interests of other individuals demonstrates. Monetary remedies are, in most ways, less intrusive than the other compulsory public law remedies i.e. they interfere less with the process and outcomes of administration.[25] Thus, in our fish quota example, the standard public law remedies would lead to the quashing of the original allocation and the retaking of the decision with all the likely attendant harm to holders of quotas and the wider community. The grant of a monetary remedy would only cause financial loss to the authority: it would not cause harm to the interests served by the challenged decision. Just for this reason, a monetary remedy is a good fallback. It provides redress for breach of the duty originally owed to the claimant where to grant one of the traditional remedies would interfere with administration too much. On the other hand, it is easy to imagine circumstances in which the financial loss suffered by an authority as a result of having to pay damages or compensation would be very great. This points us towards the only

24 The reasons why such circumstances are hard to envisage appear in the next paragraph.

25 As has been pointed out by Schuck in *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983) Chapter 1 and Cane in "Damages in Public Law" n.3 above. Both these authors compare the degree of intrusiveness of different public law remedies along various dimensions, finding damages to be less intrusive than other remedies (although not always the least intrusive) along all of them.

kind of public interest consideration that might defeat entitlement to the remedy. The monetary remedy should be withheld if the financial losses to the authority that result, or the prospect of them, are so great as to stultify the authority in the performance of its functions.[26]

The kind of remedy that my argument sanctions is thus like existing public law remedies in that it may, in certain circumstances, be withheld even though a duty owed to the claimant has been breached. On the other hand, it has a very considerable advantage. One of the principal objections to the form of liability that the argument supports is that public authorities would be overwhelmed by having to pay out damages or compensation where they had committed public law wrongs. A remedy that can be withheld where to grant it would stultify the authority in the performance of its functions obviates this objection. At the same time, it avoids the injustice that arises from the blanket exclusion of liability for public law wrongs.

A fourth ramification concerns the range of duties and powers in relation to which the argument makes a monetary remedy prima facie appropriate. Under a system satisfying the rationale that the argument supports, liability could arise in principle in relation to any of the types of duties and powers whose possession distinguishes public persons from private ones. Thus liability might arise in respect of the failure of an authority to confer some benefit upon the claimant; for failure, for example, to supply housing, education or other forms of welfare benefits. The benefits in respect of which such liability might arise would include protection both from hazards that are not necessarily the fault of third parties, such as fire or flooding, but also from hazards that *are* the fault of third parties, such as child abuse, crime and the negligent construction of buildings. Equally, liability could arise from misuses of an authority's legal powers of coercion such as may occur in licensing and other forms of regulation. These categories of potential liability cut across traditional restrictions on liability in the law of tort: there can be liability for omissions as well as for acts, in respect of failure to prevent harm caused by third parties[27] and in respect of forms of harm unrecognized in private law. On the other

26 However, if a general monetary remedy for public law wrongs was created, it would be appropriate to exclude this in cases in which compensation was available via another judicial avenue e.g. because there was a special statutory remedy. Traditionally, it has also been possible to withhold a public law remedy, e.g. prohibition, not only because of the effect that granting it might have on the public interest or on third parties but because the claimant has acquiesced in the challenged administrative act. It is unlikely to be necessary to invoke this ground for withholding a remedy where the remedy in question is compensation because if such a claimant has suffered loss it will have been caused not by the administrative act but by the claimant's failure to challenge it. This, at least, is the case, where the claimant acquiesces knowing of the possibility of legal challenge. If the claimant is unaware of the possibility there is no good ground, in any case, for withholding the remedy.

27 I do not mean to imply that there can never be liability in tort in these circumstances. But it is obvious that the rationale set out here would justify liability in cases in which the

hand, the prima facie case for liability must always be examined in the light of the three qualifying factors set out above: a duty sounding in damages can only arise in the context of duties that exist to benefit individuals or powers whose exercise impacts forseeably upon the welfare of individuals; for a remedy to be granted, breach of the public law duty must cause a type of harm in relation to which a monetary remedy is appropriate; and the remedy can be withheld where to grant it would stultify the authority in the performance of its duties. It seems at least possible that the taking into account of these factors might lead to the exclusion of liability in some cases in which it would also be excluded in the existing law of tort.

A fifth ramification is that liability of a public authority for breaches of public law should be liability of the authority itself and it should not be necessary to ascribe the wrong to some employee in order to attach it to the authority. This follows from the fact that the rationale concerns the treatment of private persons by the state rather than the relationships between private persons.

It has not been my intention in the foregoing to work out in full a form of liability that satisfies the rationale I have presented . I have been trying merely to sketch a few of the features that I think such a form of liability would have to have. The immediate purpose of this is to provide a criterion by which to judge whether our present law is adequate, and how it falls short if it is not. Only after I have dealt with these questions will I go on to elaborate a form of liability that satisfies the criterion. As I have emphasized above, the argument supporting the rationale here advanced, is both descriptive and normative. I have set forth a particular interpretation of public law, one that both explains and justifies many of public law's features. A consequence of the interpretation is that there ought, in principle to be a monetary remedy in respect of harms caused to individuals by breach of public law duties owed to them. An argument like the one I have made must, I think be tacitly assumed by those who assert that there is something wrong with those cases – like the archetypal licensing case – in which the courts are unable to grant a monetary remedy in respect of loss caused by a breach of public law. And since this assertion is central to the views of many of those critics[28] who regard our law of administrative liability as deficient, some such argument must underpin those views. It also, I shall suggest below, expresses the normative aspiration that has led our judges, in a number of cases, to attempt to extend the law of tort so as to cover public law wrongs.

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presence of these factors would rule out liability in the private law of tort. This claim is elaborated and made good in Chapter 12 below.

28 E.g. the All Souls-JUSTICE committee n.1 above; Public Law Team, Law Commission Monetary Remedies in Public Law: A Discussion Paper (11 October 2004) at 8.15–8.23; Wade and Forsyth, Administrative Law (9th ed., Oxford University Press, 2004) pp.786–787.

Chapter 4
Cohen and Smith's Theory of Entitlement

I digress now from the argument I have been making to consider an alternative rationale for administrative liability, that advanced by Cohen and Smith in the article "Entitlement and the Body Politic: Rethinking Negligence in Public Law."[1] There are a number of reasons for doing so. The theory has attracted widespread attention and is taken seriously by many commentators.[2] It is intended, like the rationale I put forward above, to explain the many attempts by judges in cases against public authorities to escape the constraints of traditional tort law.[3] It also employs concepts of entitlement and equal treatment similar to those I have employed (or since Cohen and Smith's writings long predate mine, I should perhaps say that I employ concepts similar to theirs). At the same time, the theory is deeply unsatisfactory. Showing why will, I hope, justify my decision to discount it in the rest of this book. It may also cast further light on the rationale set out in the previous chapter.

David Cohen has elaborated his views on administrative liability in a number of articles subsequent to "Entitlement and the Body Politic."[4] One change of emphasis

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1 (1986) 64 Can Bar Rev 1.

2 See especially Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004). See also Dugdale, "Public Authority Liability and the Citizen's Entitlement" (1994) 45 NILQ 69; Fairgrieve *State Liability in Tort* (2003) at p.163. As Cohen and Smith are Canadian and their theory is concerned especially with Canadian law, it receives particular attention in Canadian writings: see e.g. Hogg and Monahan, *Liability of the Crown* (3rd ed., Carswell, 2000) pp.154–155, Sopinka, "The Liability of Public Authorities: Drawing the Line" (1993) 1 Tort Law Rev 123. Cane, who considers the theory briefly in "Damages in Public Law," is less impressed by it.

3 Thus at p.24 of Entitlement and the Body Politic the authors say that "[t]he strong dissenting judgment of Lord Atkin in *East Suffolk Rivers Catchment Board v Kent* and the many unsuccessful (until recently) actions which have been brought against public bodies for non-feasance, attest to a widely shared intuition," an intuition they think is captured by their theory.

4 "Regulating Regulators: The Legal Environment of the State" (1990) 40 UTLJ 213; "Adjustment to the Consequences of State Action: Suing the State" (1990) 40 UTLJ 630; "Government Liability for Economic Losses: The Case of Regulatory Failure" (1992) 20 Can Bus LJ 215; with P. Finkle "Crown Liability in Canada: Developing Compensation Policies for Regulatory Failure" (1995) 37 Can Pub Admin 79; "Responding to Government Failure" (1995) 6 NJCL 23. One article predates "Entitlement and the Body Politic", "The Public and Private Dimensions of the UFFI Problem: Part II" (1983–4) Can Bus LJ 410.

to be found in the later writings concerns the agency envisaged as distributing compensation. In "Entitlement and the Body Politic", Cohen and Smith write for the most part as if this function will be performed by the courts. In the later writings,[5] Cohen imagines it being entrusted to an independent administrative body and also advocates legislative programmes to fix the kinds of compensation available in relation to particular types of administrative activity. However, the core notion of his theory of entitlement, as set out in "Entitlement and the Body Politic" appears to remain unchanged. It is this notion, and its expression in the original article, that has captured the attention of commentators and that accordingly I concentrate on here.

The argument of Entitlement and the Body Politic consists partly in a critique of the use of negligence to impose liability for the wrongs of public authorities. The article (published in 1986) was written in the wake of the House of Lord's decision in *Anns v Merton Borough Council*[6] and its acceptance by the Canadian courts. The authors argue that various features of the traditional law of negligence make it unsuited to dealing with administrative liability. For example, they claim that the distinction between acts and omissions, central to the private law of negligence, is inappropriate in relation to the welfare and regulatory functions of public authorities; they criticize the courts' tendency to attach liability in negligence to individual officials, and hence only vicariously to public bodies, rather than directly to the bodies themselves; and they argue that the policy/operational distinction introduced in *Anns* is useless as a method of distinguishing between cases in which the imposition of judicial norms on public officials is appropriate and cases in which it is not. Added to these criticisms is the claim that the attempt in *Anns* and its progeny to overcome some of these deficiencies – for example by forsaking the traditional reluctance to find liability for omissions – is unfortunate because it upsets well-established understandings in the private law of negligence. These are all points that I shall endorse below when I come to assess the suitability of negligence as a vehicle for imposing administrative liability in the light of principle I.[7] Where I part company with Cohen and Smith is in relation to the positive rationale they put forward.

According to Cohen and Smith, government welfare and regulatory programmes create entitlements. These entitlements are as strong as private law property rights and the task of the courts should be to identify and enforce them.[8]

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5 For instance in "Responding to Government Failure" ibid.

6 [1978] AC 728.

7 Other elements of the critique assume the correctness of Cohen and Smith's theory of liability and accordingly I do not endorse them. In Chapter 13 below I address the claim, made at certain points in Entitlement and the Body Politic and in some of Cohen's later articles, that the purpose of the law of negligence is to maximize economic efficiency and that, on this ground, it cannot be fruitfully applied to public authorities.

8 The theory is entirely concerned with the substantive outcomes of administrative action. The authors specifically exclude liability for purely procedural errors.

I turn in a moment to the question of what exactly these entitlements are and how they are to be identified. It will be useful first to note two features of the theory. One concerns its scope, the range of types of governmental function to which it applies. Talk of government programmes creating entitlements tends to suggest programmes to distribute benefits, understood in a narrow and uncontroversial sense, to people who apply for them. Programmes to distribute social security payments or housing, for example, fit this model. It is clear, however, from the examples that Cohen and Smith use that the range of functions to which they intend the theory to apply is much wider. They intend it to cover, in fact, every case in which the rights or interests of citizens are determined by the exercise of public power. Their preferred examples of entitlement creating functions are drawn from *Anns v Merton Borough Council* and other cases involving powers or duties to ensure that new buildings comply with regulations,[9] and from *Schacht v R.*,[10] a Canadian case which involved a failure by the police adequately to warn motorists to avoid the scene of an accident.

The second feature of the theory to note is that is that it rests upon the authors' rejection of judicial review. "We should," they tell us, "throw off the intellectual constraints imposed by the law of negligence and as well, those of the traditional judicial review model of administrative law … We need a new approach, a new theory, a new area of civil obligations of the body politic."[11] Thus, whereas the rationale I argued for above would involve a kind of creative extension of existing administrative law, Cohen and Smith propose to start from scratch. Their theory purports to determine not only when compensation should be paid for failure to meet an entitlement, but also when an authority should be obliged to provide the actual benefit to which the citizen is entitled.

What then of Cohen and Smith's notion of entitlement? What kind of entitlements do they have in mind and how are they to be identified? A first step to understanding what the notion might mean and also its inadequacy is to consider the authors' "theoretical justification of a principle of entitlement." The first part of this justification involves going back to first principles of political theory and invoking the idea of the social contract. "The justification for the state's authority to command," they tell us, "is that the individual will receive a benefit which will correlate with a burden on the part of the state."[12] This seems reasonable enough but it is followed by a gross non sequitur. "This benefit burden relationship must be in terms of a right and duty relationship – that is, *a right for the individual to receive state benefits*, and a duty on the state to provide them." It does not in the least follow from the proposition that the legitimacy of the state depends upon its providing benefits to citizens, or to each citizen, that the benefits must be in the form of legally identifiable or enforceable rights. The state may provide its benefits

9 E.g. *Kamloops v Nielson* [1984] 2 SCR 2, SC.

10 (1973) 30 DLR (3d) 641, [1973] 1 OR 221 (Ont. CA).

11 See Cohen and Smith, n.1 at p.20.

12 Ibid. p.30.

by means of discretionary action that cannot be characterized using the language of legal rights and duties; and the mechanism for responding to government failure may be political rather than legal, as where the government is voted out of office.

That Cohen and Smith's argument really is as crude as I have made it appear can be seen from an example they give on the next page. "Let us assume for the moment that some kind of egalitarian state claims first, that citizen A has a duty to pay a greater amount of taxes than could be justified in terms of the benefits which A wants or needs from the state, and second, that the state has a right to collect taxes in excess of that for the benefit of citizen B. Citizen B would then have a right to receive the benefits which justified the collection of taxes from citizen A. B's right to the benefit is, therefore, a necessary condition for the state's right to collect the taxes from A which it justifies in terms of a benefit to be given to B ... The state must always justify whatever level of taxation it maintains in terms of benefits to citizens." If this were intended as a description of the actual practice of states it would be nonsense. It is hardly any better when considered, as it is intended to be, as a normative argument. There is no reason to suppose that a state is only justified in levying taxes if it creates, at the same time, legally enforceable rights to the benefits to be delivered by means of the money raised. In some general sense, the legitimacy of the state's tax raising powers depends upon the state's propensity to use the taxes for the public good and it is arguable that it also depends on every citizen receiving some share in that good. But much more would be needed to show that the state's raising of taxes is only legitimate to the extent that individual citizens have legal rights to the benefits that the revenue is intended to provide.

Of course, none of this is to say that there should not be legal remedies for certain governmental failures. Part of the function of administrative law is to determine when there should be such remedies and the rationale I set out above requires that there should also be a remedy where breaches of the principles of administrative law cause loss. But Cohen and Smith repudiate conventional administrative law so it is incumbent upon them to provide an alternative set of principles to bridge the gap between their premise and the conclusion they want to reach. In the first part of their "theoretical justification" they singularly fail to do this. The result is not only that their conclusion lacks support but that the conclusion itself is unclear: we remain in the dark as to the nature of the entitlements they are contending for.

There is, however, a second part to the theoretical justification. Here Cohen and Smith introduce the idea of equality. In doing so, they invoke section 15(1) of the Canadian Charter of Rights and Freedoms. This is a general anti-discrimination provision guaranteeing equal protection and benefit of the law but in practice the principle the authors appeal to is the narrow, juridical principle that like cases must be treated alike. They argue, in effect, that citizens are entitled to consistency in the exercise of governmental powers that affect them. Although the principle of juridical equality invoked by Cohen and Smith is the same as the one I invoked above in relation to principle I, they put the principle to a different use. The argument in relation to principle I is that to deny a remedy ex post facto to the victim of a public

law wrong when the victim of an identical wrong would be entitled to a remedy if they sought it ex ante, is a breach of the principle of juridical equality. Cohen and Smith's argument is that if an authority confers some benefit on a citizen in certain circumstances then the same benefit must be conferred on another citizen whose circumstances are relevantly similar. The practical difference between the two is that Cohen and Smith's argument can only have any application to cases in which there actually exist two persons whose cases are relevantly similar, one of whom receives the benefit and the other of whom does not. By contrast, the argument in relation to principle I merely dramatizes the fact that in the current state of the law, whether or not a claimant receives a remedy may turn on the arbitrary question of whether a remedy was sought before or after the injury was suffered. It does not depend on the actual existence of two claimants identically placed.

An example of the kind of situation Cohen and Smith seem to have in mind can be found in the following passage.

> "If the legislature enacts that all persons who have been resident in Canada for ten years or more shall be paid a pension of $300 per month at age sixty-five, then a person who met those requirements should have a good cause of action against the state for that amount whether the reason it was not paid was deliberate or inadvertent bureaucratic action. It should make no difference whether the legislation specifically defines the entitlement, or empowers the bureaucracy to set the residence and age requirements and the amount of the payment."

The situation envisaged is one in which the administration adopts criteria as clear and definitive as the imagined statutory ones. In such circumstances, it is plausible to say that a citizen who satisfies the criteria yet is refused a payment should be able to reverse the decision. However, functions which involve the making of payments, such as pensions or social security payments, in accordance with clearly announced criteria, are not the sort of functions that give rise to problems of administrative liability. Where such criteria exist and a payment is wrongfully withheld, a claimant will generally be able to gain what she is entitled to by means of ordinary judicial review remedies.

If the requirement of juridical equality or consistency is to help us define entitlements in the sorts of cases in which the lack of a monetary remedy *has* been found to be a problem, then it must do so in cases in which the discretion of the administration is usually much less rigidly structured. One has only to reflect on the reasons why discretion is granted to administrative bodies in the first place, to see that in only a very few of these cases will the requirement of consistency, by itself, be enough to define what a citizen is entitled to. The legislature grants discretion to administrative bodies where it wishes some general end to be attained but cannot foresee in advance the best way of attaining it, perhaps because it will have to be attained against a background of constantly changing circumstances. This being so, there will be little ground for saying that the administration should be held to hard and fast rules or precedents. There will be cases in which a body,

by promulgating criteria, making promises, or behaving so consistently over a period that criteria can be deduced from its actions, creates legitimate expectations of consistency with past conduct. But even in these cases, a court will not be justified in insisting that the body adhere rigidly to the criteria; and in order to judge the lawfulness or propriety of any departure from them, concepts other than consistency will be required.

Cohen and Smith clearly intend their theory of entitlement to cover a far wider range of functions than those of the pension-paying type, and a far wider range of cases than can be settled purely by appeal to the notion of consistency or to legitimate expectations. Indeed, they explicitly reject the idea that the creation of entitlements has anything to do with the raising of legitimate expectations or reliance by intended beneficiaries.[13] Yet on the basis of their theoretical justification it is impossible to see how their notion of entitlement can be extended beyond this narrow range of functions and cases. It is natural then to turn to other parts of the article to see whether the authors' account of how the theory is to apply in practice casts more light.

The process whereby authorities define entitlements, they tell us, has two stages. Firstly, the legislature sets up programmes.[14] These may specify with sufficient precision who is to receive what, in which case entitlements are defined from the outset, and the task of the administration (or bureaucracy as they always call it) is confined to implementation. However, if a statute confers discretion upon the legislature, the second stage, at which the administration defines the entitlements, is required. They envisage legal challenge to a decision of the administration with respect to its failure to satisfy an entitlement as having three stages. Firstly, the plaintiff will claim that she falls within an entitled class but has not received what she is entitled to. Secondly, the court will conduct an inquiry into the claim and seek to determine the nature of the entitlement and the membership of the entitled class. Thirdly, the administration will have the opportunity to argue that the plaintiff does not fall within the entitled class. The second and third stages are presented as involving a kind of cooperative venture between court and administration.

This is the formal structure Cohen and Smith identify. The question is whether in describing how it applies they provide any conceptual tools, other than that of consistency, by means of which entitlements might be defined. The answer is that consistency remains the sole concept that does any useful work but that a host of other methodological guidelines and strictures are introduced. The effect of these is either to add nothing of substance or to sow confusion and undermine further the plausibility of the theory. Thus, we are told that at the second stage of an entitlement-based challenge, an extensive factual inquiry will take place into the conduct of the governmental function in issue.[15] Since the requirement

13 See p.17.

14 Cohen and Smith seem to assume that all powers of public authorities – or at least all powers capable of giving rise to entitlements – originate in legislation.

15 See especially p.53

of consistency is the only meaningful generator of entitlements put forward, the purpose of the inquiry seems to be to establish the existence of some consistent past practice that would give rise to an entitlement, and on the basis of which the act in issue could be shown, if inconsistent with that past practice, to deprive the plaintiff of her due. This inevitably suggests the danger of governmental functions being subjected to a straightjacket of rules or binding precedents. The different strategies suggested by the authors for avoiding this implication are not easy to reconcile with one another. All involve the idea that at the third stage, the administration will be able to offer justifications for any departure from past practice. Sometimes, the authors write as if an authority might be expected to produce a manual that contains rules or guidelines as to how to respond to every contingency.[16] If this were so then, presumably, the relevant rule or guideline could be cited in the authority's defence whenever it appeared to act in a way inconsistent with past practice. Yet such a manual is clearly impossible in relation to most discretionary functions for the reason that we saw above, namely that discretion is granted in the first place because the ways in which it might have to be used cannot all be foreseen. More often, the authors adopt the strategy of pointing out the many justifications an authority might be able to give for departing from past practice. At some points, they do this by seeming to suggest a distinction between rule-governed discretions and discretions exercised on an individualistic, criterion-free basis.[17] This is, of course, a false dichotomy. No discretion can be entirely rule-governed and no discretion (as opposed to an arbitrary power) can be entirely criterion-free. Elsewhere, they emphasize that "the departure from historical self-defined standards is not *determinative* of liability, the bureaucracy being permitted to justify its dynamic behaviour on efficiency grounds among others."[18] When they state that "[w]e do not believe, as does Kenneth Davis, that the 'best' rule consists of precedent adherence practices", they come close to rejecting altogether the only meaningful basis they have suggested for their notion of entitlement. At the very least, the effect is to remind us again how small is the number of cases in which the notion of consistency or juridical equality could, by itself, form the foundation of any entitlement.

Matters are made no clearer by Cohen and Smith's insistence that, in entitlement analysis, the court cannot interfere with or question the exercise of an authority's discretion in defining entitlements. The insistence is based on the authors' belief in the possibility of a firm distinction between the process of defining entitlements and the process of implementing them. The function of the court in this context is simply to ascertain the result of the entitlement-defining process and then to ensure that it is implemented. By way of example they cite *McCrea v City of*

16 See e.g. the suggestion at p.40 that "the application of this articulated entitlement definition process would provide an incentive for superior bureaucrats to create standards and to develop structured policy."

17 See the middle paragraph of p.11, first paragraph of p.21 and the final sentence of p.53.

18 Page 56.

White Rock,[19] another case concerning local authority powers to inspect residential housing construction. The authority there adopted a policy of only carrying out inspections after receiving notice from the builder. Since, the authors tell us, this constituted an entitlement decision on the part of the authority, it would have been wrong for the court to question it or make it the basis of a finding that the authority had been negligent, even if it did appear to be negligent or unreasonable.[20] Another example concerns highway safety crews whose tasks, in Canada, include checking the hillsides above the highways for loose rocks that could fall and cause accidents. Under the entitlement approach, in a claim arising from an accident caused by falling rocks, a decision not to carry out these inspections, even if it appeared to judges to be unreasonable, could not be called into question. Nor could a decision, made on budgetary grounds, to carry out inspections using reduced staff numbers. The focus of any entitlement analysis would be on whether the victim's accident arose from conduct on the part of the inspection crew which departed from established practice i.e. which, in Cohen and Smith's jargon, was not in accordance with the entitlement decision made.

The distinction between, on the one hand, a discretion or policy-based function of defining entitlements and on other, a discretion or policy-free function of implementation is exactly like the policy/operational distinction used in the law of negligence. The use to which Cohen and Smith wish to put it is also exactly like the use to which the policy/operational distinction is put in negligence: they wish to avoid altogether interference by the courts with the discretionary or policy-based parts of the administration's function, allowing the court to intervene only where the administration fails to implement its own policy.[21] The authors recognize this parallel.[22] Yet distinctions of this type are unworkable for the reasons they themselves give in their critique of negligence.[23] Even the most low-level actions of public authority employees involve elements of policy or discretion, and it is impossible for a reviewing institution to judge these without employing standards as to how discretion should be exercised.

If the stricture that courts could not question entitlement decisions of the administration were taken literally, it would have the consequence of making it next to impossible ever to find that an authority had wrongfully excluded a citizen

19 (1975), 56 DLR (3d) 525, [1975] 2 WWR 593 (BCCA).

20 The reasoning here parallels that in a long line of cases predating the *Dorset Yacht* and *Anns* decisions in which it was held that there could not be liability in negligence for an omission because the court could not dictate to the defendant authority how it was to use a discretionary power. A good example of such a case is *Shepherd v Borough of Glossop* [1921] 3 KB 132.

21 In one respect, Cohen and Smith's distinction is more extreme than the policy/operational distinction. Under the latter, the courts are able to assess the competence with which authorities implement their policy decisions. Under the former, Cohen and Smith seem to imagine a simple binary choice: in accordance with entitlement decision or not.

22 See pp.50–51.

23 See p.26.

from an entitlement. Any justification given for the failure to supply a citizen with a benefit would have to be accepted however weak. The authors do suggest at various points that there are circumstances in which the strength of a justification given for a departure might have to be tested by the court. In relation to the example of the reduced or cancelled rock inspections, they say that "the bureaucracy would have to demonstrate, rather than merely allege, that the entitlement was defined and distributed in a different manner."[24] All this seems to require is a demonstration that there really was a decision not to inspect or to use smaller numbers. Once this is shown, there is no basis for questioning the decision. The idea seems to be to isolate those acts that are completely inadvertent, in the sense that their outcomes are unintended, so that in the eyes of the authority itself they have no justification. But this distinction between advertent and inadvertent acts brings its own problems. Even where an act is inadvertent, what is to stop the authority offering some purported justification – a putative entitlement decision – for it? Suppose, for example that the highway safety crew fails by an oversight to remove a particular dangerous boulder and that it causes an accident. What is to stop the authority claiming that a decision was taken, given the time constraints on the day, only to remove rocks visible from certain vantage points, the offending boulder not being so visible? Cohen and Smith's approach specifically excludes the use of concepts such as reasonableness and negligence to test whether such a justification should be accepted. An answer to this might be to say that in order to be offered as a justification, an entitlement decision must demonstrably have been taken in advance of the act giving rise to the challenge; it must have been expressed and recorded. This means, however, that an act done spontaneously in response to particular circumstances can never be justified. Thus suppose the following series of events. A highway maintenance crew is responsible for a particular stretch of highway. It has always in the past found time to clear rocks from the hillside. But on a particular occasion, the crew arrives to find that a lorry has shed an unusually large and dangerous load. The crew decides there and then to clear the spilled load before it does anything else. Not long after it has accomplished this task, a rock falls and causes an accident. In the absence of some expressed and recorded decision on the part of the responsible authority to reorder its priorities in these circumstances, the crew's actions cannot be justified and the authority is liable. The obvious implication of such a regime would be that authorities should stick to previously enunciated policy whatever the circumstances. We are back to the straightjacket of rules, a consequence that Cohen and Smith are anxious to avoid. (Or, alternatively, to the impossible dream of the manual that makes provision in advance for every situation in which a particular discretion might have to be exercised.)

The authors also say that stronger justification for an act is required where the act's effect is to deprive a single victim or narrowly defined group of victims, the reason being that such acts are more likely to be inadvertent. They give no

24 Page 47.

indication, however, of what such stronger justification should consist in or of how its strength is to be judged.

The ultimate unworkability of Cohen and Smith's theory can be seen if we return once more to their favoured examples of local authority building inspection and *Schacht v R.*[25] We can get some idea of how the approach is supposed to work from the former. If a local authority had a power to inspect new residential buildings while under construction and adopted a policy of inspecting the foundations of every such building down to a depth of 6 feet, then presumably we would have the sort of situation that in Cohen and Smith's view gives rise to an entitlement. If a citizen bought a house that turned out to be uninhabitable due to faulty foundations; and this could be traced back to a failure by the authority to undertake an inspection in accordance with its usual policy; and this departure from the policy had no justification but was due to pure inadvertence; then the authority would be liable to the citizen. The problem arises if the authority attempts to justify its departure from established practice. If the factual inquiry revealed that the foundations were not inspected because the address of the house in question was crossed off a list by mistake or its details put in the wrong drawer of a filing cabinet, this presumably would be clear evidence of inadvertence. But if the authority offers anything purporting to be a reason or justification – for instance, that it did not inspect during the relevant period because of staff shortages, or that the builders were obstructive – then the theory appears to offer no means of rejecting it. The indispensable tool for judging whether a reason given for departure from an established practice is a good one is the question whether the reason serves the purpose for which the power in question was granted. But there seems to be no place in Cohen and Smith's theory for the concepts of proper and improper purpose or for the courts to judge in any way the fitness of an action for attaining an end. For the courts to ascribe purposes to legislation and to judge whether this or that act of the administration served those purposes would seem to contravene their strictures against interference by the courts with the administration's entitlement defining powers. Even if this most implausible of the theory's features can be put to one side, the concepts of proper and improper purpose, reasonableness and so on appear to have been excluded as part of the general rejection of conventional administrative law.

The example just considered, with its assumption of a regular practice, is of the kind most favourable to the operation of the theory. By contrast, *Schacht v R*,[26] a case whose outcome Cohen and Smith find congenial, illustrates why in relation to many cases, if not most, the theory does not have even the superficial semblance of workability. The facts were that contractors were building a culvert underneath a highway in Ontario. As a result there was a large hole or gap in the highway around which traffic had to take a detour. The approach to the gap on the North side was marked by a number of signs on the hard shoulder. Immediately in front of the gap,

25 See n.10 above.

26 See n.10 above.

in the middle of the road, was a large square sign and there was an identical sign on the gap's opposite side. At about 12.30 a.m. on the morning of the events giving rise to the claim, a Southbound car hit the square sign marking the North side of the gap, jumped the gap, hit the square sign on the other side and fell into the gap. The driver was seriously injured, his passenger killed and the two signs demolished. A local police officer arrived at the scene of the accident between 12.30 and 12.45 and he was joined from about 1.15 onwards by members of the Ontario Provincial Police, the police force responsible for control of the highway in question. The policemen worked to remove the injured driver, dead passenger and wrecked car. When they left at 3.01 the two signs marking the North and South edges of the gap were still demolished. The only indicators left to mark the edge of the gap were a line of flares that had burned out by 3.15. The Department of Highways was notified of the accident and the demolition of the signs but not until 2.55. At some time between 3.15 and 3.52, the plaintiff, who was driving South along the highway, drove into the gap and was injured. Employees of the Department of Highways arrived at 4.11, one hour and sixteen minutes after notification, and erected new signs. If they had been notified immediately at 12.30 or at 1.15, the signs would have been erected before the plaintiff arrived at the scene.

The reason I have described the facts of this case in such detail is that it illustrates how often it will be impossible to judge the culpability of an authority where the only criterion is that of consistency. A majority of the Supreme Court of Canada, affirming the judgment of the Ontario Court of Appeal, found the police liable in negligence for failure to mark adequately the dangerous gap in the road once the two signs had been demolished. (The minority adopted a more orthodox analysis. The provisions of the statute created no action for breach of statutory duty and no common law tort had been committed since the police had merely omitted to do something that might have averted an accident.) The Supreme Court derived a duty to mark the site of the accident from a general duty to make the roads safe for traffic. This duty the Court derived in turn from a statutory duty (contained in s.3(3) of the Police Act of Ontario) to maintain a highway patrol (the Ontario Court of Appeal also referred to a common law duty on the police to protect the life, limb and property of the subject[27]). Even given the duty that the Court ascribed to them, it was only possible to arrive at the conclusion that the police were liable by making contestable decisions about what it was reasonable for the police officers to do or not do. For example, it is arguable that it was reasonable not to put up extra markings: the plaintiff was held 50 per cent to blame for his misfortune and the minority in the Supreme Court took the view that a reasonable motorist would have been sufficiently alerted to the gap by the signs on the hard shoulder.

How should *Schacht* be decided under the theory of entitlement? Cohen and Smith characterize the case thus: "Where ... as in *Schacht v R*, a police officer is already at the scene of an accident and fails to put up sufficient warning devices

27 [1973] 1 OR 221, 30 DLR (3d) 641 at para 28.

to prevent a further accident, his behaviour deprived the plaintiff of a benefit to which we determine individuals are entitled, and consequently state liability will lie."[28]It is unclear, however, what the determination is that defines the entitlement they refer to, or what the entitlement itself consists in. Is there an entitlement to safe roads? Or an entitlement to adequate signage? Or an entitlement that the traffic police so conduct themselves as to minimize accidents? If the entitlement is characterized in such general terms, then given the peculiarities of the case, it is not clear that the plaintiff was deprived of his entitlement. The theory seems to require the existence of a published guideline so detailed that it applies unmistakably to the facts of the case. Or that a detailed factual inquiry into the general conduct of the Ontario police in relation to traffic accidents reveal another accident so like the one in issue that the police's conduct in relation to it could serve as a sort of precedent or template dictating the correct behaviour in relation to the accident in the instant case. Again, given the peculiarities of the case, either scenario seems highly unlikely.

Judgments as to what an authority should or should not have done cannot be mechanically read off from entitlement decisions made by the authority itself in the way that Cohen and Smith's theory seems to assume. For this to occur, there would need to be either published guidelines that establish to the letter what must be done in every circumstance or an established practice that yielded equally detailed guidance. But as we have seen, neither is possible. In the real world, the propriety of a public authority's conduct cannot be assessed without ascribing purposes to it and without making judgments as to what actions are reasonable in pursuit of those purposes. These acts of interpretation and judgment form the bridge between the general words that describe an authority's powers and duties and the particular acts whose lawfulness or propriety is to be judged. Yet there is no place for them in the theory of entitlement.

Cohen and Smith reject existing administrative law and purport to replace it with something better. What they provide in its stead, however, is something far cruder. The tensions and dichotomies that administrative law is intended to overcome – between rules and discretion, judicial interference and judicial deference – are reinstated so that the authors' account of the theory is characterized by an endless shuttling back and forth between extremes. Hence they appear to claim at one moment that an authority can be compelled to act in accordance with past practice but at another that the theory does nothing to inhibit the dynamic exercise of discretion; and that public authority functions can be divided into two clearly demarcated zones, one in which the court (or other reviewing institution) must be absolutely deferential to the decisions of the authority and another in which the court can dictate to the authority how it must behave. The theory of entitlement is really only plausible in relation to the narrow range of cases in which an authority promises or creates a legitimate expectation of something and then refuses to provide it. It thus falls far short of Cohen and Smith's ambition to

28 Page 47.

state a rationale that articulates the intuition underlying all the cases in which the law of tort has been found inadequate to deal with public authority liability. In the search for rationales for administrative liability, the theory of entitlement can be safely discarded.

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Chapter 5
Principle II

The second principle I wish to endorse is stated by the Council of Europe in the following terms:

> Reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered damage and the act was exceptional or the damage was an exceptional result of the act. (Principle II)

This is very like the French legal principle *égalité devant les charges publiques*, a comparison I return to below.[1] I wish first however to analyse the principle and its relation to recognized principles of English law. A few examples will make clearer what it entails. It might lead to reparation being granted: where a citizen has her land expropriated to make possible some public work such as the building of a road;[2] where citizens suffer the ill effects of having the state carry on some dangerous activity next to their land such as the production of munitions or nuclear energy; where individual citizens bear the brunt of measures taken to deal with some emergency, as where houses are demolished to stop the progress of a fire or livestock slaughtered to prevent the spread of some disease; or where the burden of some regulation falls uniquely or especially heavily on an individual citizen or enterprise, as in the well known French case of *Société La Fleurette*[3] where a prohibition on the manufacture and sale of artificial cream affected only one company, the claimant in the case.

The principle is, I suggest, an unexceptionable one and follows easily once one accepts some conception of equality according to which citizens are entitled to be treated as equals. Such a conception rests on the belief – central to modern liberal democracy – that every person is equal in worth and dignity. It is, however,

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1 A number of other European legal systems contain a similar principle: see Bronkhorst, "The Valid Legislative Act as a Cause of Liability of the Communities" in Heukels and McDonnel eds. *The Action for Damages in Community Law* (Kluwer Law International, 1997). See also Flogiatis in Fairgrieve, Bell and Andenas, *Tort Liability of Public Authorities in Comparative Perspective* (BIICL, 2002).

2 Compensation is of course provided for in this case, and in a number of others to which principle II applies by statute. I return to this fact in Chapter 9 when I consider the extent to which English law does and can be made to fulfil the principle.

3 CE January 14, 1938.

a different and more substantive conception than the one invoked above in relation to principle I. The notion of equality relied upon to support principle I is a purely formal one. It requires no more than that in the application of a rule only those considerations relevant to attaining the rule's purpose be taken into account. It does not rest on any substantive conception of the equal worth or dignity of all persons and is therefore compatible with the rule itself making distinctions that are arbitrary or based on "suspect classifications" such as race, sex or religion. Thus, to use a well worn example, if an education authority dismisses a teacher on the ground that she has red hair, the principle of formal equality has been breached because the teacher has been treated differently than other teachers, and the authority has exercised its power with respect to her, on a ground that has nothing to do with the purpose for which the power was granted. But if Parliament inaugurates a campaign of persecution against red haired people and this involves passing a statute requiring all red haired teachers to be sacked forthwith, then a decision by the authority to sack red haired teachers it employs will not offend the principle of formal equality since the authority's act is entirely in accordance with the statute. Moreover, so long as an authority does not take into account irrelevant considerations in exercising its powers, the principle of formal equality gives rise to no objection to acts which impose a much heavier burden on some citizens than others, even if the placing of the burden on those citizens is quite arbitrary from the point of view of the object to be attained.

The development of principle II in English law thus requires the presence of a more substantive conception of equality. Jowell has argued for the longstanding presence of such a principle in the common law,[4] beginning with the famous dictum of Lord Russell of Killowen in *Kruse v Johnson*.[5] If older common law cases alone are relied upon, the case looks tenuous. But if one adds the influence of numerous sources external to the common law – EC law, the ECHR and Human Rights Act, the various anti-discrimination statutes – together with the growing recognition of the centrality, referred to above, of the belief in equality to modern ideas of liberal democracy, then a strong argument can be made for treating a substantive conception of equality as a general principle of English law.[6] A number of recent decisions reflect this.[7]

If we assume that there is a principle of substantive equality in English law – one that requires public authorities to treat people equally unless there is some

4 Jowell, "Is Equality a Constitutional Principle" (1994) 47 CLP 1.

5 [1889] 2 QB 291. His lordship said that bylaws would be unlawful "if, for instance, they were found to be partial and unequal in their operations as between different classes."

6 For a recent general discussion see McCrudden, "Equality and Discrimination" in Feldman ed. *English Public Law* (Oxford University Press, 2004) especially 11.60–11.75. See also Craig *Administrative Law* (5th ed., Sweet & Maxwell, 2003) pp.681–686.

7 See for example *A v Secretary of State for the Home Department* [2003] 2 WLR 564 at [7]; *R (Gurung) v Ministry of Defence* (2003) 100(6) LSG 25. See more generally Craig, *Administrative Law* ibid. at pp.681–682.

good justification for not doing so – then it might seem that principle II can be subsumed within principle I. Principle I requires reparation for loss caused by breach of public law duties owed to individuals. The equality principle could be interpreted as a principle of public law that gives rise to duties to individuals affected by administrative action. The equality principle is indeed such a principle but many cases that arise under principle II will differ from principle I cases in an important respect. Principle I comes into play where there has been a breach of some public law duty. The money paid by way of remedy is intended to repair the harm done by the breach, but it cannot alter the breach's character as an unlawful act. By contrast, under principle II, it will often be the case that the breach of the equality principle involved in imposing an exceptional burden on a particular individual can be effectively removed by paying compensation. In other words, the unlawfulness will consist simply in the failure to pay compensation and once this is addressed, the unlawfulness will cease. Thus, to take the road example, assuming that there is a good reason for building the road in the first place, the road must be built somewhere, and if taking any of the feasible and rational routes would require the expropriation of land and the route chosen is one of the feasible and rational ones, then the expropriation is justified. Any unlawfulness consists in taking the individual in question's land without adequate compensation. Once compensation is provided, the breach of the equality principle is removed and the administrative act ceases to have an unlawful character. Likewise, the demolition of a house to prevent the spread of a fire or the passing of a regulation that imposes a particular burden on a small number of people may be entirely justified, as long as compensation is provided.

This is not to say that the imposition of any exceptional burden can be rendered lawful by the payment of compensation. There are many forms of unequal treatment that are too serious – involve too grave an infringement of fundamental interests of the persons affected – for a monetary remedy to be capable of making them lawful. Racially discriminatory acts would be one example of this type of unequal treatment. Most breaches of fundamental rights under the European Convention committed in pursuance of some public policy would also be examples. Where a breach of the equality principle falls into this category, then any monetary remedy granted can only have the function of repairing the harm caused: it cannot do anything to alter the unlawful character of the act.

We may, then, think of breaches of the equality principle as falling into two categories which I shall call justifiable and unjustifiable breaches. Justifiable breaches are those which may be rendered lawful by the payment of compensation, unjustifiable breaches those that cannot be made lawful in this way. Unjustifiable breaches fall unequivocally within principle I as well as principle II: to the extent that breaches of the equality principle are unjustifiable and cause harm to individuals, principles I and II overlap. Justifiable breaches, on the other hand, form a distinct *sui generis* class. To the extent that principle II is concerned with these, it is a supplement to, rather than an offshoot of, principle I.

Just because of its distinctness from principle I, it is this aspect of principle II that is most important.

If principle II cannot be subsumed within principle I, might the converse hold: might it be possible to subsume principle I within principle II? Might it, that is, be possible to characterize all loss-causing breaches of public law duties owed to individuals as involving a form of unequal treatment. I raise this possibility because it is sometimes suggested that principle II, or something like it, could be the master principle in a system of administrative liability that overcame the defects in English law addressed by principle I as well as dealing with cases of the sort described in this section.[8] If we interpret principle II as being relevant only where a particular case involves breach of the principle of substantive equality, then we must reject the idea that principle I can be subsumed within it. Instances of irrationality, acting for improper purposes or procedural impropriety are not easily assimilated to unequal treatment. To show that these wrongs have been committed does not depend on demonstrating that the authority would have treated another person similarly situated differently and there are often no grounds for asserting that it would have done. On this view, the two principles overlap but are distinct. On the other hand, one might argue that in any case in which a citizen suffers loss as a result of public law unlawfulness, the conditions for the application of principle II are satisfied. The loss is an exceptional burden and is caused by activity intended to serve the public interest.[9] The act in question may not be unlawful because it involves unequal treatment of the claimant. But the fact of treating the claimant unlawfully where other persons affected by the exercise of the power in question are treated lawfully may itself be regarded as a form of unequal treatment. Interpreted in this broader sense, principle II may be thought of as underpinning principle I or as subsuming principle I within itself.

Because principle II involves reparation for the effects of justifiable acts (or acts involving justifiable breaches of the equality principle), it invites an obvious objection. This is that all governmental action involves the distribution and redistribution of burdens and benefits and that to make reparation to citizens who have to bear an extra burden as a result of such action would tend to interfere with the normal process of government.[10] This is, however, to exaggerate the

8 Fordham seems to suggest this: see further Chapter 13, pp.221–223. To the extent that the principle of *égalité devant les charges publiques* is sometimes elided with a wider principle of social insurance against risk and the latter is sometimes said to be the master principle of French administrative liability, a similar suggestion is made in relation to French law.

9 The Council of Europe's formulation refers to acts which serve the general interest rather than to acts *intended* to serve the general interest. I submit, however, that the principle should be taken to apply to acts of the latter type as well as the former. Even if a particular administrative act does not, in fact, serve the public interest it arises from a larger activity which does.

10 Cane (in "Damages in Public Law" (1999) 9 Otago Law Review 489) considers a similar objection in relation to principle I type liability. In his reply, he distinguishes between loss lawfully inflicted which he calls "endogenous loss" and loss unlawfully inflicted which

consequences of applying the principle. Where an act is justifiable, the imposition of an unequal burden on some individual or small class of persons will typically be a side-effect rather than the principal purpose of the act in question: it may be intended, in the secondary sense that it is foreseen, but it will not be desired. The effect of reparation in such a case will not be to undermine the policy pursued but simply to shift the cost of the policy from the shoulders of the individuals in question to those of the public as a whole. Where it is in some way the point of a policy to impose a burden on particular individuals, and the policy is a justifiable one, then principle II no longer demands the payment of reparation. For this reason, principle II does not require the payment of reparation to someone who is justly punished for wrongdoing. Nor does it require the payment of reparation where the burdens imposed are the result of a deliberate and lawful scheme for the redistribution of goods, as where the rich are taxed to help the poor. Moreover, liability can be confined to those cases in which the unequal distribution of the burden is especially egregious, as the Council of Europe's formulation of the principle emphasizes in its reference to the exceptional nature of the damage.

An important feature of principle II is that it could be used to justify a court in ordering reparation for the effect of a statute. This aspect of the principle is well established in French law: the *La Fleurette* decision referred to above, for example, is an instance of its application. It is also recognized in the law of the European Communities.[11] The prospects of implementing this aspect of principle II in English law are limited, however, since, as the law stands, no compulsory remedy can be issued in respect of consequences that follow directly from a statute. The most that could be hoped for would be a declaration that a statute was deficient in failing to provide for compensation.

Égalité devant les charges publiques and the principle of risk

No-fault liability of the administration in French law is sometimes characterized as having two conceptual bases.[12] One, égalité devant les charges publiques, is roughly equivalent to principle II. The other, the principle of risk is explained

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he calls "exogenous loss." Since only the former results from the state's lawful pursuit of its objectives, granting reparation for the latter cannot interfere with such pursuit. Clearly, this argument would apply to what I called above "unjustifiable" breaches of the equality principle i.e. cases demanding liability under principle II that also fall within principle I.

11 See e.g. Case T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v Council* [1998] ECR II-667 (confirmed on appeal Case C-237-98 [2000] ECR I-4549). While the principle was acknowledged in this and other cases, it has never been invoked successfully against EC institutions. See more generally Craig and De Burca, *EU Law: Text, Cases and Materials* (3rd ed., Oxford University Press, 2003).

12 For accounts of no-fault liability in French law see Fairgrieve, *State Liability in Tort* (Oxford University Press, 2003) Chapter 5; Brown and Bell, *French Administrative Law* (5th ed., Clarendon 1998) Chapter 8; Bell "Governmental Liability in Tort" (1995) 6

by Fairgrieve as follows. "Certain activities of the state which are undertaken in the public interest inevitably run the risk of causing loss to others. Should that risk materialize, according to the risk principle, the state is obliged to provide reparation to those affected."[13] Conceptually speaking, the second of these two principles is really only an application of the first. If the administration is obliged to provide reparation wherever it imposes an exceptional burden on some citizen or group of citizens, this must extend to cover the case in which the burden falls as a result of some risky activity.[14] On the other hand, not every case in which the administration imposes an unequal burden giving rise to liability will involve the imposition of a risk. If a state-run munitions factory explodes causing harm to nearby householders,[15] this could be said to result from the materialization of a risk. Likewise, perhaps, if harm is caused by juvenile delinquents who have escaped from a detention facility with a liberal regime.[16] But principle II also covers cases in which the imposition of the burden is an immediate result of the administrative action in question rather than of the materialization of some risk to which the action gives rise. Such cases would include the expropriation of land, the making of regulations or the conduct of an activity that inevitably causes a nuisance.

Égalité devant les charges publiques and the risk principle appear to be not very clearly distinguished in French law and this leads to a tendency to run them together in academic commentary. This is true both of discussions of French law but also of other discussions of the conceptual basis of no-fault administrative liability since these tend to be influenced by the French example. As a consequence, expressions such as "risk principle" or "risk theory" are sometimes used to refer to a principle like principle II in discussions of the reform of English law.[17] Given, however, that the risk principle is a specific application of principle II and not identical with it, this is somewhat misleading.

A further complication is that on one reading at least, the French risk principle extends further than Fairgrieve's description of it suggests. Some decisions of French administrative tribunals involve liability for risks created by third parties

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NJCL 85; Errera, "The Scope and Meaning of No-fault Liability in French Administrative Law" [1986] CLP 157.

13 See Fairgrieve ibid. at p.137.

14 A risky activity, for these purposes, is one that gives rise to a risk that remains large whatever precautions are taken. This could be because the magnitude of the harm likely to occur if the activity goes wrong is very great, as with munitions factories or nuclear power stations. Or it could be, presumably, because something about the activity meant that the risk of it going wrong was impossible to reduce below a certain level. Vaccination of a whole population might be an example of the latter.

15 As in CE 28 March 1919 *Regnault-Desroziers*.

16 As in CE 3 February 1956 *Thouzellier*. Compare *Dorset Yacht Co. v Home Office* [1970] AC 1004.

17 E.g. by Craig in *Administrative Law* 5th ed., 2003, pp.936–7 and by the Committee of the JUSTICE-All Souls Review of Administrative Law 11.66–11.69.

and not the state. Public authorities have been found liable, for example, for losses suffered by companies as a result of blockades of ports, highways and waterways carried out by strikers and demonstrators.[18] The rationale for such decisions is that the state is responsible not only for positively imposing risks on its citizens but for failing to avert risks that arise from other sources, and that where the harm threatened by these risks eventuates and is suffered particularly heavily by some small minority of citizens, reparation is in order. One can see how the different rationales described in this and the last paragraph may be associated and combined in the following passage from Duguit.

> The only way to affirm the liability of the State is to rely upon the idea of social insurance provided by the central budget and compensating those who have suffered a loss arising from the public services, and the purpose of which is to benefit all. The idea is in turn linked to another one, which has made deep inroads into the legal conscience of modern societies, that of equality in the face of public burdens … So if the intervention of the State creates a special loss for some people, the Government must compensate it , whether there is fault of the public officials or not. The State is, so to speak, the insurer of what is now called the social risk; that is the risk arising from social activity, through an intervention of the State.[19]

The principle of social risk is a political ideal, as are fundamental legal principles such as the principle of substantive equal treatment delineated above. Absent legislative endorsement, however, for a political ideal to become a legal principle it must be the subject of consensus in the political culture of the state in question. There may be a consensus about the principle of social risk in French political culture, but there is none here. Although Parliament has made provision for citizens to be protected against many risks this does not take us to the point at which it can be assumed that the state is obliged to insure us against them all. The principle of social risk cannot therefore be readily transposed into our legal discourse; and since my aim in the present work is to advance a form of administrative liability derived from principles already accepted in English law, I propose to put it to one side.[20]

We are left then with the principle of "equality before public burdens" as expressed in the Council of Europe's formulation and its corollary, liability where the state has created some risk that materializes in the form of harm constituting an unequal burden on some citizen or limited group of citizens. It perhaps bears emphasizing that while principle II thus entails strict liability for harms resulting

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18 As for example in CE 22 June 1984, *Société Sealink Ltd.* The foundational case of this type is CE 30 November 1923, *Couitéas*.

19 L. Duguit *Traité de Droit Constitutionnel* (3d ed., III, Paris) pp.466 *et seq*, quoted by Errera n.12 above p.171.

20 See, in this respect, the arguments made by Bell against state liability for social risk in Bell "Governmental Liability in Tort" n.12 above.

from certain ultra-hazardous activities, it only does so for one among the several reasons that such liability might be though desirable. Strict liability for harm resulting from ultra-hazardous activities might, for example, be advocated because it induces the creator of the risk to take greater precautions than would a weaker standard or because it relieves claimants of the often difficult task of showing that the risk creator was at fault. From the perspective of principle II what matters however, is that the risk is a) exceptional in that it is different from and exists in addition to the risks that the average citizen must face every day[21] and b) undertaken in the public interest.

In the current state of English law, the implementation of this aspect of principle II would create an inconsistency: the state would be strictly liable for harms resulting from certain risky activities while private persons causing harm via the same activities would not.[22] For example, there would be strict liability for injuries caused by an explosion in a state-owned munitions factory but not for injuries caused by an explosion in a privately-owned one. This discrepancy would clearly be unsatisfactory. If the state is under an obligation to treat its citizens as equals, it must also be under an obligation to ensure that the rules governing the relations between citizens do not permit gross inequalities in the risks that one citizen may impose upon another.[23] This takes us, however, beyond the realms of state liability (as opposed to obligations of the state) and hence beyond the scope of this work.[24] What perhaps mitigates the problem is that activities that are exceptionally risky, even if not performed by the state itself, are likely to be

21 This is why there should be strict liability of the state for causing harm via some unusual activity even though the same harm (death or serious injury) might be caused via some everyday activity (e.g. driving) that is not made the subject of strict liability.

22 The main source in the common law of strict liability for harm resulting from risky activities is the rule in *Rylands v Fletcher* (1866) LR 1 Ex 265, affirmed (1868) LR 3 HL 330. The English courts have steadfastly refused to expand the scope of this rule so as to create a rule of strict liability for abnormally dangerous or ultra-hazardous activities such as exists in the United States (see *Restatement of Torts, Second*, § 519). Moreover, in recent decisions the House of Lords has reaffirmed a restrictive interpretation of the rule by assimilating it to private nuisance with the consequence that it cannot give rise to liability for personal injuries and only those with a proprietary interest in the land affected by the escape of the non-natural substance from the defendant's land can sue: see *Transco Plc v Stockport MBC* [2003] UKHL 61; [2004] 2 AC 1; see also *Cambridge Water Co. Ltd. v Eastern Counties Leather Plc* [1994] 2 AC 264.

23 This is a different principle from the principle of social risk discussed in the previous paragraph.

24 For recent discussions over the status of the rule in *Rylands v Fletcher* and the question whether strict liability for ultra-hazardous activities is desirable see Nolan, "The Distinctiveness of Rylands v Fletcher" [2005] 121 LQR 421; Murphy, "The Merits of Rylands v Fletcher" (2004) 24 OJLS 643; Stanton, "The Legacy of Rylands v Fletcher" in Mullany and Linden eds. *Torts Tomorrow: A Tribute to John Fleming* (Law Book Company, 1998).

forbidden except with a licence from the state.[25] Where an activity regulated in this way is lawfully performed but causes exceptional loss, the state can arguably be held liable under principle II. This leaves open the question of the liability of the private operator whose activity was the direct cause of the loss.[26]

As I have made use of the Council of Europe's formulation of Principle II, it is worth, finally, considering two qualifications that the Council adds. The first is that "[t]he application of this principle may be limited to certain categories of acts only." The Committee of the JUSTICE-All Souls of Administrative Law took the effect of this qualification to be that it is for legislatures to decide in what cases principle II-type liability should apply.[27] No doubt there are advantages, from the point of view of legal certainty, in having the categories to which principle II can apply defined in legislation. However, I can see no overriding reason why the courts should not build up a case law under principle II and, in so doing, define these categories themselves. An objection made to the development in ordinary tort law of no-fault liability for loss resulting from ultra-hazardous activities is that it would be hard to decide which activities to treat as ultra-hazardous. To the extent that this objection has force in the context of ordinary tort law, it may also apply to principle II liability, although the focus there should be on whether the loss suffered was exceptional rather than on the hazardousness of the activity giving rise to it.[28] However, it is doubtful whether the problems faced in this context need be any greater than those encountered in the development of the law of negligence.[29]

The Council's second qualification[30] is that "[r]eparation under Principle II may be made only in part, on the basis of equitable principles." In the explanatory memorandum that accompanies the recommendation, the Council explains that "since this provision specifically mentions cases in which it would be manifestly unjust for the injured person to bear the damage 'alone,' it follows that it may be just to make fair rather than full reparation." What I take this to mean is that governmental programmes may be expected to impose some burdens on citizens, so that fair reparation in a particular case might represent, not the whole burden, but the difference between the exceptional burden borne by the citizen in question and a normal or acceptable burden. So if, for example, a road improvement scheme causes the traffic noise suffered by a particular householder to rise to unacceptable levels, the householder will be entitled to reparation. But the reparation might

25 See e.g. Nuclear Installations Act 1965; Civil Aviation Act 1982.

26 The two statutes named in the previous footnote, in fact, impose strict liability on licensed operators.

27 The Committee cites the Vaccine Damage Payments Act 1979 as an example of a UK statute that applies the principle.

28 If the true measure of the hazardousness of an activity is whether harm of great magnitude will occur if the activity goes wrong, then there is little difference between the two questions.

29 Cf. Murphy n.25 above at p.659.

30 Set out in Principle V of the Recommendation.

represent the difference between the new unacceptable noise level and some more acceptable noise level – perhaps the level borne by other householders affected, but less severely so, by the scheme – but not the difference between the new unacceptable noise level and the near silence that the householder enjoyed before.

The JUSTICE-All Souls Committee put a slightly different construction on this second qualification. They thought that the provision by statute, in relation to a given type of harm, of a fixed sum would meet the requirement of "reparation in part, on the basis of equitable principles." It is, however, open to question whether this method of compensation is always fair rather than merely convenient. The JUSTICE-All Souls Committee's example of the Vaccination Damages Payments Act 1979 points up the problem. The Act provides for a fixed sum to be paid to persons who suffer harm as a side effect of vaccination, whether or not there was negligence. But it is not obvious that this constitutes fair reparation if the victim suffers harm far greater than can be compensated for by the fixed sum.

Chapter 6
The Reach of Public Law

The purpose of this and the succeeding two chapters is to say more about principle I and about the notion of public law duty that underpins it.[1] In Chapter 3, I argued for an interpretation of public law according to which public authorities owe public law duties to individuals. I argued further that, as a consequence of principle I, breach of these duties should lead in certain circumstances to the payment of compensation and I gave some rather general indications as to what these circumstances were. In order, however, to yield criteria clear enough to assess the existing law by, this account requires further elaboration and clarification. In Chapter 8, I shall attempt to explain in more detail the nature of public duties and the circumstances in which they may be owed to individuals. But what character one ascribes to public law duties depends in part upon the character of the functions and activities in relation to which one takes them to arise and this and the following chapter are therefore devoted to a discussion of the scope or reach of public law.

The discussion in these chapters will not encompass the difficult question of which bodies or functions are public and which private or of how, in general terms, to draw the line between the public and private spheres. As Cane says, an activity or body's status as public is ascriptive i.e. it involves the making of a decision, on normative grounds, as to whether to treat the body or activity in question as public.[2] Certain criteria employed in making this decision are uncontroversial: it is universally accepted that a body is public if it derives its powers from a statute which makes clear that the powers are to be used for public purposes; likewise, if a body possesses coercive powers that can only be justified on the assumption that they are to be used towards some public end. Beyond this, there is less agreement. It is not necessary, however, for me to deal with this question for present purposes.

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1 The material in these chapters does not relate to principle II. This is a) because the form of liability required by principle II is not susceptible of the sort of elaboration I give here in relation to principle I and b) because what counts as public in relation to principle II is different. Strictly speaking, principle II must apply to any activity which imposes burdens on individuals and which is permitted to be undertaken because it is in the public interest to allow it, whether or not it is undertaken by a public body and whether or not the body undertaking it has to have regard to the public interest in performing it. So, for example, the generation of nuclear power should be subject to principle II even if it is undertaken purely for profit by a private company.

2 Cane, "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in Bell and Eekelaar, *Oxford Essays in Jurisprudence* (Clarendon Press, 1987); Cane, "Church, State and Human Rights: Are Parish Councils Public Authorities" (2004) 120 LQR 41.

My concern, rather, is with what follows once it is accepted that some body or activity is public. The first issue I address is thus not how, in general terms, to assign bodies or activities to the public or to the private sphere but how much of what a public body does should be governed by public law and how much by private law.

It might be thought that to address this issue is also unnecessary because, as in relation to the question of which bodies are public and which private, I could simply accept the classifications made in current law. Given the still existing formulary bias in our system, to do the latter would mean treating as public those powers whose exercise is amenable to judicial review and as private those powers whose exercise can be challenged by means of a private law action. As in previous chapters, however, the approach I take begins with principles rather than with remedies and causes of action, the principles in question being ones I adopt not just because they are normatively correct but because they are also already present in our law. From the point of view of this approach, a division between public and private which is based on the division between judicial review and private law causes of action is unlikely to be satisfactory. Since judicial review offers no ex post facto remedy,[3] there are bound to be cases which are excluded from its scope not because they do not involve issues of public law but simply because an appropriate remedy is lacking. Accordingly, I shall argue that we should think of many of the practical activities of public authorities as governed by public law even though, in the current state of the law, the way in which they are carried out may only be challengeable via the private law of tort.

Before I begin, two preliminary observations are in order. Firstly, I shall borrow the terminology used in relation to s.6 of the Human Rights Act and refer to bodies whose status as public authorities is beyond doubt as "core" public authorities and bodies whose status as public is uncertain or only some of whose functions are public as "hybrid" public authorities. I emphasise, however, that the sense of the terms as used here is not necessarily identical with their sense when used in a human rights context: my concern at present is with the part of public law that exists independently of the Human Rights Act.

Secondly, none of what follows in the present chapter – or in the next two – is intended to show that a satisfactory law of administrative liability could not be created on the basis of existing private law causes of action. Whether or not this is so is a question that remains to be determined. My aim is only to work out in sufficient detail the criteria that any adequate law of administrative liability must meet.

3 By this I mean that judicial review offers no compulsory remedy in relation to acts which have ceased to have legal – as opposed to practical – effect.

The powers of core public authorities and the reach of public law

Public authorities possess their powers for public purposes. If we confine our attention, for the time being, to "core" public authorities on the one hand, and natural private persons on the other, it is possible to make a more categorical statement. Core public authorities can act only for public purposes. By contrast, private persons may act for their own purposes. They are constrained in the ways in which they may do so; they may only pursue their own ends to an extent compatible with others being able to do the same and for that reason are made subject to duties; but they are not limited to acting only in ways that will help attain some duty owed to others.

It might once have been open to doubt whether this view accurately represented the law. It contrasts with another, according to which at least some core public authorities resemble private persons in being permitted to do whatever the law does not expressly forbid. This latter view notoriously found expression in the judgment of Sir Robert Megarry in *Malone v Metropolitan Police Commissioner.*[4] It is also supported by the suggestion, sometimes made, that the Crown can exercise its "third source" powers (i.e. the ordinary common law powers it holds in common with private persons)[5] in the same unrestricted fashion as a private person.[6] However, the view of the position of core public authorities I have put forward is the dominant one amongst commentators[7] and numerous authorities accord with it.[8] It is emphatically confirmed in the much quoted dicta of Laws J (as he then was) in *R v Somerset County Council ex p Fewings*:

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4 [1979] WLR 700. This position is sometimes characterized as following from the Diceyan refusal to recognize public authorities as a distinct class: see e.g. Nardell, "The Quantock Hounds and the Trojan Horse" [1995] PL 27. Nardell refers to "the unreconstructed Diceyan wisdom that individual and government alike are subject to a single system of rules and remedies" and its "converse: no matter how incommensurable the respective power of citizen and state, both benefit from the same 'residual' freedom." While it is plausible to make a link between the Diceyan framework and the principle in *Malone*, it is not clear that, strictly speaking, the one implies the other.

5 The expression comes from BV Harris, "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626.

6 See *R v Lord Chancellor ex p Hibbit and Saunders* [1993] COD 326, The Times, March 12, 1993, QB; Hogg and Monahan *Liability of the Crown* (3rd ed., 2000) pp.219–223. See also the discussions in Harris n.4 above, especially at p.635; Freedland "Government by Contract and Public Law" [1986] PL 86, 91–95; McLean, "The Crown in Contract and Administrative Law" (2004) 24 OJLS 129.

7 See e.g. BV Harris n.5 above; JW Harris n.11 below; Nardell n.4 above; Davies n.19 below; Oliver, *Common Values and the Public-Private Divide* pp.112–116; Wade and Forsyth *Administrative Law* (9th ed., Oxford University Press 2004) pp.354–356.

8 See *Cannock Chase DC v Kelly* [1978] 1 WLR 1 (council's exercise of powers as landlord challengeable in judicial review); *R v Wear Valley DC ex p Binks* [1985] 2 All ER 699 (council's decision to deprive applicant of contractual licence to hold stall on

> "Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationship with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books … But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of rights which it enjoys for its own sake; at every turn all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose."[9]

The view I advocate here is, moreover, to be preferred on grounds of principle. A theoretical justification takes us back to the notion of the state. The state exists to protect its citizens from harm, to enable them to pursue their own ends and to provide in other ways for their welfare. These are its only legitimate ends and the task of public law is to ensure that it serves these ends and no others. Since the power of the state is divided between various organs, public law has a further task of confining each organ to its proper sphere and this means ensuring that each organ pursues only the particular public purposes assigned to it.

In Chapter 3, I followed a widespread practice in talking about fidelity to *statutory* purpose. This way of speaking reflects the fact that the great majority of public authorities are the creation of statute. Yet it is too narrow. The generalization that core public authorities can act only for their assigned public purposes applies to all such authorities whether statutory or not. Most importantly, it applies to the Crown and the police. The purposes for which these authorities can act is a matter of common law. In the case of the Crown, of course, the task of defining these purposes is far from simple[10] and is complicated by the tradition, referred to above, of treating the Crown as able to exercise the common law powers it shares with private persons in the same manner as a private person. Nonetheless, it follows from the view I have espoused here that these powers, as well as its unique

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council-owned land subject to judicial review); *R v London Borough of Ealing ex p Times Newspapers* (1987) 85 LGR 316 (refusal on ideological grounds to take certain newspapers for public libraries held unlawful); *R v Enfield LBC ex p Unwin* [1988] COD 466 (decision to suspend contractor from approved list subject to principles of natural justice); *R v Mid Glamorgan Family Health Services Authority, ex p Martin* [1995] 1 WLR 110 (authority's powers as owner of medical records limited by duty to act in best interests of patients); *R (Molinaro) v Royal Borough of Kensington and Chelsea* [2001] EWHC Admin 896; [2002] BLGR 336 (authority's decision to insist on term in lease governing permissible use subject to judicial review).

9 [1995] 1 All ER 513, 524 E–F. Laws J's judgment was given at first instance. The Court of Appeal's judgment is reported at [1995] 3 All ER 20.

10 Defining the governing aims of the police is less difficult. For a clear account of judicial dicta on the matter see Clayton and Tomlinson *Civil Actions against the Police* (3rd ed., Sweet & Maxwell, 2004) Chapter 1, especially 1-016–1-019.

prerogative powers, can only be exercised in pursuit of public purposes. This means, if nothing else, that they must be exercised in pursuit of some plausible conception of the public interest.

From the view of public power as always restricted by reference to public purposes important consequences follow. One consequence concerns those powers that core public authorities hold in common with private persons. A core public authority may possess the capacities and powers of a private person. It may, for example, be able to enter into contracts and to own land. But it can never possess these capacities to the full. The capacities must always be limited by reference to the public law purposes for which they are possessed.[11] So, for example, in the *Fewings* case itself,[12] the council wished to ban the pursuit on its land of stag hunting, an activity of which it disapproved. The Court of Appeal held that it could not do this unreflectively, in the manner of a private landowner. It had first to ask itself the question whether the ban was consistent with the statutory objective for which it was empowered to acquire the land, namely for the "benefit, improvement or development" of the area.

On the other hand, to point out that core public authorities only possess private law-type powers in a restricted sense is not to deny that they may exercise them in exactly the same fashion as private persons in a wide range of circumstances. In my discussion of Dicey's equality principle in Chapter 2, I argued that where a public authority possesses the same powers as a private person then, other things being equal, their exercise should be governed by the same rules as would govern their exercise by a private person. Thus, I suggested, if some public authority owns land or employs workers, the same legal rules should apply to the authority as would apply to a private land owner or employer unless there is some good reason why they should not.

These two propositions – that core public authorities only possess private law-type powers in a restricted sense and that the exercise of those powers should, other things being equal, be subject to the same rules as would govern their exercise by a private person – are both reflected in the practice of the courts but seem to contradict one another. A first step to showing how they can be reconciled is to consider the relationship between the principles of public law familiar to us from judicial review and the requirement that core public authorities act only so as to attain their assigned purposes.

I have been emphasising in this chapter the principle that core public authorities can act only for public purposes, and a central function of public law is keep public

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11 Note in this context J.W. Harris's characterization of the species of ownership exercised by public bodies: "[t]he content of the domain conferred on an official … over state … property in his charge is a variable composed of elements borrowed from ownership interests and elements deriving from the particular function which that relationship is supposed to serve." See J.W. Harris, "Private and Non-Private Property: What is the Difference" (1995) 111 LQR 421 at 434.

12 Note 8 above.

authorities to those purposes. But as I argued in Chapter 3, it is also the function of public law to protect the interests of individuals. It does not do this, in the fashion of the European Convention of Human Rights, by setting out a clearly defined set of individual interests to be counterposed to the general interest. But without defining in any systematic fashion what the individual interests to be protected are,[13] it protects them in a variety of ways. Thus it requires public authorities to exercise their powers consistently from one case to another; where the interests of a particular individual are especially strongly affected by the exercise of a public power, it requires the authority concerned to follow procedures designed to make especially sure that the outcome in the particular case is congruent with the authority's lawful aims; and it obliges public authorities to take into account the effect of their actions on individual citizens. These methods of protecting the interests of individuals come into play whenever their operation is necessary to ensure that protection; but as we shall see it is not always necessary. For the purpose of the present discussion, it will be useful to analyse administrative law into its constituent principles and to explain the role that different principles or groups of principles play in contributing to its overall ends.

One group of principles is clearly concerned with ensuring an authority's faithfulness to its assigned purposes. This group is made up of the principles that demand adherence to proper purposes, the taking into account of relevant considerations and the ignoring of irrelevant ones; and that prohibit the fettering of discretion or the making of decisions in bad faith. We can also include in this group principles concerned with keeping an authority within its jurisdiction. For convenience, I shall refer to these principles as the "purpose-regarding norms." Since core public authorities must always act faithfully to their assigned purposes, all their actions must be subject to these principles.

In the case of other public law principles, however, the relationship to purpose is less straightforward. The requirement that an authority act reasonably has several

13 Although the interests recognized by pre or extra-Human Rights Act administrative law are not systematically set out in a single place, it is possible to deduce what they are from the practice of the courts. One way of identifying them is to look at the sorts of interests that need to be in issue if the courts are to require the application of rules of natural justice. Use of this method yields all the rights recognized in private law plus other interests – for example if a person needs some licence to pursue her livelihood, the courts will require that the relevant authority observe norms of procedural fairness in determining whether the licence should be revoked or renewed, thus effectively recognizing the licence-holder's interests in pursuing her livelihood in the manner in question. One can also identify the individual interests recognized by administrative law by looking at the kinds of interests capable of being the subject of a substantive legitimate expectation strong enough to override a policy pursued by a public authority in the general interest; or by considering the part of the requirement of reasonableness that obliges an authority to consider the effects of its actions on individuals and asking which kinds of interest must be taken into account in order to satisfy this requirement; note in this context the reference to cases such as *Hook* and *Wheeler* at n.14 below.

strands. Some of these are concerned with ensuring fidelity to purpose but others are not. Thus the judgment that an act was unreasonable might rest on the fact that it could not possibly achieve its intended purpose; or on the fact that it was calculated to achieve a result which could only be regarded as congruent with the authority's purposes if these were given an interpretation that was itself unreasonable. To the extent that considerations of this type form the basis of a judgment that an act is unreasonable, we can count the requirement of reasonableness as belonging to the group of purpose-regarding norms. On the other hand, an act might be considered unreasonable not because it could not help achieve the authority's purposes but because it inevitably involved ignoring or giving too little weight to the interests of affected individuals.[14]

The principles associated with the ideal of procedural fairness are aimed at ensuring fidelity to purpose, but in a special sense. Their function is to provide an extra guarantee of that fidelity in individual cases in which important interests of an individual are at stake.[15] In their nature, the requirements of procedural fairness only apply to certain sorts of public power and in certain sorts of circumstance.[16] The old distinction between judicial and administrative functions has long been abandoned in favour of the more flexible principle that the court will impose

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14 The kinds of cases adduced by Jowell and Lester in "Beyond Wednesbury: Substantive Principles of Administrative Law" [1987] PL 368 as evidence that pre-Human Rights Act law contained a tacit principle of proportionality would be examples of this. See for example *R v Barnsley MBC ex p Hook* [1976] 1 WLR 1052 and *Wheeler v Leicester City Council* [1985] 2 All ER 1106, both cases in which what were arguably disproportionate punishments were held unreasonable. I do not mean to endorse any claim that pre-Human Rights Act law public law contained a fully fledged principle of proportionality of the sort employed in European Convention and EC law. English law has not traditionally allowed any precise balancing of the public and individual interests. Nonetheless, one traditional definition of an unreasonable decision is that it defies accepted standards. On that basis, a decision that gives too little or no weight to what is generally recognized as an important individual interest is unreasonable.

15 In case this is not clear, consider the following simple example. Suppose an authority has the power to license an activity in order to ensure that it is conducted safely. If it is minded to revoke a licence-holder's licence on the ground that she is not conducting the activity safely, it may be required to present the licence-holder with the evidence it has to support its view and to allow the licence-holder to present evidence to the contrary. The effect of these procedural requirements is to increase the probability that the licence will only be revoked where there are genuine grounds for doing so i.e. where the activity is genuinely being conducted in an unsafe manner. By increasing the accuracy of the decision, the requirements of procedural fairness thus promote fidelity to the authority's purpose in the particular case. This benefits both the individual affected by the exercise of the power, since the authority will only revoke her licence where there are good grounds for doing so and the general public, who have an interest in the activity being permitted where it is safe and forbidden where it is not.

16 They may also be employed outside the public law context where one private party has power over another, as for example in *McInnes v Onslow-Fane* [1978] 1 WLR 1520.

whatever procedural norms fairness demands. Nonetheless, these norms tend to apply where an authority has the power to determine whether an identified individual should receive some benefit or suffer some burden. They are necessary above all where the individual is, so to speak, at the mercy of the authority and has no protection other than that provided by the procedural norms themselves.

Lastly, the doctrine of substantive legitimate expectations[17] does not ensure fidelity to purpose but ensures consistency in cases in which important interests of an individual or limited class of individuals is affected by the exercise of the power in question. Whether it applies depends upon whether the authority in question has behaved so as to raise some reasonable expectation on the part of an identified individual or limited class of individuals.

I shall call all those public law norms that do not fall within the class of "purpose-regarding norms", again for the sake of convenience, "individual-regarding norms." It is important to emphasize, however, that these *are* simply labels adopted for the sake of convenience and that not too much importance should be attached to the particular terms I have used. Above all, the use of the label "purpose-regarding" should not be taken to imply that the norms in question are only concerned with the attainment of public purposes in the general interest and not with the protection of individual interests. Ensuring the fidelity of an authority to its public purposes will protect the interests of individuals where the purpose in question is to protect or benefit individuals. All that calling these norms "purpose-regarding" is meant to imply is that the norms are applicable wherever a public authority must be kept to its public purposes (which in the case of core public authorities is always) and not where the interests requiring protection are solely those of individuals. Similarly, the use of the label "individual-regarding" should not be taken to imply that the norms in question are never concerned with holding public authorities to their assigned purposes: we have seen from my account of the function of the principles of procedural fairness that they may be. All the label is meant to imply is that these norms only apply where individual interests are in need of protection.

We can see how this analysis helps to resolve the apparent conflict between the two propositions considered above if we distinguish now between three types or levels of power that a public authority may possess.

Type 1: uniquely public powers

Type 1 comprises special powers that go beyond those usually possessed by private persons. These are generally powers to determine what a private person's entitlements are, as in the case of licensing, or to override the private rights of individuals as where an authority can confiscate property, arrest people or remove children from their parents. It follows from what was said above, that the exercise of these powers will always be subject to the "purpose-regarding norms." Many

17 I count the doctrine of procedural legitimate expectations amongst the principles of procedural fairness.

powers of this type – licensing powers, for example – will also frequently be subject to the "individual-regarding norms." Since they are unlike the powers private persons usually possess, there are no private law principles to govern their use and private rights cannot avail victims of their misuse since either (as in the licensing case) there are no relevant private law rights or the private rights that there are can be overridden.[18] In relation to such powers, the protections provided by public law are therefore especially important.

Type 2: private law-type powers

Type 2 comprises those legal powers that public authorities share with private persons such as being able to make contracts and own land. In relation to powers of this sort the two conflicting propositions – about the limitedness of public authority power and the subjection of private law type-powers to private law rules – are harder to reconcile. The basic principles that govern the power of public authorities to make contracts are tolerably clear: in order to make a contract, a public authority must satisfy the usual requirements of the law of contract; but the contract must also serve some purpose for which the authority has the power to act;[19] and it must not fetter the authority's discretion.[20] The picture becomes harder to make sense of, however, when we look at judgments which deal with the question whether the exercise by public authorities of other contractual powers should be subject to public or to private law. In these decisions, the courts have often insisted that there must be a "public element" if the case is to be determined in accordance with public law principles and not merely on the basis of the ordinary rules of contract. This public element has been readily discovered in relation to some types of contract-based action, for instance where local authorities have exercised their powers as landlords to evict tenants,[21] and to make decisions about the rights of market traders.[22] But in cases concerning the dismissal of public authority

18 In cases in which a public authority purports to override a private law right – as for example, in the case of arrest – the individual concerned may be able to use a private law remedy. But the success of the remedy depends upon showing that the authority has acted unlawfully, and this is a matter of public law. See the discussion in Chapter 10 below at pp.134–5.

19 As the authority failed to do, for example, in *Hazell v Hammersmith LBC* [1992] AC 1. For an illuminating recent discussion see Davies, "Ultra Vires Problems in Government Contracts" [2006] 122 LQR 98.

20 See e.g. *Dowty Boulton Paul Ltd. v Wolverhampton Corporation* [1971] 1 WLR 204.

21 *Bristol DC v Clark* [1975] 1 WLR 1443; *Cannock Chase DC v Kelly* n.8 above; *Sevenoaks DC v Emmott* [1979] 79 LGR 346; *Wandsworth LBC v Winder* [1985] AC 461. See also *R (Molinaro) v Royal Borough of Kensington and Chelsea* n.8 above in which the decision challenged was a refusal by the authority to allow a tenant to change the use of premises.

22 *R v Barnsley MBC ex p Hook* n.14 above; *R v Basildon DC ex p Brown* (1981) 79 LGR 655; *R v Wear Valley DC ex p Binks* n.8 above; *R v Birmingham CC ex p Dredger and*

employees, the courts have been slow to hold that there is a public element and have tended to insist that, with certain significant exceptions, the same rules should be used as would apply between private parties.[23] In the field of procurement, the courts have in some cases held that decisions are subject to judicial review[24] and in others that the public authority concerned was subject to constraints no greater than would apply to a private person.[25]

A similar diversity is found in cases concerning the exercise of public authority powers as landowners where there is no subsisting contract. Decisions to revoke licences granted to members of the public to use land for particular purposes have generally been held susceptible to judicial review,[26] but local authority decisions to sell or refuse to sell land have been held reviewable in some cases[27] and not reviewable in others.[28]

One might suppose, from reading some of these cases, that public authorities possess a zone of private power into which public law principles do not intrude. On this view, the question in any given case would then be whether the authority concerned was using the private or the public part of its powers. From what was

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Paget [1993] COD 340; *R (Agnello) v Hounslow LBC* [2003] EWHC 3112 (Admin).

23 The leading case is *R v Berkshire AHA ex p Walsh* [1985] QB 152 CA. The most important exceptions are where a decision is one of policy so that it affects a number of workers and not simply the claimant, and where statute lays down some special procedure for dismissal of employees: see *R v Secretary of State for the Home Office ex p McLaren* [1991] IRLR 338; *R v Derbyshire County Council ex p Noble* [1990] IRLR 332 and see generally Deakin and Morris, *Labour Law (*4th ed., Hart, 2005) especially at 2.5 and 5.47–5.52.

24 As for example in *R v Lewisham LBC ex p Shell UK Ltd*. [1988] 1 All ER 938; *R v Enfield LBC ex p Unwin* n.8 above; *R v Derbyshire County Council ex p Times Supplements [1990] Admin* LR 241; *R v Legal Aid Board ex p Donn and Co. (a firm)* [1996] 3 All ER 1; *R v Bristol CC ex p DL Barret and Sons* (2001) 3 LGR 11.

25 As for example in *R v Lord Chancellor ex p Hibbit and Saunders* n.6 above. See also *Mass Energy Limited v Birmingham City Council* [1994] Env LR 298, where the court held that judicial review was only available in relation to procurement decisions where it was necessary to ensure that specific statutory requirements were observed, and to similar effect *R v Bridgend County BC ex p Jones* (2000) 2 LGLR 361.

26 See *Fewings* above n.8; *Wheeler v Leicester City Council* n.14 above. See also *West Glamorgan County Council v Rafferty* [1987] 1 All ER 1005 where the court found that the council's action in seeking a possession order against the defendants was unreasonable given that the defendants were occupying the council's land as a result of the council's failure to perform its duty to find them a site to occupy under the Caravans Act 1968.

27 *R v Barnet LBC ex p Pardes House School Limited* [1989] COD 512; *R (Ise Lodge Amenity Community) v Kettering BC* [2002] 24 EGCS 148.

28 *R v Leeds CC ex p Cobleigh* [1997] COD 69; *R v Bolsover District Council ex p Pepper* [2001] JPL 804; (2001) 3 LGLR 20.

said above, however, it follows that this cannot be the case. Since a core public authority can only act in pursuit of its assigned public purposes it must always be doing so even when it is exercising private law-type powers. And by the same token, it must always be subject to the purpose-regarding norms. When a core public authority exercises private law-type powers, we must therefore think of it as simultaneously subject to two sets of norms, those of private law and, at the very least, the purpose-regarding norms of public law.

But if this is so, why do the courts sometimes ignore public law or treat it as inapplicable when deciding cases involving the exercise by public authorities of private law-type powers? The answer, I suggest, is as follows. Where a public authority exercises type 2 powers, it does so typically for purposes ancillary to its assigned public purposes. Sometimes, the ancillary purpose in question is to maintain the basic infrastructure necessary to the operation of any organization. Thus an authority's powers to own land will be used to acquire the land it needs as a site for its offices, and its powers to contract will be used to acquire necessary supplies and to employ workers who perform generic tasks such as security guards, cleaners and secretaries. In other cases, type 2 powers may be used for purposes which are more particular to the public authority in question than the generic functions just mentioned but which can nonetheless be described as ancillary to the authority's assigned public purposes and necessary to the maintenance of its infrastructure. Thus, for example, the National Health Service uses its powers to contract to obtain medicines and to employ health care workers.

The exercise of type 2 powers for the sorts of purposes just described – despite being, for the reasons we saw above, subject to public law norms – is unlikely to give rise to instances of public law unlawfulness. The reasons for this are twofold. Firstly, such exercises will nearly always serve the authority's purposes. Decisions to employ or dismiss workers or to choose one supplier of goods over another will not contravene the purpose-regarding norms unless they are corrupt or transparently unreasonable or involve such obviously bad judgment as to breach the authority's fiduciary duty to use tax payers' money carefully.

Secondly, if we turn to the individual-regarding norms, these will seldom apply. This is, in part, because an authority exercising type 2 powers for ancillary or infrastructural purposes is rarely in a stronger position *vis-à-vis* persons affected by the powers' exercise than an analogously-placed private person would be. For example, an authority choosing which of a number of suppliers of goods to contract with cannot, as it can in type I cases, determine or override the rights of the individuals it is dealing with; their position, in theory at least, is no stronger or weaker than it would be if they were seeking a contract with some private organization. In these circumstances, there is arguably no reason for the person affected by the exercise of the authority's powers to be able to claim the protections afforded by the rules of natural justice. Nor, since the relationship between the authority and the potential supplier is an essentially commercial one, does there seem to be any reason for the supplier to have any legitimate expectation that the authority will give greater weight to its rights or interests

than private law generally requires an organization awarding a contract to give to the rights or interests of those seeking to receive the award. In other words, there seems no reason for the public law doctrine of legitimate expectations to apply at all. Similarly, that part of the requirement of reasonableness that demands that an authority consider the impact of its decisions on individuals will be satisfied if the authority respects the potential supplier's private law rights. In other words, again, the public law requirement does not apply. At the same time, it remains always the case that if the authority exercises the power in question so as to infringe the affected party's private rights, then that party can bring private law proceedings in the normal way.[29]

The tendency of the courts to speak as if public authorities possess a zone of purely private law power can then be explained as reflecting – in a rather unsatisfactory fashion – certain features of the use by public authorities of the sorts of legal powers that private persons also possess. In sum, these are that authorities often use the powers to perform various functions ancillary to their primary assigned purposes; that the performance of these functions is unlikely to result in public law unlawfulness; but that persons adversely affected will be able to seek private law remedies if their private law rights are infringed.

If we look at recent case law, we find that this explanation finds some support in the actual practice of the courts if not in their rhetoric. Thus we find that while, on the one hand, the courts have characterized one procurement case as not involving a public element when rejecting a claim based on legitimate expectations[30] and have insisted in another that judicial review was only available because there was breach of a specific statutory requirement,[31] they have allowed elsewhere that there should be judicial review of contract-awarding decisions "if there were bribery, corruption or the implementation of a policy unlawful in itself"[32] or if there were irrationality.[33]

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29 Cf. The remarks of Scott LJ in *Mass Energy* n.24 above at p.313. His Lordship dismissed the idea that the doctrine of legitimate expectation applied in the context of procurement but said that if a representation gave rise to the formation of a contract, the disappointed tenderer would have his action.

30 *Hibbit and Saunders* n.6 above.

31 *Mass Energy Limited v Birmingham City Council* n.25 above.

32 *R (Cookson and Clegg) v Ministry of Defence* [2005] EWCA Civ 811 at [18].

33 See *R (Gamesa Energy UK Ltd) v National Assembly for Wales* [2006] EWHC 2167 (Admin). By contrast in *R (Menai Collect Ltd) v Department of Constitutional Affairs* [2006] EWHC 724 (Admin) the court held that a decision not to award a contract to the claimant was not amenable to a challenge based on failure to take account of relevant considerations and mistake of fact. On the other hand, when one examines the reasoning in this case, one finds that the judge effectively considers and rejects the claim rather than simply deciding a priori that the decision is not susceptible to claims of the type in question. My thesis is also at odds, to some extent, with two cases in which decisions to

In cases concerning the sale of land, the explanation above renders explicable the difference between two recent cases. In *Pepper*,[34] having entered into negotiation with the claimant property developers to sell them a piece of land, the defendant council refused to do so. The developers sought judicial review on the grounds that their legitimate expectations had been breached but the court held that the decision was not amenable to review. In *Ise Lodge*,[35] the claimants were a group of local residents who sought to challenge the council's resolution to sell a piece of land which it had earlier resolved to preserve as amenity land. The resolution was not a disposal for the purpose of s.123 of the Local Government Act 1972 and therefore not subject to the requirements of that section. Nonetheless, Goldring J held that it was a matter of public law and susceptible to the claimants' challenge. This was based on the allegation that the council had acted irrationally in the sense that it had taken into account irrelevant considerations and failed to take into account relevant ones. The two cases conform to the logic of the explanation I have offered.[36] The first involved a commercial relationship in which the claimants sought to invoke a public law norm which would have served to protect their own interests without doing anything to ensure the authority's fidelity to its assigned purposes. Accordingly, the claim could not succeed. In the second, by contrast, the claimants were essentially questioning whether the authority's actions served the purposes for which it was permitted to exercise the power in question.[37] The

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remove the claimants from lists of approved contractors were held amenable to challenge on procedural grounds: see *Unwin and R v Bristol CC ex p DL Barret and Sons*, n.8 and n.24 above.

34 n.28 above.

35 n.28 above.

36 The decisions on employment cannot really be made to fit this pattern. Nonetheless, a rational approach would, I suggest, differentiate between conduct by an authority in the treatment of its employees which affected its capacity to attain its public ends and conduct whose only important impact was on the rights or interests of employees concerned. In relation to the former, the purpose-regarding norms would be relevant but in relation to the latter, there would be no reason not to confine the employees to the remedies available in ordinary employment law. To the extent that these were not sufficient, this would reflect a deficiency in employment law generally and not just as it relates to public employees. Cf. Morris, "Employment in Public Services: The Case for Special Treatment" (2000) 20 OJLS 167 where the author's argument for different treatment of public employees are all to do with those aspects of the behaviour of employees – potentially corrupt contacts with outsiders, strikes – that impact especially on the ability of an authority to attain its assigned ends. See also Fredman and Morris, *The State as Employer: Labour Law in the Public Services* (Mansell, 1989) Ch.7.

37 This is not to deny that it was in the interests of the claimants to have the authority exercise its powers in a particular way – or even that the authority might have been under a duty towards the claimants to do so. But this was because the authority had chosen, from amongst the lawful purpose for which it could exercise the power, to exercise it for a purpose which benefited the claimants; and as members of the public affected by the

court was prepared to entertain this challenge, even though it found, on the facts, that it failed.

To repeat, then, the courts' habit of characterizing certain exercises of private-law type powers as taking place in the realm of private law reflects the fact that these exercises are unlikely to give rise to instances of public law unlawfulness, not that they are not subject to public law norms. The corollary of this is that the private-law type powers whose exercise the courts have held to take place in the realm of public law are typically of a kind whose exercise is much more likely to give rise to public law unlawfulness. Whereas the powers which the courts assign to the private law category are exercised for purposes ancillary to the authority's primary assigned purposes, those assigned to the public law category are exercised directly in pursuit of those purposes. There is consequently a much closer relationship between how the powers are exercised and whether the authority's assigned purposes are attained and this increases the probability that exercise of the powers will contravene one or more of the purpose-regarding norms.

Where, moreover, an authority's assigned purpose in exercising a power is to confer benefits of some sort on individuals then there generally subsists between the authority and the individual affected the kind of relationship to which the application of individual-regarding norms is appropriate. This is because the individual is likely to be dependent upon or, in some sense, at the mercy of the authority so that any private law rights she may have will not provide her with sufficient protection from misuse of the power in question. In these circumstances, it is arguable that the authority should treat the individual in accordance with some, at least, of the principles of procedural fairness; that the individual has some entitlement to the guarantees of consistent treatment provided by the doctrine of substantive legitimate expectations; and that the reasonable authority must take into account the impact that exercise of the power in question has on the individual and not merely the need to avoid infringing the individual's private law rights.

Both of these features – the greater probability of contravening the purpose-regarding norms and the applicability of individual-regarding norms – can be seen where local housing authorities lease accommodation. Here the authority exercises the private law powers of a landlord but does so in order to attain one of its primary purposes as a local housing authority, namely to provide housing to those who are in some way in need.[38] This being so, there is a close relationship between how, for example, the authority exercises its powers to evict tenants and whether or not it is attaining its purpose: it would be failing in its purpose if it evicted tenants on the basis of irrelevant considerations and it therefore cannot

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exercise of the power the claimants were entitled to bring legal proceedings to ensure that it continued to be used for lawful purposes.

38 This purpose is not set out in so many words in the legislation but it is implicit in the combination of local housing authorities' duties to allocate housing (see the Housing Act 1996 s.167) and their powers to own and to manage housing (now contained in the Housing Act 1985 ss.7 and 21).

have anything approaching the degree of freedom in its dealings with its tenants that a private landlord might have.[39] Further, because it possesses its powers, in part, for the benefit of its tenants and because, despite having private rights under their leases, the tenants position vis-à-vis the authority is rather a weak one, one would expect the individual-regarding norms to apply.

This is indeed what we find. In challenges to decisions to evict council tenants, the courts have been prepared to entertain arguments based both on the taking into account of irrelevant considerations and the failure to provide reasons or give a fair hearing.[40] A similar explanation can be given of the courts' consistent willingness to treat challenges to local authority decisions concerning market traders as belonging to the realm of public law.[41]

The case law on the amenability to judicial review of the private law type powers of public authorities has been the subject of a certain amount of academic comment. Arrowsmith, writing primarily in the context of procurement, has argued that the courts "should accept that these powers are reviewable as a matter of principle but that review may be negated or limited by specific policy factors, rather than continue searching for some 'public law' element to the decision as a justification for applying public law doctrines to the case before them."[42] Craig has written in reply that it is:

> "Somewhat odd to suggest that *all* contracts entered into by public bodies should be subject to judicial review, in particular if this is taken to mean that the substantive and procedural principles of public law should be applied. These principles may not be appropriate when a public body makes an ordinary commercial contract for furniture, a lease or the like. It is not self-evident that a private contractor who makes such a contract with a public body should have greater substantive and procedural rights than any other contracting party. Given that this is so it seems that it *is* necessary to retain the idea of a 'public law element' in order to distinguish between the two types of cases."[43]

More recently, Bailey has endorsed Arrowsmith's position and emphasized the inappropriateness of treating the question of whether particular grounds of public

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39 It follows, of course, from what I said above that even when exercising the kinds of powers that the courts commonly assign to the realm of private of law, an authority does not have the degree of freedom that a private person has. My point, however, is simply that this is more obvious in cases like that of the local authority landlord in which private-law type powers are used to attain one of the authority's primary purposes.

40 See *Cannock Chase DC v Kelly* n.8 above, *Sevenoaks DC v Emmott*, n.21 above.

41 See the cases cited at n.22 above.

42 Arrowsmith "Judicial Review and the Contractual Powers of Public Authorities" (1990) 106 LQR 277 at 291. See also by the same author "Legitimate expectations and judicial review in contract award procedures: a note on R v The Lord Chancellor, ex parte Hibbit and Saunders" (1993) 2 PPLR CS 104; *The Law of Public and Utilities Procurement* (1996) pp.33–37 and (2005 edition) pp.79–85.

43 *Administrative Law* (5th ed., Sweet & Maxwell, 2003) p.812.

challenge apply as a question of amenability to judicial review.[44] The real issue in any case, he argues, is whether the grounds are made out.

The conclusion of the account I have given here is that Craig is right to the extent that there are certain commercial contexts in which there is little justification for the application of what I have called the individual-regarding norms of public law. On the other hand, Arrowsmith and Bailey are right to the extent that it is misleading to speak of core public authorities as possessing a zone of purely private power. Nor does it make sense to turn the issue of whether particular principles of public law apply in a given case into a question of jurisdiction.[45]

In this account of the status of type 2 powers I have gone to some lengths to try and explain the courts' practice of characterizing some acts of public authorities as belonging solely in the realm of private law. From the point of view of my larger argument, however, the important point is that where core public authorities have legal powers of the sort also possessed by private persons they are simultaneously subject to two sets of norms and hence, potentially, two sets of duties. Their exercise of private law type powers is subject to the same limitations as such powers are subject to when exercised by a private person i.e. they are limited by the need to respect the private rights of others. At the same time the powers must be exercised in conformity with whichever public law norms are applicable and this may give rise to duties to individuals in the same way as the exercise of the pure public law powers belonging to type 1 may do. I shall draw out the implications of this for liability later in this chapter and in Chapter 8.

Type 3: practical powers

I turn now to type 3 powers. Whereas type 2 comprises the powers which public authorities share with private persons to enter into legal relations, type 3 comprises the powers that public authorities possess, through their employees, to perform practical activities that could in principle be performed by natural persons. The power of the fire brigade to put out a fire or of the highway safety crew to remove rocks from the hillside[46] above the highway are examples.

It should be said straight away that many of the practical activities of public authorities do not fall into this category because they are done in execution of decisions made in the exercise of type 1 powers. This means that the authorities are able to invade or override private law rights. Protection of the interests of individuals affected by the exercise of these powers must be a matter of public law since those individuals cannot seek protection by insisting on their private law rights. An obvious example of practical activities which involve the invasion of private law rights is the exercise by the police of powers to arrest and imprison

44 Bailey "Judicial Review of Contracting Decisions" [2007] PL 444; See also the same author's note on the *Menai* and *Gamesa* cases at (2007) 17 PPLR 1, NA11.

45 I.e. of whether or not a particular act is amenable to judicial review.

46 As seen in the Canadian cases discussed in Chapter 4.

people and to enter and search premises.[47] The functions of the authorities I mention here as exercising type 3 powers – the fire brigade and the highway authority – may themselves involve the exercise of powers to override private law rights: the fire brigade is empowered where necessary to break into houses and destroy property; highway authorities have powers to enter onto land in order to do works necessary to make the highway safe. But the particular powers I mention can in principle be performed without invading private law rights; and they do not in themselves involve the exercise of capacities not possessed by natural persons.

If we confine our attention to powers of this last type then, the logic which I applied in relation to type 2 powers requires the following. On the one hand these powers must be like all a core public authority's other powers in that they can only be exercised in pursuit of the authority's assigned public purposes; this means that they must be subject at least to the purpose-regarding norms of public law. On the other hand, other things being equal, the exercise of the powers should be subject to the same rules as would govern their exercise by a private person.

I shall address in a moment the question of when, in relation to these activities, it is appropriate to invoke public and when private law norms. Before I do this, however, I wish to say more about the basic notion that the practical activities of public authorities can be governed by public law. The idea is an unfamiliar one because judicial review is largely concerned with supervising the exercise of powers belonging to type 1 and type 2 but, as I suggested in the introduction to this chapter, this is simply a reflection of the absence in judicial review of any ex post facto remedy.[48] Clearly, most of the norms of public law have little relevance to the most practical activities. There would be something incongruous about requiring a fireman at the scene of a fire to take into account relevant considerations and ignore irrelevant ones. Nonetheless, we can think of the performance of practical activities as being governed by the requirement of reasonableness in both the purpose-regarding and the individual-regarding senses I identified above. Public authorities must act reasonably in the purpose-regarding sense because to allow them to do otherwise would be inconsistent with the basic principle that they must always act so as to attain their assigned purposes. This must be so of authorities such as the fire brigade or the police whose duties self-evidently contain a large practical element: it would make no sense to insist, for example, that the fire brigade act reasonably and in a way faithful to its purposes when making policy

47 That redress for the misuse by the police of the sort of powers mentioned in the text is traditionally provided by the law of tort is an issue I deal with in Chapter 10.

48 Note in this connection the passage in Wade and Forsyth's *Administrative Law* (8th ed.) pp.602–3 in which the authors castigate Lord Diplock for pretending that every act found to be unlawful in judicial review must be a decision. Compare further French administrative law where *agissements* (i.e. actions not capable of producing legal effects) as well as *décisions exécutoires* (decisions capable of producing legal effects) can give rise to administrative liability: see Fairgrieve *State Liability in Tort: A Comparative Study* (Oxford University Press, 2003) p.29.

decisions about staffing, equipment, operating practices and so forth but then to treat the decisions its members make on the ground as to how to fight a fire as immune from the same fundamental requirement of fidelity to purpose. It must also be so of the practical activities of public authorities whose functions are entirely administrative and whose powers *vis-à-vis* the citizen belong to type 1. If the tax authorities decide that a citizen is entitled to a tax rebate, they are then under an obligation to send the citizen in question a letter containing a cheque and this means that the clerk charged with carrying out the task must not forget to do it or post the letter to the wrong address or include a cheque in the wrong amount. The obligation to perform practical tasks reasonably in the purpose-regarding sense is, in effect, a duty of practical competence and, where appropriate, I shall speak of public authorities as having such a duty in the rest of this book.

Once one accepts that the practical activities of public authorities are subject to a public law requirement of reasonableness in the purpose-regarding sense, it is then arbitrary to deny that they are also subject to a requirement of reasonableness in the individual-regarding sense. In other words, just as both strands of the requirement of reasonableness apply to the kinds of exercise of public power that traditionally form the subject matter of judicial review, so must both strands apply to a public authority's practical activities. A public authority is thus obliged to conduct its practical activities in a way which takes account of the interests of the persons likely to be affected by them.

These conclusions can be strengthened by refuting two assumptions which have often been made and which conflict with the idea that public authorities' performance of their practical activities can be governed by public law. One such assumption is that there are two monolithic standards of reasonableness, a public law standard and a negligence standard, each irreducibly distinct from the other and applying uniformly within its usual domain of application. If we put to one side for a moment the recent advent of alternative standards of substantive review, the assumption entails that to invoke reasonableness in the context of public law is to invoke a single highly deferential standard, the Wednesbury standard, that applies whatever act is under review; whereas to invoke reasonableness in the context of negligence is to invoke a standard more suited to practical activities and involving much more intrusive practical prescriptions. This would mean that to apply public law reasonableness to practical activities would be to apply a highly unsuitable standard, a far too deferential one. Alternative standards such as "super-Wednesbury" or proportionality would hardly be more appropriate.

To see why the assumption is false, it helps to think for a moment about how the notion of reasonableness is used in ordinary discourse. Broadly speaking, in ordinary discourse, to perform an activity reasonably is to perform it in accordance with generally accepted standards. More exactly, it is to perform it in a way compatible with whatever duties and obligation the actor is generally recognized as having, in a way generally recognized as likely to achieve the desired result, and

in accordance with generally recognized moral standards.[49] Judgements of what is reasonable vary in their degree of prescriptiveness. In relation to many practical activities, the judgement most people will make as to what is reasonable will be fairly prescriptive because only a small number of methods are recognized as likely to achieve a desired result. Everyone will agree that it is reasonable to try to put a fire out with water and that it is unreasonable to try to put it out with petrol. Such cases are also clear cut because they present no moral dilemmas. Judgments as to reasonableness will be far less prescriptive, however, where there are no agreed upon methods of achieving the desired outcome and where there is no consensus as to the moral criteria that should apply. In such cases, a judgment will very likely exclude some courses of action as unreasonable while refusing to condemn a very wide range of other courses of action none of which obviously contravene accepted standards. So if, for example, a government minister is charged with addressing the social problem of drug addiction, certain methods, such as shooting anyone suspected of being a drug addict, will be ruled out as unreasonable. But the choice of methods not ruled out as unreasonable will be a wide one. In between these two extremes – the putting out a fire case and the drug addiction case – there is a whole spectrum of types of activity. Each differs according to the degree to which commonly accepted standards dictate how the activity in question should or should not be conducted and the corresponding prescriptiveness of any judgment that will be made as to the reasonableness of any course of action adopted.

Normatively, there is no reason not to transpose this model into the legal sphere. Nor, I suggest, does it misrepresent actual legal practice to do so. In debates over the relationship between public law reasonableness and reasonableness in negligence, it has been pointed out[50] that the latter standard is not invariably a more prescriptive (or less deferential) one than the former: in professional negligence, a much more deferential standard is used.[51] By the same token, there is no reason not to think of public law reasonableness as being a more prescriptive notion where a public authority is engaged in the performance of a practical task. The prescriptiveness of the test of what is reasonable should vary in accordance with the extent to which the range of courses of action open to the actor is circumscribed by generally accepted standards.

It follows from the foregoing that what constitutes reasonable conduct in a particular case is likely to differ according to whether the actor is a public authority

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49 I.e. the ordinary language notion of reasonableness has both the "purpose-regarding" and the "individual-regarding" character I ascribed to the public law notion earlier in this chapter. In other words, it combines two values that are often distinguished in philosophical discussions of rationality, instrumental rationality and rationality as a moral value.

50 See e.g. Bailey and Bowman "The Policy/Operational Dichotomy – A Cuckoo in the Nest" [1986] CLJ 430 especially at pp.431–436. See also Hickman "The Reasonableness Principle: Reassessing its Place in the Public Sphere" (2004) 63 CLJ 166 at pp.176–183.

51 As e.g. in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

or a private person; but this is because a public authority's duties, resources and capabilities are likely to be different from a private person's and not because the concept of reasonableness itself alters between the two domains.

The second assumption I wish to rebut is less widely accepted than the first – indeed is generally discredited – but it may be worth nonetheless spelling out why it is mistaken. The assumption is the one which, on one reading at least, underpins the policy/operations distinction. It is that where a body performs a practical activity as part of some larger function, the activity can somehow be separated from its larger context and regulated accorded to a standard appropriate to the activity itself rather than to the function of which it is part. Bound up with this is the idea that the proper standard to be applied in regulating a practical activity is the same wherever the activity can be classified, as a matter of ordinary language rather than law, as being of a particular type. On this view, a particular standard would be appropriate to govern instances of fire fighting just because they were fire fighting; and a particular standard would be appropriate to govern instances of the taking of flood control measures just because they were the taking of flood control measures.

The conception of reasonableness I defended above involves, at an abstract level, a uniform method but results in different standards depending partly upon the nature of the activity being performed, but also upon the duties, resources and capabilities of the person performing it. By contrast, the assumption involved in this understanding of the policy/operational distinction entails fixing on the nature of the activity, and disregarding the duties of the person performing it. Typically it has been associated with the belief that the "policy" parts of a public authority's functions must be governed by public law but that the "operational" parts may be governed by the ordinary law of negligence.[52]

The assumption is false, however. The standards which govern a practical activity must be conditioned by the legal duties in fulfilment of which the activity is performed. The case of the fire brigade can be used again to illustrate this contention. The fire brigade has a duty to put out fires. It has "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,"[53] and it must "secure provision of the personnel, services and equipment necessary efficiently to meet all normal requirements"[54] and "make arrangements for dealing with calls for help and for summoning personnel."[55] Its conduct is thus clearly governed by public law standards. It is tempting to suppose, nonetheless, that at the practical level, on the ground, what constitutes competent fire fighting must be the same whether carried out by the fire brigade or a private company. Yet how an act is performed at the operational level may be

52 For an example of someone who has expressed such a belief, see the account of Harlow's arguments in Chapter 7.

53 *Fire and Rescue Services Act 2004* s.7(1).

54 Ibid. s.7(2)(a).

55 Ibid. s.7(2)(c).

determined by decisions made at the policy level as to levels of staffing, budgets and so on. The decision on the ground as to whether to take one course of action or another in attempting to put out a fire might, for instance, be determined by some earlier decision as to whether to buy a particular sort of equipment. The latter decision would belong unequivocally in the realm of public law, its lawfulness and propriety to be judged in the light of the fire brigade's overarching duties to the general public. And since a judgment as to the reasonableness of the former, practical decision could not be made separately from a judgment about the latter, policy one, the practical decision must be thought of as governed equally by public law. Moreover, where, as in the case of the fire brigade, an authority's powers derive from statute, the statute is likely to contain provisions bearing upon the practical implementation of the authority's duties.[56]

If one compares the legal conditions to which, on the view I have advanced here, the fire brigade is subject with those to which a private person who has voluntarily set about putting out a fire is subject, the difference is very obvious. In the case of the private person, the default position is that they are under no obligation to put out the fire at all and are hence not obliged to exhibit any particular level of skill or competence.[57] By contrast, in the case of the fire brigade, the default position is that it is so obliged and this is so not primarily because it has a particular expertise or because it makes promises or representations to the persons it assists but because this is the effect of its statutory duties when interpreted in accordance with the norms of public law.[58]

Even if one makes the comparison with a private person who, for some reason, is obliged to attempt to put out a fire, the legal conditions are unlikely to be the same. One can imagine a situation in which fire fighting services were delivered privately rather than by a public authority. Householders might, for example, obtain the services under contracts with insurance companies. Under such an arrangement, what the householders were entitled to expect in the way of fire fighting would, no doubt, have important elements in common with what citizens are entitled to expect from the fire brigade. It might be possible to isolate certain rudiments of good fire fighting which apply equally to all fire fighters. But it could never be assumed overall, even at the most practical level, that what constituted adequate

56 For example s.13 of the predecessor to the present Act, the Fire Services Act 1947 provided that "[a] fire authority shall take all reasonable measures for ensuring the provision of an adequate supply of water, and for securing that it will be available for use, in case of fire." The provision was discussed in *Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority* (decided by the Court of Appeal together with the *Capital and Counties v Hampshire CC* [1997] QB 1004). The 2004 Act contains an equivalent provision, s.38.

57 See the *Capital and Counties* case, ibid.

58 The proposition that a public authority that embarks upon a particular course of action is obliged to pursue it with practical competence even though it might lawfully have decided not to pursue that course of action in the first place is set out and defended in Chapter 8 at pp.104–6.

performance in the case of one did so in the case of the other. The judgment as to what was adequate would be governed in one case by public law standards and in the other by standards shaped by the terms of the contract.

I have used here the example of the fire brigade but the same points could be made using any number of other public services. The highway safety crews that figure in the Canadian case law[59] and that I referred to above in my discussion of Cohen and Smith's theory of entitlement could also serve as an illustration. The propriety of a crew's action or failure to act in clearing or not clearing particular dangerous rocks from a mountain side cannot be judged without considering policy decisions taken as to staffing, budgets, the frequency with which the crews are deployed and so forth, nor without taking into account the framework of statutory powers and duties under which the crew acts. Another good example is furnished by the case of *Thomson v Home Office*.[60] There the claimant was a prisoner who sued the Home Office in negligence after another prisoner attacked him with a razorblade. The judgment as to the prison's culpability in failing to prevent the attack inevitably raised a question as to the reasonableness of the prison governor's policy of allowing prisoners to use razorblades. The latter question was dealt with as a matter of what constitutes reasonable conduct in the law of negligence. But there is no doubt that the lawfulness of the policy was also a matter of public law and could have been challenged in judicial review.[61] For our purposes, what the case shows, again, is that judgments as to the lawfulness or propriety of the practical or operational conduct of core public authorities cannot be made in isolation from judgments about the lawfulness of the authorities' policy decisions or without consideration of the public law context.

Once one accepts that a pure public authority's practical activities must be governed by public law as much as is the making of policy or the taking of decisions having legal effects, then one must accept that breaches of public law may be involved at the operational stage. Let us return for a moment to the example of the fire brigade. Suppose that a fire occurs near the fire station, that it is the only fire on the night in question and that the fire brigade is informed of it but chooses not to attend because it has decided that to save resources it will not attend fires on certain nights chosen in advance. In the context of the general duties imposed by the governing statute, it is strongly arguable that for the fire brigade not to attend is unreasonable as a matter of public law.

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59 E.g. *Just v British Columbia* [1989] 2 SCR 1228.

60 [2001] EWCA Civ 331. Similar instances of the difficulty of disentangling the policy from the operational parts of an authority's functions can be given in relation to the police.

61 Hickman cites the case as one in which the opportunity for consideration of the relationship between reasonableness in negligence and reasonableness in public law was missed: see "The Reasonableness Principle: Reassessing its Place in the Public Sphere" (2004) 63 CLJ 166.

In the foregoing example, policy and operational elements are mixed in the way I have suggested commonly occurs. The (admittedly unlikely) policy of only attending fires on certain nights could be challenged in judicial review but it is also implicated in the decision on the particular night not to attend the fire. One can, however, alter the example so that there is no policy element of this sort. One can imagine the fire brigade not attending the only fire on a particular night simply because the firemen are all drunk and asleep or cannot be bothered. Here it seems no less true to say that the failure is unlawful as a matter of public law.

One can also apply this line of reasoning to a real example much closer to the operational end of the spectrum. In *Capital and Counties v Hampshire County Council*,[62] the fire brigade were called to put out a fire at industrial premises. One of the first steps taken by the fire chief on the brigade's arrival was to order his men to switch off the building's sprinkler system so as to make it easier for them to operate in the part of the building not yet alight. This strategy was unsuccessful and the whole building burned down. In the resulting negligence action, the Court of Appeal held that the decision to turn off the sprinkler system was absolutely mistaken. On the view I am advancing here, although the case was decided using the principles of negligence, the fire chief was subject to a public law duty to act reasonably, a duty which he breached. Clearly the Court of Appeal thought the decision taken by the fire chief was one that no reasonable fire chief would take, although this is not the language the judges used.

I return now to the question of how to reconcile, in relation to type 3 powers, the two propositions set out earlier. To recap, these are: firstly that core public authorities must act always in pursuit of their assigned purposes; and secondly, that other things being equal, the exercise of a public authority's powers should be subject to the same rules as would govern their exercise by a private person.

The chief means whereby private law regulates practical activities is negligence, as is reflected in the discussions of reasonableness and the policy/operations distinction above. Given that negligence is often applied to public authorities, it may seem question-begging to characterize it as purely a creature of private law. The issue I wish to discuss here, however, is: in what respects, or to what extent, can the behaviour of public authorities be governed by the same rules as private persons and to what extent must it be governed by rules or standards that are uniquely public? For this purpose, I assume that a public authority can only be liable in negligence where the same conditions are satisfied as would be necessary for a private person to be liable. In other words, I identify negligence with the set of principles that apply as between private parties.[63] I address the question of the extent to which negligence may be understood in a broader sense,

62 Note 55 above.

63 This understanding corresponds to what I call in Chapter 11 "the private approach" to negligence.

which involves it being able to accommodate the unique features of public authorities, in Chapters 10–12.[64]

Taking negligence in this narrow sense then, to what extent should we think of the practical activities of public authorities as being governed by the standards it prescribes? In order to answer this question, it will be useful first of all to compare the relationship between type 3 powers and the rules of negligence with the relationship between type 2 powers and the rules of private law. In the latter case, the authority is simultaneously subject to both public and private law norms. For example, the public authority landowner which licenses stall holders to operate on its land may enter a contractual relationship with the stall holders. By doing this it will be subject to the norms of contract law both in the sense that it is using a legal form constituted by those norms and in the sense that it is bound to respect the contractual rights of the stall holders. At the same time, if it tries to terminate a stall holder's right to use the land, it may be subject to norms of public law such as the requirements that it act reasonably, take into account relevant considerations and ignore irrelevant ones, and observe principles of procedural fairness. The public and private law norms do not operate entirely independently of one another. It would be more accurate to say, rather, that the authority only possesses private law type powers to the extent compatible with the performance of its public law duties, so that the public law norms curb or limit what the authority can do in the exercise of its private law-type powers: where the two conflict, the public law norms must prevail. Nonetheless, there is a sense in which one can talk of an authority being subject to both sets of norms simultaneously.

In the case of type 3 powers, we may also speak of the authority being subject simultaneously to two sets of norms. The public law norms which govern its practical activities are, as we have seen, those of reasonableness. So far as the rules of negligence are concerned, these do not, as the rules of private law do in the case of type 2 powers, constitute the legal forms by means of which the authority is able to act.[65] They do, however, define private law rights which the authority is bound to respect in performing whatever activity is in question. This is so for two reasons. Firstly, it is a feature of the law of negligence that it confers upon persons forseeably affected by a given activity a right that the activity be

64 Understood in this broader sense, negligence also applies to powers belonging to type 1 in my typology. The same point made here in relation to negligence can be made in relation to the earlier discussion of private law-type powers such as ownership of land and powers under a contract: in our system the rules that govern these powers are thought of a applying equally to public and private persons; the question I have been concerned with, however, is that of the extent to which the rules that apply to public authorities can be the same as those that apply to private persons and the extent to which they must be different.

65 The ability of public authorities to perform practical activities does *depend* on the use of private law forms. To act through its employees a public authority needs to be able to employ people. It also requires the corporate personality that is constituted via rules belonging to the law of corporations. These private law forms are preconditions of the performance of practical activities, however. The activities are not constituted by them.

conducted in accordance with a certain standard. Typically, the standard is one that avoids exposing the right holder to more than a certain level of risk. Secondly, it is ex hypothesi the case that possession by a public authority of a type 3 power does not entitle it to infringe the private rights of citizens.[66] It follows that in exercising type 3 powers public authorities must conform to the requirements of negligence, understood in the narrow sense that I have defined it for present purposes.

Public authorities exercising type 3 powers are, then, subject simultaneously to two sets of norms. They must act reasonably in the sense required by public law; and they must act reasonably in the sense required by negligence. The significance of this alters depending upon whether one is concerned with instances of misfeasance or nonfeasance, of acts or omissions. In the case of misfeasance, it follows from what I have said above that the practical effect of the two standards will be identical. Reasonableness, I have argued, is in itself a standard which is neutral between public and private spheres but whose practical application differs according to the capabilities, resources and duties of the person whose actions are in issue. Public authorities have duties to assist others that private persons lack but they do not have special duties to avoid harming others. We can thus say that a public authority performing a particular practical task is under the same duty to avoid harming others as a private person with the same resources and capabilities would be. This is the conclusion one reaches whether one takes the public authority's actions to be governed by the public law standard or the private law one.

In the case of nonfeasance, the position is more complex. In Chapters 10–12, I explore in greater detail the relationship between public law and negligence standards. Here I set out some basic principles. Generally speaking, it is true to say that public authorities performing practical duties are subject to a great many duties to which private persons analogously placed are not subject. This is not true in relation to every practical activity, however. Whether it is or not depends, as in the case of type 2 powers, upon the relation of the power in question to the authority's assigned purposes. Putting out fires and removing dangerous rocks are both activities which directly serve the relevant authorities' assigned purposes. But, through their employees, public authorities carry out practical activities that are only ancillary to their purposes. An example that has often appeared in the literature (although it is not put to exactly the use I put it here) is that of the driving of a motor vehicle by a public authority employee in the course of his duties. Another might be the repair or rebuilding of an authority's offices. Nowadays

66 I.e. this is the way I have defined type 3. Incidentally, the private law rights that an authority performing a practical activity must respect are not confined to those conferred by negligence. The authority is bound to respect all the rights that the performance of the activity might infringe. So, for example, the highway crew charged with removing rocks is not, absent specific statutory authorization, empowered to trespass on private land in order to carry out its task. (If it were so empowered, the power would belong to type 1 in my typology.)

such activities are more likely than not to be performed by a private contractor. But supposing them to be performed by employees of the authority and in some way necessary to the performance of the authority's functions, their relationship to the achievement of the authority's assigned purposes is likely nonetheless to be a distant one. Because such activities serve a variety of the authority's purposes, there is no sense in requiring any one of those purposes to determine the standards which govern the activities' performance and hence no need to invoke public law norms. We may thus think of such activities as governed by the same rules as would apply if they were performed by a private person.

Where, by contrast, an authority performs an activity which does directly serve its assigned purposes, we must think of it as subject to duties in public law which are unlike those to which it is subject in negligence. Thus, as we saw above, where members of the fire brigade attend the scene of a fire they are under a duty which a volunteer would not be under to use reasonable competence in putting the fire out. Likewise, the highway crew is under a duty which a volunteer would not be under to use reasonable competence in removing rocks from the hillside.

There are of course cases in which the law of negligence imposes a duty to assist others. A person may come under such a duty where she assumes responsibility towards another or enters some special relationship. Where, however, a public authority with a duty to perform a particular task comes under a duty in negligence to perform the same task, the content of the two duties is likely to be quite different. On the understanding of negligence employed here, the duty in negligence arises because of some relationship which the authority has entered into. The character of the duty reflects the nature of the relationship and must have the same content as would the duty of care to which a private person would be subject who had the same resources and capabilities and had entered into an analogous relationship. The duty will not be shaped by the public purposes or the detailed statutory provisions that determine the nature of the authority's duty in public law. On the other hand, there are cases where, as with misfeasance, a duty in negligence turns out to be identical to an authority's public law duty. One class of cases where this occurs is the class involving professional relationships. The tasks performed by professionals are perhaps not easily assimilated to the other kinds of activity I have mentioned as belonging to type 3, but for the sake of convenience, I discuss them here.

Professional services, notably health care and education, are often provided by public authorities. Where this happens, the practice of the courts is to apply to their performance the standards of the law of negligence. The activities are hence treated in the same way as if they were being conducted by private professionals, according to a standard that is neutral between the two spheres. It follows, however, from the theoretical framework I have set out above that if a doctor is acting on behalf of the National Health Service and in fulfilment of the general duties to provide health care laid down in its governing statutes, then her actions must be regulated by the norms of public law. An analogous conclusion follows in relation to a teacher in the state system.

This difference need not matter in practice. As long as a duty is owed in both the public and the private case, and the circumstances of the person owing the duty are not markedly different, there is no reason for the standard of conduct required by public law to differ from the standard required by the ordinary law of negligence. Thus there is no reason for the standard to be expected of a teacher in a state school to differ from the standard to be expected of a teacher in a private school nor for the standard to be expected of a private doctor to differ from that to be expected of an NHS doctor. There may of course be differences in resources between state schools and hospitals and their private equivalents. But the courts' practice of requiring the same standards of the professionals working in each is a beneficial instance of the principle that, other things being equal, the same rules should apply to public and private persons.

The basis of the courts' practice is that each professional is a member of the same profession whether working in the private or the public sector and that therefore the same standards should apply. We could also justify the practice, however, in a way that takes greater account of the public law context of the work of public sector professionals. We could say, plausibly, as a matter of statutory construction, that the purpose of the NHS is to enable citizens to benefit from the same professional services as some of them would be able to benefit from if it did not exist. Likewise, it is plausible to argue that the intention of the legislation governing state education is that state school pupils should receive an education that conforms to recognized professional standards.

If we step back from the narrower context in which professionals services are often delivered – the surgery or the classroom – it is immediately apparent that the delivery of the kinds of professional services that are governed by ordinary professional negligence are an island (admittedly a very important one) in a sea of wider statutory duties, many of which have no private counterpart.[67] The professional duties of the doctor to treat her patient competently arise once the doctor has undertaken to provide the treatment. But the NHS is under a duty to treat the patient which precedes the giving of any undertaking and has no private sector counterpart. The NHS owes other duties such as the duty to provide ambulance services to take people in need of emergency care to hospital. And while the standards that apply when a doctor makes a diagnosis or applies a treatment may be the same whether the doctor is public or private, the decisions of the NHS as to whether to offer a particular treatment are subject to public law principles and may be challenged in judicial review. In a similar fashion, as long as a pupil is established at a school, the standards determining what constitutes adequate education may be the same. But the state school pupil is entitled to be educated by

67 Note in this respect the comparison made in *R (A) v Partnerships in Care Ltd.* [2002] EWHC 529 (Admin); [2002] 1 WLR 2610 especially at [24] between the clinical duties of the psychiatrists in a state registered mental hospital and the statutory duties of the hospital.

the state and can invoke a battery of legal provisions governing admission to and expulsion from state schools which are not available to the private pupil.

One can go further and imagine circumstances in which even the standards governing conduct within the surgery and the classroom differ between the public and the private sphere. The private doctor may, for example, warrant that she will achieve a particular outcome rather than simply exercise due care in providing a treatment.[68] Or Parliament might alter the statutes governing health or education to make it clear that henceforth, in order to cut costs, NHS doctors or state school teachers were to provide services that in some way differed from the standards that were previously recognized as constituting good practice. In those circumstances, the standards demanded by public law and the standards demanded by the law of negligence would cease to match one another.

The case of public sector professionals exemplifies a larger truth. This is that where the law of negligence (understood in the narrow sense used here) imposes on a public authority a positive duty to act, it will often involve picking out one from among a much larger number of duties to act to which the authority is subject. In Chapter 12, I shall argue that, in such circumstances, to confine liability to those instances in which there is breach of one of the duties in negligence produces arbitrary results.

Conclusion

I began this chapter with two propositions: that everything a core public authority does must be done in the service of its assigned purposes; and that, other things being equal, a public authority's activities should be governed by the same rules as govern the activities of private persons. On the basis of these, I have attempted to define how much of a public authority's activity must be governed by public law and how much by private law. The resulting picture is not a simple one. Nor does it allow any straightforward jurisdictional division to be drawn between public and private. We could sum up the difficulty of making any such division via the example of the rules that govern emergency vehicles. Fire engines, ambulances and police cars are not subject to speed limits if they are being used for fire, ambulance or police purposes and if the observance of those limits would be likely to hinder the purpose for which they are being used on a particular occasion, but they are so subject otherwise.[69] In a system such as ours, in which the jurisdictional divide is not very firmly established, this tends to argue in favour of further attenuating the divide rather that trying to strengthen it. If there were a strong jurisdictional

68 Cf. *Thake v Maurice* [1986] QB 644.

69 Road Traffic Regulations Act 1984 s.87(1).

divide, a great many of the rules governing public authorities would have simply to duplicate those that governed private persons.[70]

It hardly needs saying, however, that the difficulty of determining when public law and when private law should apply does nothing to call into question the truth of the proposition that public authorities are governed by distinct principles. These principles extend, or ought logically to extend, to a far higher proportion of public authorities' activities than the treatment of them by our courts sometimes suggests. As we have seen, the activities covered include practical activities wherever these are performed directly in pursuit of an authority's assigned purposes. Practical acts do not often form the subject matter of judicial review but this, I have argued, is not for any reason of principle but simply reflects the absence in judicial review of any ex post facto remedy.

I have not attempted, so far, to say what exactly this discussion's implications are for liability. It does not necessarily follow from the fact that an activity is subject to public law norms that the authority performing it owes a public duty to persons affected by it. Still less does it follow that the authority owes a duty whose breach sounds in damages. In Chapter 8, I will attempt to spell out in more detail the criteria that determines when a public authority does owe a duty to individuals. In the meantime, it will nonetheless be instructive, I hope, to give examples of circumstances in which principle I might demand liability. I do this with respect to each of the types of public power I identified in this section in turn.

Under type 1, the misuse of licensing powers would produce liability, as in the example in Chapter 1 of the authority which revokes a licence in circumstances in which it does not have the power to do so. So would unlawful invasions of the private law rights of individuals, such as the arrest of a citizen by a policeman on unreasonable grounds. (There is no contradiction between the proposition that this would give rise to liability under principle I and the fact that it would also give rise to liability under the current law: principle I does not operate only in those domains that current law treats as belonging exclusively to public law.) Certain exercises of the type I powers of the Crown could also give rise to liability under principle I. An example might be where the power to issue or withhold passports was wrongfully exercised causing loss to an individual.[71]

Under type 2, the misuse of private law-type powers where these were exercised in pursuit of an authority's assigned purposes might give rise to liability. An example is suggested by the facts of the *Binks* case.[72] There, under an informal arrangement with the Council, the applicant was allowed to sell hot food from a caravan in the town's market place. The Council, exercising its powers as landowner, gave the applicant notice to quit without prior notification or reasons. This was held to be a breach of natural justice. The court rejected the argument

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70 I address the jurisdictional division between public and private more fully in Chapter 13.

71 Cf. *R v Foreign Secretary, ex p Everett* [1989] QB 811.

72 Note 8 above.

that since the case did not concern a statutory market, public law principles did not apply. On the interpretation of principle I which I have adopted, breach of the principles of natural justice may give rise to liability if it results in certain harms to individuals. But we can alter the facts so that the unlawfulness of the Council's act was like that in the *Hook* case.[73] There a market trader's licence to trade in a statutory market was revoked because the trader had broken a Council bylaw by urinating in a side street. The Court of Appeal held the decision unlawful partly because it was unreasonable to impose so severe a sanction for such a trivial act. If we imagine such a decision being taken in the exercise of powers like those in *Binks*, then we have an example in which principle I requires liability for harm caused by the unlawful outcome of a public authority's exercise of its private law-type powers. In principle, the Crown could also be liable under principle I for harm caused by misuse of the ordinary common law powers it possesses, such as its powers as a landowner.

One might contrast the authority's conduct in these street or market trading cases with other harm-causing exercises of a public authority landowner's powers in relation to which it would be unnecessary to invoke public law norms. For example, if an authority invites people onto its land, there is no reason for its liability toward people who suffer harm there not to be governed by the ordinary rules of occupiers' liability. Similarly, in cases in which an authority has no special statutory powers which enable it to override the rights of neighbouring landowners,[74] there is no reason for the authority not to be subject to the ordinary law of nuisance or to those obligations in negligence that arise especially in the context of ownership of land.[75] In both these examples, the authority's exercise of its private law-type powers is limited by the private law rights of others.

Under type 3, a whole host of instances of principle I liability can be imagined arising both from unlawful policy decisions as to how to exercise practical powers and from failures in those powers' exercise. The examples given above in attempting to demonstrate the ineffectiveness of the policy/operational distinction can serve as illustrations. One such example was that of the fire brigade which chooses not to attend a fire because of its policy of not attending fires on particular nights in order to save resources. It is clear from the general duties imposed by the governing statute that the fire brigade's powers are for the purposes (inter alia) of helping individuals. This being so, the exercise of those powers may be subject to duties owed to individuals. A reasonable authority must have a reasonable policy as to when to attend fires and if a particular fire occurs in circumstances in relation to which any reasonable policy would dictate that the fire brigade should attend – e.g. it is a serious fire, the only one on the night in question, the fire

73 Note 14 above.

74 This is *ex hypothesi* the case with powers which fall under type 2. Statutory powers to override the rights of citizens fall under type 1.

75 As exemplified by *Goldman v Hargrave* [1967] 1 AC 645, PC and *Leakey v National Trust* [1980] QB 485.

brigade is apprised of it, it is in the fire brigade's area and they have the resources to deal with it – then the fire brigade is under a duty to attend and that duty is owed to the potential victims of the fire. If the fire is one that the fire brigade could, with reasonable competence, put out then it owes an additional duty to the fire's potential victims to do so. If all these conditions are satisfied, then failure to attend on the basis of the unreasonable policy imagined in the example should give rise to liability to the fire's victims. A fortiori (and assuming the same conditions were satisfied) there would also be liability in the case of the fire brigade that failed to attend through drunkenness or indolence and of the fire brigade that attended and failed to put out the fire through incompetence. Similar examples could be given with respect to other emergency and rescue services and other services intended to confer practical benefits on citizens such as those associated with highway safety.[76]

Principle I liability could also arise in the kinds of situation I considered in my discussion of professional standards. Here there are two kinds of case. The first is where liability would arise in the ordinary law of professional negligence. In these cases, I argued, principle I would also dictate liability. The second is where there is failure to fulfil the uniquely public law duties to which bodies such as area health authorities and local education authorities are subject. Thus there might be liability where a patient suffered harm as a result of the unreasonable refusal of the NHS to provide some expensive treatment or where a child suffered harm to her development through the failure of an education authority to provide her with a school.

76 The claims made in this paragraph are given further support in Chapter 8.

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Chapter 7
The Distinctiveness of Public Law

In the discussion in the previous chapter, I insisted on a particular feature as being the mark of public power; and as being the source of the fact that public authorities may owe duties whose breach, under principle I, gives rise to liability in circumstances in which a private person would be subject to no such duty. The feature is that a public authority must always act in pursuit of public purposes including, where the purpose assigned to the authority in question is of this type, the purpose of securing the welfare of individuals. I contrasted this provisionally with the position of natural persons who are not constrained to pursue any particular ends but who are merely limited in what they can do by the need to respect the rights of others.

This picture requires modification for two reasons. Firstly, the private sector is not entirely populated by natural persons able to do whatever they like so long as they do not infringe the rights of other natural persons. And secondly, there are public bodies that are not obliged to serve the public in everything they do. I shall address these issues by way of an examination of the views of two scholars both of whom, in different ways, have attacked the idea of the distinctiveness of public law.

Common values and the public/private divide

The first of these is Dawn Oliver in her book *Common Values and the Public/Private Divide*. The dominant theme of the book is variously stated. In the preface, Oliver tells us "that the distinctions between public and private law are artificial, and that it is more productive to concentrate on the similarities between the two kinds of law rather than the differences." Elsewhere, she says that "in practice public and private law cannot be separated and indeed that it is not possible to define one or the other in ways that can be of wide or general application."[1] A further, more trenchant formulation is borrowed from the American scholar Karl Klare: " [t]here is no public/private distinction."[2] A subsidiary theme concerns the procedural divide introduced into English law by *O'Reilly v Mackman*.[3] Oliver

1 See Oliver, *Common Values and the Public/Private Divide* (Butterworths, 1999) at p.14.

2 Klare, "The Public/Private Distinction in Labour Law" 130 U Pa L Rev 1358, 1361 (1982), quoted by Oliver at p.248.

3 [1983] 2 AC 237.

thinks this should be abolished, a view I shall endorse later in this book. Agreement on that point does not, however, entail agreement with her larger argument.

Oliver's method of making good her main claim is to point to the many features that public and private law have in common. She does this both at the level of fundamental, underlying values and of practice. In respect of the former, she claims that public and private law share five key values: autonomy, dignity, respect, status and security. In relation to practice, she points out that controls on the exercise of legal power similar to those to be found in public law are to be found throughout private law. Thus while public authorities must act within the powers granted to them, a private person may be under an obligation not to act in breach of the terms of a trust deed, contract, articles of association or other enabling instrument. Similarly, she tells us, requirements of procedural propriety in public law are mirrored by the standards that govern the decision-making processes of employers, trustees, company directors, committees of trade unions and other persons and organizations.[4] Standards of reasonableness also apply in a wide range of private law situations. In relation to the Human Rights Act, Oliver emphasizes the potential for invocation of convention rights in actions between private persons. The overall thrust of the argument is that private law is as much concerned as is public law with protecting the rights of individuals and preventing abuse of power.

In pointing out that many private persons are subject to constraints on how they may act that go far beyond a mere obligation not to infringe the rights of others, Oliver is, of course correct. This part of her argument bears upon the first of the two reasons I gave above for modifying the simple statement I began with i.e. it goes to show that the private sphere is not entirely populated by natural persons free to act as they wish subject to the obligation not to infringe the rights of others. We might modify the simple statement to take account of Oliver's point by adding a rider to the effect that a natural person may acquire powers that are only to be exercised in pursuit of particular purposes, as where she assumes the position of trustee; and that artificial private persons may be constrained to act in pursuit of defined purposes in everything they do, as for example where a registered company is required to attain the objects set out in its memorandum and articles of association.

None of this undermines the basic point of distinction insisted upon, namely that public authorities must act always and only in pursuit of public purposes. But it is perhaps worth giving special consideration to the two types of institution, usually classified as belonging to the private sphere, that do most to cast doubt on the idea that this feature is confined to public authorities. These are the professions and the public trust.

To begin with the first of these, it is part of the concept of a profession that its practitioners are obliged to act in the public interest. In their preliminary discussion

4 I draw here on Oliver's summary of the case for substantive integration at pp.248–9, ibid.

of the subject, Jackson and Powell[5] state that professionals "normally, owe a wider duty to the community, which may on occasion transcend the duty to a particular client or patient." They give examples such as that of a doctor's duty to prevent the spread of contagious diseases outweighing his duty to a particular patient and architects' responsibilities for public safety and environmental considerations going beyond their immediate duty to the client. As a matter of law, however, professionals do not usually owe duties to members of the public in respect of whom they have made no voluntary undertaking. For example, a health care professional who passes the scene of an accident is not legally obliged to help.[6] Not to help may be a breach of the relevant professional code, but professional codes do not have direct legal effect although the supervisory bodies that enforce them may be statutory and may themselves be supervised by the courts.[7] Thus, in spite of their public orientation, professionals, in our system at least, do not possess the characteristic that I have singled out as the mark of a public authority.[8]

Turning now to the case of the public trust, public trustees really are obliged, legally, to act in pursuit of the public interest. Of course, these obligations arise out of voluntary arrangements, unlike the obligations of public authorities which are imposed by statute or the courts. They are also the subject to their own special body of law. To deal with public trusts, I therefore enter a small caveat to the generalizations I have made so far, and say that the trustees of public trusts are also constrained to act solely for public purposes, but that for historical reasons (and perhaps also because of their voluntary origins) they occupy a category distinct from public authorities.

I have concentrated here on one strand of Oliver's argument for downplaying the distinction between the public and the private and used it as a pretext for modifying the generalizations I made at the beginning of the chapter. But what of her larger argument? Does it support the strong claims that I quoted above about the non-existence or impossibility of the public-private distinction? It is already implied in what I have said so far that it does not, but it is worth addressing briefly the other components of her argument.

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5 *Jackson and Powell on Professional Liability* (6th ed., Sweet & Maxwell, 2007) at 1–005.

6 *In Re F (Mental Patient: Sterilization)* [1990] 2 AC 1, 77 and see generally Montgomery, *Health Care Law* (2nd ed., Oxford University Press, 2003) p.168.

7 For an account of the regulation of the medical profession, see Montgomery, ibid. Chapter 6; Jackson *Medical Law: Text, Cases and Materials* (Oxford University Press, 2006).

8 The members of a profession which is subject to heavy statutory regulation and upon whose members statutory duties are imposed may owe legal duties to the public. One could argue that this was so of the auditor in *Caparo v Dickman* [1990] 2 AC 605. Where this is the case, the professional in question is very like – in fact arguably is, pro tanto – a public authority. This raises in a different form the problem that I consider below of the hybrid public authority entitled to make a profit for itself.

The fact that it is possible to discern respect for the five key values Oliver identifies in both public and private law does not have the significance she ascribes to it. As others have pointed out,[9] it is hardly surprising that, taken at a high enough level of generality, public and private law share certain values. A belief in the autonomy, dignity and respect due to the individual, for example, is a fundamental tenet of liberal societies and one would expect it to pervade the whole legal system. The fact that it is recognized in both public and private law really shows no more than that they are both forms of law.

Nor is the existence, in private law, of controls on the exercise of power that resemble those in public law enough to efface the distinction. By their nature, public authorities owe duties to citizens, duties to attain the general ends that are their defining purpose – to put out fires, make the highway safe, provide care to the elderly and so on. The controls on the exercise of power that apply in public law arise in the context of these duties: they serve to ensure that public authorities use their powers to fulfil the duties and this includes ensuring that the rights and interests of individuals are infringed no more than can be justified by reference to that aim. By contrast, private persons (subject to the caveat I noted above) do not start out with duties to citizens. They are free to act in pursuit of their chosen projects. The controls on their powers are either simply constraints as opposed to methods of ensuring that they attain some prescribed end; or they arise in the context of relationships entered into voluntarily or on the basis of an assumption of responsibility. This is the aspect of the public/private distinction I have emphasized; and it is in fact insisted upon by Oliver who asserts throughout her book that public bodies are different from private ones in being obliged to act at all times in execution of their duties to the public.[10]

Klare's claim that there is no public/private distinction is part of an argument directed against the idea that there is a part of the law – private law as conceived in the classical liberal thought of the nineteenth century – that concerns only the relationships between individuals and not the public interest. Most of Oliver's arguments are also directed against ideas associated with the classical liberal conception of private law and in particular against the idea that private law need not or does not have built into it protections against the abuse of power by stronger parties. But to reject these ideas is to reject only one conception of the public/private divide. Early in her book, Oliver says that public and private cannot be separated because "public law" is shorthand for a whole collection of ideas.[11] But it does not follow from the fact that a distinction is multifaceted and hard to make that one should abandon the attempt. The principal fault of Oliver's book is that

9 See e.g. Alder "Restitution in Public Law: Bearing the Cost of Unlawful State Action" (2002) 22 LS 165, 168–9; Davies, "Ultra Vires Problems in Government Contracts" [2006] 122 LQR 98 at p.99.

10 See especially pp.112–116. Oliver also thinks there should be liability for breach of public law duties i.e. liability of the principle I type: see especially pp.256–60.

11 Ibid. p.14.

she purports to reject the distinction wholesale when in fact she accepts at least one version of it while rejecting others.

Hybrid public bodies and the reach of public law

The challenge to the idea of the public sphere as distinct does not come only from private bodies that are in one way or another obliged to take into account the interests of others or act altruistically. There exists a large zone that is intermediate between the public and private spheres and which is inhabited by bodies that cannot easily be fitted into either category. Prominent examples of bodies occupying this zone are: private companies that carry out statutory duties to the public, such as the privatized utilities; private companies performing public functions that have been contracted out to them by public authorities; and privately created regulatory bodies that hold a position of de facto monopoly power over people performing the regulated activity.

This fact has led the second of the two scholars I referred to above, Harlow, to suggest that there is no need for a special form of liability in relation to public bodies.[12] In Harlow's view the public and private spheres interpenetrate too much for any distinction between them to be meaningful or for any distinct body of public law to be necessary. In support of this view, Harlow points out that "[v]irtually every service designated 'public' and every function indelibly associated with the state, with the possible exception of national security, has at one time or another been privately performed." She cites in this connection an American article which mentions fire protection, welfare provision, education and policing and the fact that roads, bridges, railways and sewers were mainly built by private contractors seeking a profit. [13]

It is surprising to find this argument in a book otherwise devoted to the question of what special solution there should be to the problem of administrative liability; and if she were consistent, Harlow would have to explain why we do not need the body of public law that we already possess. Putting these objections to one side, however, the argument itself is fallacious. The fallacy has already been exposed in the argument of the previous chapter. What makes an activity public or private is not the nature of the activity itself – the fact that it is fire fighting or education or welfare provision – but the legal conditions under which it is carried out. Fire

12 See *State Liability: Tort Law and Beyond* (2004) pp.30–41. Harlow's argument is against "all rules and liability principles that treat the state as special" and not just against a jurisdictionally distinct administrative liability. The argument is presented, in the first instance, as part of a rebuttal of Peter Schuck's advocacy (in *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983)) of the use of the ordinary law of tort to deter government from misusing its powers.

13 Freeman "The Private Role in Public Governance" 75 NY Univ L Rev 543, 552–3 (2000).

fighting as carried out by our fire brigade is public because it is carried out in fulfilment of duties owed to the general public. The same goes for those parts of our education and social welfare systems deemed public.

Of course, it is often not obvious whether the performance of an activity by a particular body is or should be subject to public law norms. As we saw in chapter 6, designating some body or activity public requires a normative decision on the part of the courts.[14] But once a function has been identified as public, the body performing it will be subject to duties that it would not otherwise have been subject to, and this may entail liability where there would have been none if the function had been classified as private or vice versa. This is true of hybrid public authorities as well as core ones: they perform their public functions under legal conditions which are quite unlike those to which a private person performing the same function would be subject.[15]

Consideration of hybrid public bodies does however pose a problem for the way in which I have characterized public power (although this is quite distinct from the problem Harlow claims to identify). If core public authorities are obliged to act solely in pursuit of public purposes, one would expect hybrid public authorities to be obliged to act solely in pursuit of public purposes when they were exercising those powers designated public. This would entail that the analysis offered above

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14 See the reference to Cane's argument at n.2 in Chapter 6 and accompanying text. Cane's point was in fact made in rebutting an earlier version of the argument of Harlow's I criticized here. The earlier version is to be found in Harlow "'Public' and 'Private' Law: Definition without Distinction" (1980) 43 MLR 241, 256–258.

15 Consider the case of a utility company subject to statutory obligations to supply the relevant commodity at the request of any homeowner and not to exercise undue discrimination between persons in the prices it charges (public electricity suppliers are under such duties by virtue of ss.16(1) and 18(4) of the Electricity Act 1989). Contrast this with the case in which the commodity is supplied by a purely private supplier subject to no statutory obligations *vis-à-vis* the customer. Even supposing the obligations in the first case were not enforceable via a special regulatory mechanism (as they are), the two situations raise quite different legal problems. In the first case, a customer faced with refusal to supply the commodity at a non-discriminatory price would require a public law solution: it is doubtful whether breach of statutory duty, as currently interpreted would cover the case. Any dispute in the second case, however, would be purely a contractual matter. At one point in her argument, Harlow asks rhetorically if it should make any difference whether prisons are run privately or by the state. The answer that the question is intended to elicit is clearly "no." But this is only the right answer because it is so obvious that prisons ought to be run as public institutions and subjected to the sorts of control usually imposed on state power. This is why the privatized prisons that exist in our system are subject to a powerful regime of public law duties and controls: see Livingstone, Owen and Macdonald, *Prison Law* (3rd ed., Oxford University Press, 2003) 1.55–1.67. See also *R (A) v Partnerships in Care Ltd.* [2002] EWHC 529 (Admin); [2002] 1 WLR 2610 especially at [25]. A genuinely private prison – an institution whose owners were given powers to imprison people without corresponding public duties or without some system of stringent public regulation – is something quite unimaginable.

of the incidence of principle I liability in relation to different powers of core public authorities would apply equally to the public functions of hybrid bodies. Yet some bodies, for example some privatized utilities, are subject to duties to the public while being permitted at the same time to make a profit for themselves. In other words, they may act simultaneously for public purposes and for their own. This means that the generalization I made with regard to core public authorities may not extend to hybrid public authorities, or at any rate, may not extend to *all* hybrid authorities. This was one reason for giving core public authorities separate treatment above.

A good example of a hybrid authority obliged to act for public purpose and permitted at the same time to make a profit for itself is the defendant in *Marcic v Thames Water Utilities*.[16] In that case, the claimant was a householder whose garden was periodically flooded with sewage as a result of inadequate sewers. The defendant was a private company but also the statutory undertaker responsible for the sewers and, as such, subject to a duty to provide adequate sewerage.[17] Its failure to provide this in the case of the claimant was due to the fact that more parts of the sewerage system gave rise to flooding than could be made adequate in a short time. The defendant was therefore obliged to devise an order of priority amongst the various repairs required and the section of the sewers which affected the claimant did not figure high in that order. The limitation on the defendant's ability to make the sewers adequate was in turn due, however, to its need to make money. It did not absolutely lack the resources to be able to repair all the defective sewers within a short time frame. Rather, it lacked the resources to be able to do so without ceasing to make a profit.

In the current state of the law, cases of this sort present a theoretical problem for the view of public power I have put forward rather than a practical problem as to when to apply principle I.[18] This is because the public utilities are all subject to regulatory regimes that provide remedies to members of the public where a utility fails in its duty towards them and these remedies include compensation. In *Marcic* itself, the householder's claim in nuisance was denied by the House of Lords on the ground that to grant it would compel Thames Water to perform its statutory duty and so circumvent the exclusive remedy provided by the Act. The correct means of obtaining redress was to apply first to the regulator and then to seek judicial review of his decision if it was unlawful. Principle I might, of course, support a claim for compensation to accompany the judicial review of the regulator. But in that case, the defendant would be a core public authority obliged to serve the public in everything he did.

16 [2003] 3 WLR 1603.

17 Water Industry Act 1991 s.94.

18 The ideal solution to this case would in fact be based on principle II and I discuss it in that context in Chapter 9. But, there is also potential for the application of principle I, albeit, given the regulatory scheme, only at the level of the regulator.

The problem is of greater potential significance, however, in cases in which a public authority has contracted out statutory functions to a profit-making private body. Most of the cases on the issue of whether such bodies are public involve challenges under the Human Rights Act but the issue can arise independently of the Act as is shown by *R v Servite Houses, ex p Goldsmith and Wandsworth LBC*.[19] In cases under the Human Rights Act, the courts have shown themselves reluctant to extend the reach of public law to profit-making bodies.[20] But in *R (A) v Partnerships in Care Ltd*,[21] a private mental hospital was held to be performing a public function for the purposes both of the HRA and ordinary judicial review. There are, moreover, strong arguments for extending public law to more contracted-out services than the courts have been prepared to countenance.[22]

The problem of the hybrid public authority, able to act at once for public purposes and for its own purposes, must therefore be faced.[23] There is no doubt that it makes it impossible to say that all public authorities without exception must act for public purposes alone. It also presents the courts with one of the more difficult instances of the need to make a normative judgment as to whether to treat a body as public. If the decision is made to do so, the right of the body to make money must, I suggest, be treated as a constraint like that which the limitation of resources and the need to fulfil other duties may impose on the ability of core public authority to perform a particular function.[24] The further judgments that this would require a court to make would be more difficult than those required in limited resources cases. In the latter, the court has to judge the reasonableness of the order of priority given by the authority to the various demands on its resources. In the case of profit-making bodies the court must do the same, but the judgment is a harder one, in part perhaps because there is less reason to assume that the

19 (2001) 33 HLR 35; (2000) 2 LGR 997.

20 See, most recently *YL v Birmingham City Council* [2007] UKHL 27. In *Poplar Housing and Regeneration Community Association Ltd. v Donoghue* [2001] EWCA Civ 595; [2001] 3 WLR 183, the association was held to be a public authority for the purposes of the HRA but it was non-profit making: see [69] point (iv).

21 See n.15 above.

22 See e.g. Craig, "Contracting Out, the Human Rights Act and the Scope of Judicial Review" (2002) 118 LQR 551; Hunt, "Constitutionalism and the Contractualisation of Government" in Taggart ed. *The Province of Administrative Law* (Hart, 1997). See also the House of Lords and House of Commons Joint Committee on Human Rights report "The Meaning of Public Authority in the Human Rights Act 1998" (2004, Paper 39; HC 382) and the dissenting judgments of Lord Bingham and Baroness Hale in *YL v Birmingham City Council* n.20 above.

23 The analogous problem where a challenge is made under the Human Rights Act is how to balance the convention rights invoked by the claimant against those of the contracting party performing the public service. This problem was considered briefly by Buxton LJ in the Court of Appeal's judgment on the *YL* case: [2007] EWCA Civ 26 at [75]–[80].

24 Cf. *R v Gloucestershire CC ex p Barry* [1997] AC 584; *R v East Sussex CC ex p Tandy* [1998] AC 714.

body can be trusted to strike the balance correctly; but above all, because striking the balance between the right to make a profit and duties to the public involves a tough political judgment as to what is a reasonable level of profit to allow, a judgment that in the case of the public utilities is made by the regulator. This nonetheless is what the courts may be obliged to do where they extend public law to cover contracted-out services; and such cases might also give rise to liability under principle I.

Accordingly, it is possible to imagine examples in which a hybrid body is subject to principle I liability in relation to exercises of each of three types of power identified above. Thus, while it is rare for type 1 powers to be contracted out, coercive powers fall into this category and these are sometimes conferred upon private contractors. The defendant psychiatric hospital in *R (A) v Partnerships in Care Ltd*,[25] for instance, had coercive powers over the patients it admitted and cared for. Type 1 powers must always be exercised (to return to the terminology employed above) in accordance with both the purpose-regarding and the individual-regarding norms of public law. Hence, a mental patient who is subject to an unreasonable or procedurally improper exercise of the coercive statutory powers of a private psychiatric hospital should have a remedy, and under principle I, where the exercise in question causes some recognized form of harm, the remedy should be a monetary one. One can imagine exercises of type 3 powers giving rise to principle I liability in the same context, for example if the psychiatric hospital fails unreasonably to provide the care that it is under a statutory obligation to provide.

So far as type 2 examples are concerned, one can imagine breaches of public law norms giving rise to principle I liability in the context of the contractual relationship between a private nursing home discharging a local authority's statutory obligations, and a person entitled to care under the arrangements in question. Generally speaking, in these circumstances, a monetary remedy could provide redress against the local authority for the default of the contractor. But as cases such as *Servite*[26] and *R (Heather) v Leonard Cheshire Foundation*[27] show, the contractor may create an obligation not shared by the authority where its conduct gives rise to a substantive legitimate expectation. If breach of a substantive legitimate expectation, such as that created by the promise of "a home for life" in the cases mentioned, caused a recognized harm to the holder of the expectation, this would give rise to principle I liability on the part of the contractor.

In each of these examples, the body in question should, as I suggested above, be treated as subject to the norms of public law in just the same way as a core public

25 Note 15 above.

26 Note 19 above.

27 [2002] EWCA Civ 366; [2002] 2 All ER 936. This case was argued, however, on the basis that there had been a breach of the claimant's rights under article 8 of the European Convention, rather than on the basis that there was breach of a substantive legitimate expectation.

authority and liable under principle I to just the same extent, with the proviso that the bodies' right to make a profit would have to be treated as a limitation on what could properly be expected of them analogous to the limitation imposed in relation to core public authorities by resource considerations.

Chapter 8
The Nature of Public Law Duties Elaborated

Having added in certain respects to the picture I wish to present of public authorities and their duties, I am now in a position to give a more detailed account of those duties and how they might give rise to liability under principle I. There is more to be said, in particular, about the distinction between duties owed to individuals and duties owed only to the public as a whole. I present the account in the form of a series of numbered propositions.

1) As I have emphasized above, every public authority exercises its powers for some public purpose or purposes. The same idea can be expressed by speaking of each public authority as having some mission or overarching duty to the public. In most cases, these purposes can be ascribed to an authority on the basis of provisions of the relevant statute, as for example the Fire and Rescue Services Act 2004 (quoted above) does in the case of the fire brigade. But a public authority's mission need not be defined by statute. It may, as in the case of the Crown or the police, derive from common law. And, in any case, what exactly an authority's purposes are cannot be determined purely on the basis of the plain and ordinary meaning of the words in the governing statute. Ascribing purposes to public authorities is part of the work of the courts in their public law jurisdiction. The statutory words are, so to speak, the raw matter, into which life must be breathed by interpretation, legislative intention being itself a product of this process rather than something to be discovered fully formed within the statute.[1]

2) The powers which a public authority possesses in order to fulfil its purposes must be exercised in accordance with any requirements laid down in the governing statute, if there is one, but also in accordance with the general principles of public law familiar to us from judicial review. These principles serve to ensure that each public authority exercises its power in pursuit of its defining purposes and also consistently from case to case i.e. in accordance with the requirements of juridical equality (and if the suggestion made in the discussion of principle II in Chapter 5 is accepted, in accordance with the requirements of a more substantive conception of equality as well). I also argued above that public law imposes upon public

1 A similar point has recently been emphasized by T.S.R Allan: see "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 OJLS 563; "Legislative Supremacy and Legislative Intent: A Reply to Professor Craig" (2004) 24 OJLS 563. Allan's views derive in turn from Dworkin: see *Law's Empire* (1986) Chapter 9.

authorities an obligation to carry out the practical element of their functions with reasonable competence.

3) The combination of overarching duties, more specific duties derived from statute and the general principles governing the exercise of public power produces further duties – sub-duties – in any given set of circumstances. So, for example, the fire brigade, having put in place the arrangements necessary for fighting fires, and the means for dealing with calls for assistance, will be under a duty to consider whether to attend and try to put out any fire that comes to its attention. The decision must be made in accordance with all the principles that govern decision-making in public law. If the result is affirmative, the fire brigade will come under a further duty to use reasonable competence in its attempt to put out the fire. Similarly, the duty of a sewerage undertaker under s.94(1) of the Water Industry Act 1991 "to provide, improve and extend such a system of sewers … and so to cleanse and maintain those sewers … as to ensure that that area is and continues to be effectively drained" must give rise to a host of sub-duties. This might include: duties to detect parts of the system not adequate to deal with the quantity of sewage they receive; duties to detect blockages; duties to decide how to deal with blockages or inadequate parts of the system, the decisions to be made, again, in accordance with the principles that govern decision-making in public law; and duties to undertake with reasonable competence any work which the decision making process identifies as necessary to deal with problems detected.

4) The body of law that governs the behaviour of any given statutory authority is an amalgam of statute law and non-statutory general principles of public law devised by the courts. Statutory provisions are interpreted in the light of the general principles and on this basis powers are conferred and duties imposed on the authority in question, including a great many powers and duties not spelt out in terms in the statute. It is thus possible to identify and distinguish the statutory provisions that lie at the root of a statutory body's powers and the general principles that apply to them; but at the level of the detailed powers exercised and duties discharged in an authority's day to day operations, it is impossible to say where statute law ends and non-statutory law begins. Indeed, any attempt to draw a line between the two would reveal a misconception.

5) It follows from the view of public authorities as always acting in pursuit of some overarching purpose that the formalistic distinction between powers and duties has no place in public law. As we shall see below, the distinction has sometimes been made much of in the law of tort. But since a power possessed by a public authority can only be exercised in order ultimately to attain one of its public purposes, the power is always subject to duties; and there is always the possibility of a court finding that the authority was under a duty to exercise the power in a particular way. This was one of the lessons of the *Padfield* case.[2] It does not mean that no significance should ever be attached to Parliament's decision to give a provision the form of a power rather than a duty; but where some might see a strict

2 *Padfield v Ministry of Agriculture* [1968] AC 997.

division between powers and duties, there are, in public law properly understood, only degrees of discretion.

6) In order to develop a form of liability based on principle I, it is necessary to distinguish between those public law duties that are and those that are not owed to individuals. One possible starting point is the reference in the Council of Europe's formulation to "a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person." What can be reasonably expected of the authority is a matter of the authority conducting itself in accordance with public law norms of lawfulness. But if our focus is on establishing a relationship between the authority and an individual – on establishing what, in the law of negligence, is called proximity – then we may think of this too as being a matter of what can be reasonably expected of an authority; or, in other words, of what a reasonable authority would do. Hence, an authority owes an individual a duty to exercise a power lawfully when it should, as a reasonable authority, have that individual in contemplation as likely to be affected by the exercise of the power. However, this statement, while correct so far as it goes, leaves us with an incomplete picture. One might, from reading it, suppose that public authorities are free to act without reference to the interests of individual citizens except in so far as their activities might cause positive harm to them. Yet this is untrue because the mission or overarching duty of many public authorities requires them to orient their conduct towards the interests of particular individuals.

To gain a fuller picture, it will be useful to draw a distinction between: on the one hand, duties that are owed to the potential recipients of the benefits which it is the purpose of a public authority to provide; and on the other, duties owed to those who, as a result of public authority activity, stand to suffer harm to interests recognized in private law. An example of the first case would be where an authority must consider whether to confer or actually attempts to confer some welfare benefit such as accommodation, education or nursing care. An example of the second would be where the police arrest a person or where the fire brigade cause damage to property in order to prevent the spread of a fire. (Very many public authority functions, of course, involve at once conferring benefits on some and infringing the interests of others. The police confer the benefit of protection from crime on some while arresting others; the fire brigade protect some from fire but may cause damage to the property of others (or indeed of the same people whose property they are trying to protect).)

In the "conferring a benefit" case, the question whether any given individual is owed a duty is, to begin with, a question of how to characterize the authority's overarching duty. Is it a duty that *can* be owed to individuals or that can give rise to duties owed to individuals? Or is it a duty owed only to the public as a whole? We saw in Chapter 3 that some overarching duties, such as certain kinds of duty to protect the environment, can only be plausibly interpreted as owed to the public as a whole, whereas others, such as the various welfare functions I mentioned in the previous paragraph, are more plausibly interpreted as giving rise to duties

to individuals. Where an authority's purpose derives from statute, answering the question is a matter of statutory interpretation although, as always, the statutory intention can only be "constructed" and not read off mechanically.[3]

If the purpose of the function *is* to deliver benefits to particular individuals, it follows that in performing it the authority must orient its conduct *towards* particular individuals. So for example, welfare agencies such as those concerned with child protection or care of the elderly are required, in the one case, to act on information received that suggests a child may be in danger, and in the other to make an assessment of any elderly person who may be in need. In these two cases, the duties to investigate the needs of particular persons are contained in statute. But in other cases, such as that of the fire brigade, no such exact procedure is laid down in the statute, and yet, on any plausible interpretation of its overarching duty, the fire brigade is obliged to act on any information received as to those who might be in need of its services. In each case, the authority is thus under a duty to bring itself into a relationship with particular individuals. The duty is owed to the particular individuals concerned and once this link between authority and citizen is established, further duties follow. The authority has a duty to consider, in accordance with the norms of public law, what benefits, if any, to bestow upon the individual concerned, and this duty is owed to the individual in question. If the only reasonable decision the authority could make would be to confer the benefit, then the authority must attempt, with reasonable competence, to do so. Moreover, even if an authority never consciously brings itself into a relationship with an individual and thus never considers what is required in the individual's case, it may still be possible to make the judgment that the authority owes the individual a duty to confer a benefit (or rather, to use reasonable competence in attempting to do so). This will be so if a number of conditions are satisfied: firstly, the circumstances must be such that the authority's overarching duty, or sub-duties flowing from it, require it to act on information it receives as to the position of the individual in question; secondly, the authority does not act on the information, even to the extent of considering the individual's case; thirdly, the individual's position is such that, had the authority considered it, the only reasonable decision it could have made would have been to confer the relevant benefit. The implausible example given in Chapter 6 of the fire brigade that, out of sheer indolence, fails to respond to a call conforms to this model.

Once the question whether duties are owed to potential recipients of benefits has been dealt with, one can move on to the issue of liability. Only a subset of possible breaches of the duties owed will cause harm of a sort that could possibly be made the subject of reparation. For example, many unlawful decisions as to

3 Compare the account in Markesinis and Unberath, *The German Law of Torts* (4th ed., Hart, 2002) pp.885–888 of the methods employed by the German courts in determining whether harm suffered by a claimant is of a sort which a statutory provision was intended to protect her from. A finding that the harm can be so characterized is necessary to found a claim to compensation under § 823 II of the Civil Code.

whether to confer welfare benefits will contravene norms of public law in a way that can be remedied simply by having the decisions remade. Of the breaches that do cause harm reparable by a monetary remedy, only a further subset (a "sub-subset" of the totality of breaches) will involve harm that consists in the failure to provide the benefit that it is the ultimate purpose of the authority concerned to supply. The other breaches may be breaches of procedural fairness that cause anxiety, distress or financial loss without infringing any entitlement to the benefit in question. In relation to the small group of breaches that *do* consist of failure to provide the benefit that it is the authority's ultimate purpose to supply, we can say that the authority has failed to fulfil its overarching duty with respect to the individual concerned. Such a statement will usually, however, be shorthand for something more complex: namely, that a sub-duty arising under the authority's overarching duty has been breached with the result that the individual to whom the sub-duty was owed has failed to receive a benefit that she would have received if the sub-duty had been fulfilled.

What of cases involving potential harm to interests recognized in private law? The position of a public authority whose actions threaten such harm is much more like that of a private person performing some potentially harmful activity. As in the "conferring a benefit" case, the pursuit of an authority's overarching duty may require it to act in relation to particular individuals: the police may be under a duty to arrest a particular person, the fire brigade under a duty to damage a particular person's property in order to prevent the spread of a fire. In seeking to determine whether duties are owed to an individual the question to be asked, however, is the one I began this discussion with: should the authority in question, as a reasonable authority, have the individual in question in contemplation as likely to be affected by the exercise of its power? If the answer is yes, then the duty owed to the individual is a duty to exercise the power in question in accordance with public law norms. As in the "conferring a benefit" case, liability should accrue where breach of one of the norms causes harm of a sort that cannot be repaired by having the offending act or decision retaken. Here, however, the function of the public law norms with respect to the individual is to prevent the authority infringing the interests of the individual more than can be justified by pursuit of the authority's overarching duty; whereas in the "potential recipient" case, the function of the public law norms is to ensure the fulfilment of the overarching duty *vis-à-vis* particular individuals.[4]

4 In the latter respect, despite the criticisms I made of it in Chapter 4, my account of the requirements of principle I has something in common with Smith and Cohen's theory of entitlement. There is also a resemblance to Smith and Cohen's theory in the argument I make below at point 10 that a citizen's entitlement is, in effect, fixed at the point that an authority decides to bestow a benefit on her. On the other hand, Smith and Cohen think that the case in which an authority positively injures a citizen can be left entirely to the existing law of tort. By contrast, the view advanced here is that many cases in which public authorities positively injure citizens must be thought of as governed by public law.

7) A procedural norm which assumes greater importance in the context of reparation for past wrongs is the requirement that decisions affecting the interests of individuals be made with reasonable expedition. In other words, there ought to be compensation for loss caused by delay in the making of decisions. Delay is not usually prominent in discussions of judicial review, presumably because the remedies it involves, while serving to compel the making of a decision or the doing of an act that is overdue, provide no redress for delay that has already taken place. It is, however, well recognized as a ground of maladministration and has often been the principal ground of complaint of litigants in tort actions against public authorities.[5] In its report on Administrative Justice, the Committee of the JUSTICE-All Souls Review of Administrative Law in the UK noted the capacity of administrative authorities to cause loss to individuals by delay in decisions affecting them[6] and included a clause in its proposed statutory provision on administrative liability creating a right to compensation for loss caused by "unreasonable or excessive delay on the part of any public body."[7] The duty to act with reasonable expedition is one that can quite easily be imposed by the courts themselves and once this is done, its breach becomes a potential ground of liability under principle I in just the same way as the procedural duties already recognized in judicial review.

8) In judicial review, the courts are sometimes prepared to hold that a public authority has acted unlawfully on the basis of some minor misconstruction of

5 I give here two examples. In *R v HM Treasury, ex p Petch* [1990] COD 19, it was held that under the Superannuation Act 1972, an implied duty was owed to a civil servant to consider his claim for a pension timeously and that failure to do so could give rise to actions for damages for breach of statutory duty or in common law negligence. On the facts, there was held to be no breach. In *Neil Martin Ltd. v Revenue and Customs Commissioners* [2007] EWCA Civ 1041, [2007] All ER (D) 393 a series of administrative errors on the part of the Revenue led to a long delay in supplying the claimant business with a certificate indicating its tax status. The claimant was entitled to the certificate and needed it in order to obtain work as a building subcontractor. As a result of the delay, it suffered financial loss. The claimant argued both that there was a statutory and a common law duty in negligence to deal with applications within a reasonable time. The Court of Appeal held that there was no statutory duty and that, following *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 WLR 1057, the absence of a statutory duty meant there should be no common law duty either. (The court did hold that in relation to one of the procedural errors the authority had assumed a responsibility towards the claimant, but this did not appear to entail a duty to act with reasonable expedition.)

6 Para 11.34. The Committee gave examples of delay causing loss, delay in processing an application on which a business transaction depended, such as for exchange control permission or an important licence, and delay in determining applications for planning permission. The Committee appeared to have in mind the facts of *Dunlop v Woolahara Municipal Council* [1981] 2 WLR 693, PC and *Rowling v Takaro* [1988] 1 AC 473, PC. The latter is described below.

7 See paras 11.84 and 11.85.

legislation; or by construing the legislation in a way which the court holds is wrong even though there is room for reasonable disagreement as to what it means and the authority's interpretation falls within the range of reasonable interpretations. An unfortunate consequence of principle I liability might appear to be that it would entail liability where misconstructions of this sort could be held to have caused loss to citizens.

An example of the kind of case where this might occur is *Rowling v Takaro Properties Ltd*.[8] This was a case from New Zealand that was decided by the Privy Council. Takaro was a company set up by an American businessman that had acquired land in New Zealand to develop a holiday resort. When the project encountered financial difficulties, Takaro sought to refinance itself by selling shares to an investor in Japan. Under the relevant legislation, in order to do this it had to obtain the consent of the Minister of Finance. When this was refused, Takaro sought judicial review of the Minister's decision. The judge found in Takaro's favour, holding that by taking into account his belief that it would be desirable for the land owned by Takaro to revert to New Zealand ownership – which was a likely consequence of the refusal of consent – the Minister had misconstrued his powers under the statute. These, the judge held, were concerned with safeguarding New Zealand's overseas resources and not with controlling the ownership of land. However, by the time the Minister's decision had been overturned, the international economy had suffered a downturn, and the Japanese investor withdrew leading to the collapse of the resort project. Takaro then sought damages and the case came eventually to the Privy Council on the issue of whether the Minister could be liable in negligence. The Privy Council held that the Minister's misconstruction of the statute and his failure to take legal advice as to its proper interpretation were not capable of constituting negligence. The Minister's interpretation of the statute was a tenable one even though the courts had found it to be mistaken. The ratio of their lordships' judgment was thus that there was no breach. They did not find it necessary to reach a conclusion on the question of whether there was a duty of care. Nonetheless, they expressed the opinion that the unlikelihood of a public authority being found negligent for a misconstruction of statute of a sort which even a judge might make tended to militate against the imposition of a duty of care in such cases.[9]

The better answer to the problem which cases like this present is not, however, that a public authority should escape liability for certain unlawful acts which cause loss, but that authorities should be accorded greater latitude in interpreting their powers. If an interpretation is a reasonable or tenable one, it should not be treated as unlawful. The solution I propose thus reflects the approach to error of law hinted

8 Note 6 above.

9 Ibid. at p.502 B.

at in *R v Monopoly and Mergers Commission, ex p South Yorkshire Transport*[10] and exemplified by the American *Chevron* doctrine.[11]

9) I noted in Chapter 3 that creating a form of liability based on principle I would involve hard decisions as to the kinds of harm that could be made the subject of reparation. In trying to explain how the determination might be made as to whether public law duties were owed to individuals, I distinguished between two classes of persons to whom duties might be owed; and I distinguished those classes of person on the basis of the kinds of interests they hold. For the purpose of identifying types of harm that might be made the subject of reparation, it is more useful to distinguish three types of interest. Firstly, there are interests in receiving the benefits which it is the purpose of a particular public function to provide, the corresponding harm being the absence of or failure to receive the benefit. Secondly, there are the interests recognized in private law, the harm consisting in the infringement of these. Thirdly, there are the interests that may be harmed by the failure to observe procedural propriety in making decisions relating to holders of either of the first two types of interest. The harm here may consist of anxiety, distress, financial loss caused by delay and so forth. Clearly, the membership of the three classes of interest, especially the second and third, may overlap. To make this classification does not, of course, solve the problem of what kinds of harms could or should be made the subject of reparation. It merely provides us with an extra indication of what the task might involve.

10) I argued above that public authorities were under a public law duty, a duty that might be owed in particular circumstances to individuals, to carry out the practical aspects of their functions with reasonable competence. I wish now to draw out an important implication of this which I did not make explicit earlier. Suppose that a public authority has a choice as to how to deploy its resources in pursuit of its overarching duty: it could address problem A or problem B but does not have the resources to do both. We can make the problem more concrete by adapting the facts of a real case, *Kent v East Suffolk Rivers Catchment Board*.[12] Assume the authority is the Catchment Board, charged with preventing flooding. Assume further that the sea wall has been breached at two points, A and B, causing flooding to, respectively, land belonging to farmer A and land belonging to farmer B. The Board has the resources to mend one or other of the breaches but not both.

Now imagine two alternative versions of this scenario. In version 1, the only reasonable course is for the Board to mend the breach at point A, perhaps because the flooding at this point is far worse than at B but can be remedied without greater commitment of resources. This being so, the Board is under a duty to mend the wall at point A or, at least, to use reasonable endeavours to do so. Assuming that

10 [1993] 1 WLR 23.

11 See the defence of this approach in Craig, *Administrative Law* (5th ed., Sweet & Maxwell, 2003) pp.510–519.

12 [1941] AC 74.

the overarching duty is of a kind that can give rise to duties to individuals, the duty to mend breach A will be owed to farmer A and breach of that duty will, prima facie, entitle farmer A to reparation. The breach of the duty might, incidentally, take one of two forms. The authority might decide unreasonably to mend breach B rather than breach A. Here the breach comprises a decision that is unlawful for the familiar reason that it is Wednesbury unreasonable. Alternatively, the authority might decide to mend breach A but do so incompetently. Here there is breach of a public law duty of the sort argued for above, namely to carry out practical tasks with reasonable competence.

Next consider version 2 of the scenario. The authority could quite reasonably decide to mend breach A or breach B. No court would have any ground for impeaching either decision. The authority decides to mend breach A and does so incompetently with the result that farmer A's land is flooded for much longer than it would have been if the task had been carried out with reasonable competence. On the view contended for here, the authority owes a duty to farmer A to carry out the task competently. The authority could quite reasonably decide not to help farmer A. But once it decides to do so it is under a duty to execute its decision competently and the duty is, moreover, owed to farmer A. Farmer A is entitled to reparation for its breach. This follows whether or not there was any reliance on the part of farmer A.

When he addressed these issues in the context of the law of negligence, Lord Hoffmann reached rather different conclusions. In *Stovin v Wise*,[13] the defendant highway authority had the power to make improvements in the safety of the road system. It had identified a particular junction as requiring improvements in visibility and intended to carry these out, but failed to follow through. An accident then occurred at the junction, resulting in an action against the authority. Lord Hoffmann was prepared to allow, in principle, that a duty in negligence could arise where there was an unreasonable failure to exercise a statutory power (although he thought such a duty would arise very seldom). But he rejected the idea that there could be liability where an authority had a discretion as to how to exercise a power, decided to exercise it in a particular way but then failed to execute its decision. Since, in the instant case, the highway authority could reasonably have decided not to improve visibility at the junction where the accident occurred, it could not be liable for deciding to improve the junction and then failing to do so. "[T]he same loss would have been suffered if the service had not been provided in the first place" he said[14] and "the question of whether anything should be done about the junction was at all times firmly within the area of the council's discretion."[15] The majority of the House of Lords in *Stovin* concurred with Lord Hoffmann's opinion. But Lord Nicholls, dissenting, disagreed with the majority on this point and expressed a view more like the one set out here.

13 [1996] AC 923.
14 Page 952 E.
15 Page 832 B.

In case the view espoused by my self and Lord Nicholls strikes the reader as implausible, consider the following. As I argued above, core public authorities are obliged at all times to act so as to attain their assigned purposes.[16] They are not at liberty to waste resources: one might invoke here the fiduciary duty to ratepayers that has been found to exist in cases concerning local authorities.[17] Nor is it permissible for them to embark on a course of action and then abandon it without in any way furthering the purpose which they exist to attain, unless the decision to abandon the course of action can somehow be justified by reference to that purpose. Clearly it cannot be so justified where the failure to complete the course of action is purely the result of incompetence or of an oversight[18] These considerations may be thought to support no more than a duty to the general public, or the portion of it that the authority exists to serve, and correspondingly, it may be said that any remedy for breach of the duty must be such as to benefit the general public. But where a decision has been made to benefit a particular person, and it is only through the authority's incompetence that the benefit is not conferred, there is, I suggest, an intuitive appeal in the notion that the same person, and not just the wider public, should have a remedy for the authority's breach of its duty of competence.

11) With one exception, the form of liability required by principle I need not raise any problems of causation not already dealt with satisfactorily by the law of tort. A great many of the public law wrongs that give rise to liability will be omissions, but the idea of an omission being a cause of harm is a familiar one and unproblematic.[19] Another factor that might be thought to create difficulties from the

16 Hybrid public authorities, as we saw above, are not obliged at all times to act so as to attain their public purposes. If, however a hybrid public authority embarked on a particular course of action intended to help attain its public purpose and then failed through incompetence or an oversight to complete it, it would be no answer for the authority to point to the fact that it was not at all times obliged to pursue its public purposes. This could only be an answer if the failure to complete the course of action served one of the hybrid authority's own purposes; and if the failure was due to incompetence or an oversight, it would not. The argument in the text thus applies to hybrid public authorities as well as core ones.

17 E.g. *Bromley LBC v Greater London Council* [1983] 1 AC 768.

18 Contrast this with Lord Hoffmann's assertion at p.956 in *Stovin* that because the defendant council had a discretion as to whether to do the work to the dangerous junction, its position would not have been worse if the report recommending the work had simply been left at the bottom of the responsible officer's in-tray and forgotten about.

19 Note in this context, Hart and Honoré's criticism of Lord Simon's judgment in the *East Suffolk* case referred to at n.12 above. Lord Simon held that the Board could not have caused the flooding of the plaintiff's land since it did no more than fail to bring it to an end: the cause of the flooding was the bad weather. Hart and Honoré argue that an omission may be a cause as long as it involves a departure from expected conduct. Lord Simons' position is only defensible in the narrow linguistic sense that we do not usually speak of someone who fails to prevent something as causing it. See Hart and Honoré *Causation in the Law* (2nd ed., Clarendon, 1985) pp.140–141.

point of view of causation is that most public law wrongs are procedural and it is usually not possible to say that the following of correct procedure would have led to a different outcome. Consequently, there will be no ground for saying that the wrong caused harm. There are two responses to this, both already touched upon in this chapter and in Chapter 3. The first is that there *are* instances in which a court is prepared to hold that the outcome of the decision making process is unlawful as a matter of public law. This is most obviously the case where a decision is held to be Wednesbury unreasonable, but it might also be so where an authority is held simply not to have the power to act as it does or not to be empowered to act for a particular purpose. The class of cases where a court is prepared to hold in judicial review that a particular outcome is unlawful is, of course, a very small one. But, as I argued in Chapter 3, this should not necessarily be seen as a problem as it tends to allay worries about the overwhelming effect of administrative liability as well as demonstrating that the possibility of such liability need not lead the courts to interfere in difficult policy decisions. On the other hand, it follows from the account of the reach of public law given in Chapter 6 that failures of practical competence count as public law wrongs. Thus the failure of the Catchment Board to end the flooding in the *East Suffolk* case, the failure of a fire brigade through incompetence or unreasonable decision-making to put out a fire,[20] and the failure of an authority through simple clerical error to deliver a benefit to its intended recipient[21] are all public law wrongs and clearly there is not too much difficulty in saying in these cases that the outcomes are unlawful. Where a case does involve a decision-making process of the sort that is traditionally impugned in judicial review, a court should also be readier to hold that the outcome is unlawful if the result is the award of damages rather than an order to the authority to make a different decision. As I noted in Chapter 3, the latter involves a more serious intrusion into the workings of the authority than does the former.

The second response to the difficulty about saying that the outcome of the decision-making process is unlawful is that procedural wrongs themselves may cause harm even though it cannot be shown that they lead to an unlawful outcome. This may be so, for example, where the failure to give reasons or to tell the claimant the case against her causes anxiety or distress, or where the claimant suffers economic loss as a result of excessive delay in reaching a decision which favours the claimant.

There is, of course, a third response to the difficulty which is to invoke the idea of loss of a chance and to argue that through suffering some procedural wrong such as being excluded from participating in the decision-making process, the claimant lost the opportunity to bring about a favourable outcome. This is not an approach I would favour since if a court is not prepared to say that the outcome

20 Cf. *Capital and Counties v Hampshire CC* [1997] QB 1004.

21 As e.g. in *R (N) v Secretary of State for the Home Department* [2003] EWHC 207 (Admin); *Neil Martin Ltd. v Revenue and Customs Commissioners* [2007] EWCA Civ 1041; [2007] All ER (D) 393.

should have been different, it is difficult to see what meaning can be attached to the idea that the claimant has lost some quantifiable possibility of influencing it.

The idea of loss of a chance could also be invoked in another context. At point 10 above, I discussed the case in which it is within an authority's discretion to choose either of two courses of action, A or B. The issue there was what should happen if, having chosen one of the alternatives, the authority then fails to complete the course of action or does so incompetently. But what if, presented with the choice, it does nothing at all? In *Anns v Merton Borough Council*,[22] the House of Lords considered this possibility in the guise of the objection that to make the authority liable for performing an act negligently which, under the law of negligence, it was under no obligation to perform in the first place would discourage it from performing acts of the type in question. Lord Salmon's answer was that while there was no obligation to act in the law of negligence, there was an obligation in public law. Public authorities could be expected to observe this obligation and there was, moreover, the remedy of mandamus if they did not. An alternative answer would be that where an authority is under an obligation to act but fails to take either of the two (or more) courses of action available, each of the persons who fails to benefit should be able to sue for the lost chance to benefit. The compensation would then represent the value of the whole benefit but would be divided between the two (or more) beneficiaries or groups of beneficiaries.

In an important respect, this is a better answer to the problem than Lord Salmon's: an order of mandamus is not much use to a claimant who has already suffered harm. Moreover, it does not involve second-guessing the authority in the way that awarding compensation for the loss of the chance to influence the outcome of the decision-making process would because it need only be applied where the court feels able to say with confidence that the authority should have acted. On the other hand, it might involve either determining to what extent it would have been permissible to choose each of the available options, or arbitrarily assuming that each of the available options was equally permissible. Despite these difficulties, it has to be admitted that in strict consistency the use of the idea of the lost chance provides the best solution in these particular circumstances. This is the one respect, referred to above, in which liability under principle I raises a problem of causation not already dealt with satisfactorily by the existing law of tort.

12) I argued in Chapter 3 that liability under principle I must be direct liability of the authority itself rather than liability of the authority's employees. This follows from the premise that principle I liability is liability for public law wrongs. In this chapter, however, I have argued that the concept of a public law wrong should be thought of as encompassing failures of practical competence as well as breach of the norms that are usually invoked in judicial review. This raises the question of which acts of an authority's employees should be treated as acts of the authority itself and which as acts solely of the employee. There is no reason, I suggest, to give this question a very different answer from the one that the courts presently give to the

22 [1978] AC 728.

question of when an employer should and when it should not be held vicariously liable for the torts of its employees. Under principle I, the ideal test would be whether the employee was able to act as she did by reason of the authority she possessed as an official of the authority in question. The current test of vicarious liability, laid down by the House of Lords in *Lister v Hesley Hall Ltd*[23] is whether the employee's tortious act is "closely connected" with her employment. The difference between these two tests in practice is likely to be slight and therefore, it will make little difference in many cases that liability under principle I must be direct where liability in the existing law of negligence is vicarious. Where it would make a difference is where the identities of the employees responsible for an authority's wrongful acts cannot be discovered or where the authority's failures are systemic rather the result of individual errors.[24]

This last point completes my outline of the features that a law of administrative liability satisfying principle I would possess. The next task is to assess the existing law in the light of the criteria established in this and the preceding chapters.

23 [2002] 1 AC 215. One commentator has criticized the test set out in this case partly on the ground that it makes it easier to sue public authorities: see McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 CWLR 268. Since I am arguing in favour of an expansion of administrative liability, I do not share these concerns.

24 See in this connection the critique of the *Phelps* case in the final section of Chapter 12.

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PART 2
Implementation

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Chapter 9
Implementing Principle II

Introduction

In the first part of this book, I endorsed two principles of administrative liability and I also attempted to show that they were consonant with, and indeed entailed, by more general principles recognized in English law. In the second part, I assess the law in the light of the two principles. I consider the extent to which current doctrine satisfies the principles and in so far as it does not, whether and how the judges might develop it so that it does. In following this approach, I turn aside from what might seem to be the more natural course of simply recommending a way in which the principles could be implemented by statute. I do this for two reasons. Firstly, even if the courts were granted statutory powers to implement the principles, a great deal of work would have to be done to determine how the new powers should mesh together with the existing law. By considering, independently of any proposed statutory remedy, the relationship of the two principles to existing law, I carry out, in essence, a task that would have to be performed in any case. Secondly, once the task is performed, it may appear, as I hope to show, that the enactment of statutory remedies is redundant. It may, that is, be possible for the courts to create a satisfactory law of administrative liability out of existing materials. In relation to both principle I and principle II, I treat the question of the extent to which current law satisfies the principle and the question of how it might be developed to do so fully together: diagnosis of how the law falls short tends naturally to merge with prescription for improvement. In the present chapter, I diagnose and prescribe with respect to principle II. I do the same with respect to principle I in Chapters 10–12. I leave discussion of the statutory reforms that others have proposed to the final chapter.

Implementing principle II

As was to some extent implied in the discussion in Chapter 5, pre-Human Rights Act common law falls a long way short of satisfying principle II. The principle itself is not explicitly recognized. What is recognized is a narrower principle that can be derived from principle II, namely that the state should compensate citizens where it expropriates their property. The exact status of this narrower principle in English law is unclear. It is certainly accepted as a moral and political matter and this is reflected in the fact that most powers of expropriation are conferred by

statutes which provide at the same time for compensation. What is less certain is whether the courts are obliged to apply it as a matter of common law, for example where the Crown uses or expropriates property under the royal prerogative. In *Attorney-General v De Keyser's Hotel*,[1] Lord Moulton, discussing the liability of the Crown to pay compensation in respect of damage done in the exercise of the prerogative of war, spoke of "the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals."[2] The question in the case was not, however, whether the Crown was liable as a matter of common law to compensate for harm done in the exercise of the prerogative, but whether the existence of statutory powers to do particular acts (the statute in question providing for compensation to be paid in respect of harm resulting from the acts) displaced prerogative powers to do the same acts. In the *Burmah Oil* case,[3] the issue *was* whether compensation should be paid in respect of damage done in the exercise of the prerogative. The House of Lords decided that it should. Since, however, the decision was effectively overridden by statute and since, in any case, their Lordships expressed grave doubts as to whether the plaintiff had suffered harm that would not have occurred without the action of the Crown, no clear guidelines to govern the payment of compensation emerged.[4]

Once one steps outside the field of expropriation, one finds that the principle that the burden of things done in the general interest should not be borne by individuals has little purchase. For example, one type of situation in which the principle would demand compensation would be where individuals suffer flooding as a side effect of a sewerage or drainage system built by a public authority to serve the general public. In fact, however, in a long line of cases, culminating in *Smeaton v Ilford Corporation*,[5] the courts have held that there is no liability in such cases. The cause of action available to the plaintiffs in these cases was nuisance. But the defendant authorities were held neither to have created nor continued the nuisance: it was not the result of any positive act on their part and while it *was*

1 [1920] AC 508.

2 At p.553.

3 *Burmah Oil Company v Lord Advocate* [1965] AC 75.

4 In *Nissan v Attorney General* [1970] AC 179, 227G, Lord Pearce reaffirmed the principle that the Crown was liable to pay compensation in respect of the use or taking of property under the prerogative, describing the prerogative as "a right to take and pay." This is, however, an obiter dictum and the case as a whole does not yield definitive guidance on the issue.

5 [1954] Ch. 450. Earlier cases of this type are *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch. D 102; *Attorney General v Dorking Union Guardians* (1882) 20 Ch. D 595; *Robinson v Workington Corporation* [1897] 1 QB 619; *Hesketh v Birmingham Corporation* [1924] 1 KB 260. What was available to the plaintiffs in these cases was a procedure for making a complaint to the minister under the relevant statute about the failure to improve the sewerage system; and if the complaint was not properly dealt with, mandamus.

the result of new households connecting to the system this was something the authorities were powerless to avoid since they were under a statutory obligation to allow it.[6] In no case of this type, before the advent of the Human Rights Act, was it suggested that the principle that the plaintiff should be relieved of the burden of something done in the public interest had any place.

Another example of the traditional absence of principle II from the common law is to be found in cases on the rule in *Rylands v Fletcher*.[7] The rule as originally formulated imposes liability for harm caused by the escape from land of something whose accumulation there by the defendant does not amount to a natural use. It might have been developed so as to reflect some more general principle, such as that one who imposes an exceptional risk on another should be liable where the risk eventuates. This would have created liability in at least a sub-class of the cases in which it is demanded by principle II. The courts have, however, consistently rejected the possibility. An especially clear example of this rejection and its consequences is *Read v Lyons*.[8] The plaintiff there was a woman effectively obliged by the government, as part of the war effort during the Second World War, to work in a state munitions factory. She was injured as a result of an explosion in the factory and, being unable to prove negligence, brought an action under *Rylands v Fletcher*. The House of Lords rejected the action on the ground that, since the explosion occurred on the defendants' premises, there was no escape from the premises as required by the rule. Arguments in favour of a wider principle based on risk were given short shrift.

The situation in the common law is thus unpromising. But I want to suggest that the entry into English law of Convention law via the Human Rights Act presents new possibilities. In Chapter 5, I mentioned the Act as one of the factors that make it possible now to say that we have a principle of substantive equality in English law. This being so, it would not be surprising if the Act also provided the means for creating a mechanism whereby breach of the principle could be made the subject of reparation. Like any system of fundamental rights, the system imported by the Human Rights Act is centrally concerned with ensuring that fundamental interests of individuals are not sacrificed in the pursuit of the public interest. That is to say, the system protects the principle that every citizen's fundamental interests are of equal importance by limiting the extent to which the fundamental interests of particular individuals can be infringed in order to further public goals. Governmental action that makes a greater inroad into protected individual interests than can be justified by reference to the aim pursued is declared unlawful. Where harm to the interest in question has already been suffered, compensation may be payable. For present

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6 That this position still represents the common law was affirmed by the House of Lords in *Marcic v Thames Water Utilities* [2003] 3 WLR 1603, see especially the speech of Lord Hoffmann.

7 (1866) LR 1 Ex 265, affirmed (1868) LR 3 HL 330.

8 [1947] AC 156. For further references in relation to the development (or non-development) of the rule in *Rylands v Fletcher*, see notes 22 and 24 in Chapter 5 above.

purposes, however, the important feature of convention-based jurisprudence is not that it brings the possibility of compensation where a right is held to have been breached. This is reparation for harm caused by unlawful government action and hence comes within the scope of principle I. The important feature is the idea that in certain cases a public authority may be able to avoid being held to have breached a right if it pays compensation for having infringed the interest that the right protects.

In identifying the place of this idea in Convention law, the starting point is the jurisprudence concerning the right to property. Article 1 Protocol 1 of the Convention, which contains the right to property, is in the following terms:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Two things make this Article important for present purposes. Firstly, a great many of the cases to which principle II is relevant can be characterized as involving interference with property interests. This is obviously true of the central case of expropriation. It is also true of some of the other examples with which I began Chapter 5, such as those of property destroyed to prevent the spread of fire or disease and of the burden of economic regulation falling especially heavily on some particular individual or group. (It is less clear whether cases in which exceptional harm to an individual results from the imposition of some risk, as in the example of the nuclear power station or munitions factory, can be made to fit this pattern. I return to this problem below.) Secondly, the practice of the European Court of Human Rights in determining whether the right under A1P1 has been breached is to ask whether a fair balance has been struck between the public or general interest and the interests of the particular individual concerned. A key factor in answering this question is often whether the state has offered adequate compensation.

To see how this might make possible the implementation of principle II, a little more needs to be said about the ECtHR's practice in relation to A1P1. The court has stated repeatedly that the Article contains three rules:

> The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that Contracting States are entitled, amongst other things, to control the use

> of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property, and should therefore be construed in the light of the general principle laid down in the first rule.[9]

The court treats nearly all cases as falling under either the second or third rules, that is, as involving either deprivation or control of the use of property. A small number of cases are dealt with under the first rule which appears to provide a catchall category for interferences with property that are not obviously covered by the other two rules.[10]

The connectedness of the three rules is demonstrated by the fact that the court applies the same three-fold test in relation to each for determining whether there has been a breach.[11] Firstly, it determines whether the measure complained of was in accordance with law.[12] Secondly, it asks whether the interference was done pursuant to the "public interest" (first paragraph) or the "general interest" (second paragraph) or to "secure the payment of taxes or other contributions or penalties" (second paragraph). Thirdly, the court asks whether the state has struck a reasonable balance between the public or general interest pursued and the interests of the individual affected. The court has said that this balance will not be found if the person concerned has had to bear "an individual and excessive burden."[13]

The second paragraph of Article 1 Protocol 1 states that "[t]he preceding provisions shall not … impair the right of a State to enforce such laws as *it deems* [my emphasis] necessary to control the use of property" etc. This clearly suggests an intention that the question whether a control of the use of property is genuinely necessary to achieve the aims set out in the Article be left to the state. In early cases under the second paragraph,[14] the Court took the view that to justify a control, a state need do no more than show that the measure was adopted in order to serve one of the recognized ends: it was not for the Court to carry out any balancing exercise. Subsequently, however, the Court has extended the balancing

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9 This particular formulation comes from *Immobiliare Saffi v Italy* (2000) 30 EHRR 756, para 61.

10 The case in which the first rule was first used in this way was *Sporrung and Lönnroth v Sweden* (1982) A 52; (1983) 5 EHHR 35. The use of this category has been criticized as unnecessary and anomalous: see e.g. Sermet *The European Convention on Human Rights and Property Rights* pp.29–31.

11 See Jacobs and White *The European Convention on Human Rights* 4th edition by Ovey and White (Oxford University Press, 2006) Chapter 15 and especially p.373. See also Anderson "Compensation for Interference with Property" (1999) 6 EHRLR 543–558.

12 If the measure involves a deprivation under the first paragraph, general principles of international law as well as national law must be respected.

13 See e.g. *Sporrung and Lönnroth v Sweden* above n.10, para 73, *James v UK* (1986) A 98; (1986) 8 EHRR 123 para 50.

14 E.g. *Handyside v UK* (1976) A 24; (1979-80) EHRR 737, para 62.

approach to control cases thus minimizing the difference between these and cases concerning deprivation.[15]

On the other hand, when it comes to the question whether compensation is necessary if the state is to avoid breach of the Article, the Court's approach tends to differ according to which rule is in play. Where there is a deprivation of property, the Court nearly always finds that compensation is necessary in order to avoid a finding of breach and has stated that compensation must be provided for deprivations of property except in exceptional circumstances.[16] By contrast, compensation is rarely required in relation to controls of the use of property. One might try to justify this on the ground that a deprivation of property will typically be a more serious infringement of the victim's interests than a control of its use. Nonetheless, the strictness of the distinction that the Court has tended to make between deprivation and control when dealing with the question of compensation has been criticized as not in keeping with the unified approach to the Article described above. In particular, Anderson has criticized the practice of classifying what appear to be deprivations under one of the other two categories in order to avoid the conclusion that the state should pay compensation.[17]

If the European Court of Human Right's jurisprudence demonstrated that compensation could only ever be necessary where there was a deprivation, then the Convention would not take us far beyond English law. There is, however,

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15 See *Pine Valley Developments v Ireland* (1991) A 222; (1992) 14 EHRR 319, paras 57–59.

16 *Holy Monasteries v Greece* (1994) A 301-A; (1995) 20 EHRR 1 para 71; *Lithgow v United Kingdom* (1986) A 102; (1986) 8 EHRR 329 para 71.

17 "Compensation for Interference with Property" n.11 above at p.553. He gives the following examples: "(a) Goodwill in a business is a possession; but when the Government causes the business to cease operating by removing its licence [*Tre Traktörer v Sweden* (1989) A 159; (1991) 13 EHRR 309; *Fredin v Sweden* (1990) A 192; (1991) 13 EHRR 784] or by making it illegal, [33298/96 *Pinnacle Meat Processors v United Kingdom*, Commission admissibility decision of October 21, 1998] it is held to be controlling the use of the underlying land rather than depriving the business of its goodwill. (b) The forfeiture and destruction of property are acknowledged to constitute deprivation but are nonetheless examined under the second paragraph of Article 1 (control on use) if the use of that property has been lawfully judged illicit and dangerous to the general interest. [*Handyside v United Kingdom* n.14 above, para 63; *AGOSI v United Kingdom* (1986) A 108; (1987) 9 EHRR 1, para 51] (c) The seizure by the tax authorities from A of goods owned by B was, remarkably, not a deprivation of B's property but rather a control on the use of B's property, justified by the need to secure the payment of A's taxes. [*Gasus Dosier v Netherlands* (1995) A 306-B; (1995) 20 EHRR 403, paras 55–59] (d) An enforceable court award, and in some cases a pending legal claim, are possessions. Yet when the Government legislates retrospectively so as to nullify an award or a pending legal claim, it is held to be not depriving the applicant of the award or claim, but interfering with its substance [*Stran Greek Refineries v Greece* (1994) A 301-B; (1994) 19 EHRR 293] or even controlling its use. [*National and Provincial Building Society and others v United Kingdom* (Application Nos 21319/93, 21449/93 and 21675/93), Judgment of 23 October 1997; (1998) 25 EHRR 127, para 69].

much to indicate that the payment of compensation may make the difference between a control on use (or interference with peaceful enjoyment) being held in accordance with the Convention and its being held not in accordance. *Banér v Sweden*[18] concerned a law, passed by the Swedish legislature, which gave citizens a right to fish in privately owned waters. The applicant was the owner of a lake subject to the legislation. This provided for the payment of compensation where owners suffered financial loss, for example because they had been in the habit of selling permits to fish and were now unable to do so, but this did not avail the applicant since he had not sold permits prior to the advent of the legislation. On the facts, the Commission held the application inadmissible but they made the following general observations about compensation:

> The legislation regulating the use of property sets the framework in which the property may be used and does not, as a rule, contain any right to compensation. This general distinction between expropriation and regulation of use is known in many, if not all, Convention countries. This does not exclude that the law may provide for compensation in cases where a regulation of use may have severe economic consequences to the detriment of the property owner. The commission is not required to establish in the abstract under which circumstances article 1 may require that compensation may be paid in such cases. When assessing the proportionality of the regulation in question it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation.

In *S v France*[19] the rural setting of the applicant's 18th century house was ruined by the construction, 300 yards away on the other side of the Loire river, of a nuclear power station. The applicant had already been awarded compensation by the French administrative courts for the abnormal and special prejudice caused by the noise from the power station. Considering this insufficient, she brought proceedings before the Commission under A1P1 and under Article 8 of the Convention. In the Commission's decision, they appear to suggest both that severe noise nuisance constitutes partial expropriation and that the applicant had suffered interference with the peaceful enjoyment of her possessions within the meaning of the first sentence of A1P1. Whichever way the interference was classified, the decision turns on the Commission's finding that the state's payment of compensation was sufficient to avoid a finding of breach.

Immobiliare Saffi v Italy[20] concerned legislation which was intended to deal with a housing crisis by staggering the eviction of poor tenants. The applicants were landlords prevented by the legislation from obtaining possession of their apartment. A court had made an order for possession but the legislation conferred upon a local official discretion as to when to call upon the police to execute the

18 (1989) 60 DR 128.
19 (1990) 65 DR 250.
20 Note 9 above.

order. Priority in the execution of such orders was accorded to landlords who needed the property for their own use or whose tenants were in arrears with their rent. Since, at any given time, the applicants did not satisfy the criteria for priority, the enforcement of their possession order was repeatedly put off over a number of years. The Court classified the interference with the applicants' property rights as a control of use. It held further that the applicants had had to bear a disproportionate burden and that this constituted breach of A1P1 and awarded the applicants just satisfaction. An important factor in the decision was the absence in the legislation in question of any provision for compensation.

As the Court of Appeal said in a recent case in which it considered the Convention case law on A1P1 and compensation:[21]

> The right analysis seems to us to be that provided the state could properly take the view that the benefit to the community outweighs the detriment to the individual, a fair balance will be struck, without any requirement to compensate the individual. Should this not be the case, compensation in some appropriate form may serve to redress the balance, so that no breach of article 1 of the First Protocol occurs.

This being so, I suggest that A1P1 provides a useful means for ensuring the observation of principle II in English law. In the jurisprudence of the ECtHR, compensation is not appropriate for every control of the use of property or interference with peaceful enjoyment, but this is just as it should be. Principle II only requires the making of reparation in relation to the imposition of exceptional burdens, and this is what the A1P1 jurisprudence also requires. The adoption of this method would have various other advantages. Firstly, as noted above, the right to property can be made to cover a great many (although not all) of the cases in which one would wish to see principle II operate. Secondly, the compensation required under A1P1 need not be such as to remove altogether the burden imposed by a public body on the claimant. Even in deprivation cases, the ECtHR does not require full compensation but merely such as to ensure that the measure in question "does not impose a disproportionate burden on the applicants."[22] This reflects, in part, the Court's practice of granting a margin of appreciation to states' decisions. But it is also easy to interpret in line with the idea, implicit in Principle II, that the aim of compensation is to reduce the burden imposed on an individual in pursuit of some public goal to a level which it is reasonable to expect individuals in general

21 *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580; [2005] 1 WLR 1267 at para 58

22 *Holy Monasteries v Greece* (1994) A 301-A; (1995) 20 EHRR 1, para 71. In deprivation cases, the ECtHR also requires that compensation be an amount "reasonably related" to the value of the property in question ibid. This does not appear to mean however that the amount be anything near the full value of the property. See also *Lithgow v United Kingdom* (1986) A 102; (1986) 8 EHRR 329.

to bear.[23] Thirdly, being based on a human right, this method applies to legislation, as principle II requires. This is not to say that English courts can therefore order compensation in respect of consequences that follow directly from a statute. Since A1P1 is given effect in English law by the Human Rights Act, English courts enforcing the Article are subject to the remedial limits that the Act imposes. Where a statute imposes an exceptional burden on some individual or group and, in the absence of compensation, the imposition is in breach of A1P1, the courts cannot award damages under the Act.[24] But they can, at least, make a declaration that the failure to provide for compensation in the statute renders it incompatible with the Convention.[25]

English courts have, in fact, already begun to consider arguments in relation to compensation under A1P1 that exhibit the features that make it a suitable vehicle for the implementation of principle II. Entitlement to compensation arising from breach of A1P1 has been considered in a number of cases of which the most important is *R (Trailer and Marina (Leven) Ltd) v Secretary of State*.[26] In that case, the claimants were the owners of a canal which had been designated a Site of Special Scientific

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23 Note in this connection the explanation given by the ECtHR in *James v UK* as to why it might be appropriate to afford a higher standard of protection to the property rights of non-nationals than of nationals of a state. The Court said that "there may well be legitimate reasons for requiring nationals to bear a greater burden in the public interest than non-nationals."

24 See ss.3(2), 6(2) and 8(1) and (2).

25 S.4. In the text, I have addressed the case of a statute that involves what I called in Chapter 5 a "justifiable" breach of the equality principle i.e. the imposition of an exceptional burden that could be rendered lawful (or, assuming a Convention framework, convention-compatible) by the payment of compensation. It is perhaps worth sketching the remedial options available to the English courts under the Human Rights Act in relation to other types of breach of the equality principle. There are four possibilities. Firstly, a breach might be justifiable (in the sense explained in Chapter 5) and the direct result of a statute. This is the case dealt with in the text. Secondly, a breach might be justifiable but committed in the exercise of administrative discretion. In this case, the court might effectively require compensation by awarding damages (as provided for by s.8 of the Act). The measure of damages in this case should be the amount of compensation necessary to render the act complained of lawful. Thirdly, a breach might be unjustifiable (in the sense explained in Chapter 5) and the direct result of statute. In this case, the court could do no more than make a declaration of incompatibility. Fourthly, a breach might be unjustifiable and committed in the exercise of administrative discretion. Here, the court could award damages but it could also grant any of the other compulsory remedies available in relation to unlawful administrative acts including a quashing order if the act complained of was such as to remain in force or continue at the time of its challenge. Unjustifiable breaches are only likely to occur as a result of infringements of rights other than the right to property, see further below.

26 Note 21 above. Others are *R (Takeley Parish Council, Trevor Allen) v Stansted Airport Ltd., BAA Plc, Secretary of State for Transport* [2005] EWHC 3312 (Admin); *Beaulane Properties Ltd. v Palmer* [2005] All ER (D) 413 (Mar); *R (Langton and Allen) v*

Interest (SSSI). The claimants had entered into a management agreement with English Nature under which they voluntarily accepted restrictions on the use of the canal in exchange for financial consideration. The legislation under which the management agreement was made was replaced by new legislation which enabled English Nature to impose restrictions on the use of SSSIs without having to offer compensation. When the old management agreement expired, English Nature was able to impose such restrictions on the claimants. The claimants sought a declaration that the relevant provisions of the new legislation were incompatible with the Convention since they permitted restrictions on the use of SSSIs without compensation where previously the same restrictions were only imposed with the consent of the landowner and for consideration. This led the Court of Appeal to consider in detail the Convention case law described above. On the facts, the claim failed, but the Court recognized the principle that compensation might be payable where a public authority failed to strike a fair balance between the public interest in control of the use of land and an individual's rights under A1P1.[27]

In another line of cases, the English courts have considered *S v France*, both in relation to A1P1 and Article 8 of the Convention. The line begins with the first instance judgment of Judge Richard Havery QC in *Marcic v Thames Water Utilities*.[28] The facts of that case were described in Chapter 7 but for convenience I repeat them here. The claimant was a householder whose garden was periodically flooded with sewage as a result of inadequate sewers. The defendant was the statutory undertaker responsible for the sewers. The statute imposed on the undertaker a duty to provide adequate sewerage[29] and also provided a remedy for failure to fulfil this duty. A complaint could be made to the regulator, the Director General of Water Services, who could make an enforcement order against the undertaker.[30] The statute otherwise excluded any action against the undertaker based on breach of the statutory duty although it permitted actions based on any other statute or on the common law. Marcic sued the defendant in nuisance, negligence, breach of statutory duty and under the Human Rights Act, invoking A1P1 and Article 8 of the Convention. Judge Richard Havery QC found against Marcic in relation to the common law claims and breach of statutory duty but for him in relation to the claim under A1P1 and Article 8. In relation to Article 8 he found an interference with the claimant's rights under the first paragraph, the question then being whether the interference could be justified as "necessary in a democratic society in the interests of the economic well-being of the country or for the protection of the rights and freedoms of others." In relation to A1P1, he invoked *S v France* as showing that a serious diminution in the value of a

Secretary of State for the Environment, Food and Rural Affairs [2001] EWHC Admin 1047, [2002] LLR 136.

27 See the passage quoted on p.120 above.

28 [2002] EWCA Civ 64.

29 Water Industry Act 1991 s.94.

30 Ibid. s.18.

property as a result of nuisance could amount to partial expropriation, the question then being whether the interference with the claimant's property rights could be justified as being in the public interest. In relation to both Articles, the judge found that the question turned on whether the justification given by the defendant for not doing the remedial work necessary to prevent the flooding to the claimant's property was adequate. This meant, in effect, looking at whether the defendant's system for determining an order of priority between the many pieces of remedial work needing to be done was adequate. The judge concluded that, while the system might in fact be fair, the defendants had not demonstrated that it was, and hence that Marcic's human rights based claims succeeded.

On appeal, the Court of Appeal also found in favour of the claimant, basing their conclusions principally on the common law. They held that the claimant succeeded because the old nuisance cases on sewers described above had been superseded by the line of authorities comprising *Goldman v Hargraves*[31] and *Leakey v National Trust*.[32] This meant that the defendants were under a duty to do what they reasonably could to abate the nuisance emanating from their sewerage system and since they had statutory powers enabling them to end the nuisance altogether they were liable to Mr Marcic for failure to take reasonable steps. The Court was at pains to deny, however, that a sewerage undertaker could only be liable for nuisance resulting from its system where reasonable steps could be taken to abate it. A householder at risk of flooding from an overcharged system should not be deprived of compensation merely because ending the nuisance to a single householder would not justify the cost of doing the necessary work. "It seems to us at least arguable" the Court went on "that to strike a fair balance between the individual and the general community, those who pay to make use of a sewerage system should be charged sufficient to cover the cost of paying compensation to the minority who suffer damage as a consequence of the operation of the system."[33] They then suggested that it might be necessary to modify the rule in *Rylands v Fletcher* to make the law in this areas Convention-compatible and considered *S v France* as exemplifying the principle that "where an authority carries on an undertaking in the interests of the community as a whole it may have to pay compensation to individuals whose rights are infringed by that undertaking in order to achieve a fair balance between the interests of the individual and the community."[34]

By the time the case reached the House of Lords, the defendants had already carried out the remedial work necessary to prevent further flooding to Mr Marcic's garden so that the outstanding practical question concerned damages. Their Lordships reversed the Court of Appeal's findings on the common law issues and upheld the first instance judge's view that the position continued to be governed

31 [1967] 1 AC 645.
32 [1980] QB 485.
33 [113].
34 [114]–[117].

by the old sewer cases. They also rejected the view that proceedings could be brought directly against the defendants under the Human Rights Act. The statutory complaints procedure was Convention-compliant and the proper course for a person in the claimant's position was to make use of it, as the claimant had not. The claim thus failed. This did not mean, however, that their Lordships were altogether indifferent to the argument that there should be compensation where an individual bore a disproportionate share of the burden resulting from action taken to benefit the public. Lord Nicholls was concerned by the absence in the statutory scheme of provisions for compensating those who suffered flooding while waiting for flood alleviation works to be carried out. As he said, endorsing the observations of the Court of Appeal, "the flooding is the consequence of the benefit provided to those making use of the system … [t]he minority who suffer damage and disturbance as a consequence of the inadequacy of the sewerage system ought not to be required to bear an unreasonable burden."[35]

In *Dennis v Ministry of Defence*,[36] the claimants were the owners of an estate that was next door to a Ministry of Defence air base. The base was used for training Harrier jet pilots and this caused severe noise nuisance to the estate. Buckley J held that the Ministry was liable in nuisance but also accepted that the training of Harrier pilots served the important public interest in defence of the realm. He therefore held that damages rather than an injunction was the appropriate remedy. What is significant from the present point of view is that Buckley J also considered A1P1 and Article 8 of the Convention, *S v France* and the arguments made in relation to these by the Court of Appeal in *Marcic*. He found that there was a breach of the claimants' Convention rights and that a fair balance between the public interest and the rights of the claimants could not be struck without compensation. He therefore found that there should be damages under s.8 of the HRA but that the award in relation to nuisance was sufficient to constitute just satisfaction.[37]

Finally, *S*, *Marcic* and *Dennis* were considered in *Andrews v Reading Borough Council*[38] There the claimant was subjected to significant noise nuisance as a result of a road improvement scheme. The claimant alleged breach of his rights under Article 8 of the Convention and sought the cost of secondary glazing to his house. The judge found that the road improvement scheme did infringe the claimant's

35 [44]–[45]. These remarks of Lord Nicholls are arguably inconsistent with the rest of his own judgment and that of the House of as a whole. The practical conclusion he drew from them was that "[t]his is a matter the director [i.e. the Director General of Water Services] and others should consider in the light of the facts in the present case." But if, as his Lordship seems to suggest, the statutory scheme was Convention non-compliant in its failure to provide compensation to persons in the claimant's position, there seems to be no reason why the Court should not have ordered the defendant to pay compensation in respect of the harm the claimant had suffered before remedial works were undertaken.

36 [2003] EWHC 793 (QB); [2003] All ER (D) 300.

37 Difficulties with Buckley J's conclusions in relation to remedies are pointed out in Bagshaw, "Private Nuisance and the Defence of the Realm" (2004) 120 LQR 37.

38 [2005] EWHC 256 (QB); [2005] All ER (D) 83.

rights but that it was also reasonable because in the public interest (and hence "justifiable" in the sense I defined in Chapter 5). In accordance with the earlier authorities, this meant that the authority could be required to pay compensation.[39] In addressing the question whether it was reasonable of the defendants to have refused to offer compensation to the claimant, the judge considered whether the defendant was in an exceptional position by comparison with fellow residents. The case for regarding the refusal as unreasonable would be stronger, the judge thought, if the claimant's position was unique or if he was in a small minority.[40] The judge found an absence of conclusive evidence on the point but appears to have decided, on the balance of probabilities, that not many residents were likely to be in the claimant's position.[41] In determining the level of damages, the judge tried to assess what would have been a reasonable position for the authority to take when faced with evidence that the noise level suffered by the claimant was excessive. He decided that if the authority had offered a proportion of the cost of the secondary glazing, no court would have entertained a claim for more and awarded a modest sum (£2,000) accordingly.

Taken together, these cases show that a principle very like principle II is in the process of being recognized in English law. The only rights in relation to which the principle is invoked are the right to property and, to a lesser extent, the right to a private life under Article 8. This partly reflects the fact that I have been searching for a principle to govern cases in which harm is caused by a restricted category of acts: acts that are genuinely in the public interest and that can be justified as long as compensation is paid. The larger principle that there should be redress, including compensation, for harms which result where the interests of individuals are sacrificed in pursuit of the public interest operates in relation to all the rights of the Convention. That the narrower principle cannot be so widely extended reflects the fact that it is seldom legitimate for the state to pay to be allowed to infringe a citizen's right. It can do this in relation to the right to property because under the Convention and, arguably, as a matter of general principle, property occupies a rather low status in the hierarchy of rights. It is possible to take or control the use of someone's property without infringing their essential dignity and the value of property to an individual is often purely, or largely, financial. Consequently, the loss to them of the property is adequately compensated for by the payment of money. Harm to private life is more serious but the instances considered above of actions rendered lawful by the payment of compensation are all of the sort that English law traditionally classifies as interferences with property. Other Convention rights protect interests that are more important to the essential dignity or welfare of the individual and may also protect important public interests as, arguably, do the rights to freedom of expression and assembly. It is thus hard to

39 See [92] and [93].
40 [115]–[116].
41 [118]–[119].

think of instances in which it would be acceptable to let the state pay to be allowed to infringe them.

There is, nonetheless, an important category of cases that fall under principle II (in the narrow sense in which I have interpreted it) but that have not been touched by the developments under the European Convention noted above. These are cases where exceptional harm to individuals is caused by the eventuation of the risk posed by certain state activities as in the munitions factory and nuclear power examples. If a munitions factory explodes killing citizens who live nearby, then the right infringed is not the right to property or to a private life but the right to life itself. It could never be acceptable for the state to pay to be allowed to intentionally infringe the right to life. But the state might be justified in conducting some activity that poses a risk to the lives of some of its citizens as long as it compensates those citizens (or their surviving dependants and relatives) when the risk eventuates. The same would go for some activity that posed a risk of serious injury, damage to health or other grave interference with fundamental interests.

Outside the rights to property and a private life, however, this way of viewing the problem is not manifest in the jurisprudence of the European Court of Human Rights. For example, the Court's attitude where the state creates a risk to life is that the state is under an obligation to ensure that the risk is reduced to an acceptable level and liable where it fails to do so.[42] In effect, the Court imposes a form of duty in negligence. It does not impose strict liability as principle II requires.[43]

Convention jurisprudence thus guides the English courts towards an approach that satisfies the requirements of principle II in relation to justifiable acts that involve direct interferences with rights; whereas it fails to do so in relation to justifiable acts or practices that impose a risk of interference. In my view, to extend the principle of liability for imposing exceptional burdens to the case in which the burden results from a risky activity undertaken in the general interest would be a justifiable development of Convention law. But it is one that the English courts, in the absence of encouragement from the ECtHR are very unlikely to make, especially as to do so would involve wholesale revision of the common law rules governing liability for hazardous activities. Where there is no judicial development of the law there remains, at least, the possibility that the approach of

42 The same principle applies where the risk is created by private activity.

43 See, for example, *Öneryildiz v Turkey* (App 48939/99), Judgment of the Grand Chamber of 30 November 2004 (2005) 41 EHRR 325. There, the applicant and his family lived in a house built next to a municipal rubbish tip. The house was demolished and the applicant's family killed as a result of a methane explosion in the tip and consequent landslide. The Court's judgment turned on the state's failure to enforce proper safety standards at the tip. In looking for guidance as to the correct principles to apply, the Court considered various instruments of the Council of Europe including the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS No. 150, Lugano 21/06/93). This prescribes strict liability for harm caused by the various activities it covers, but this aspect of the instrument was ignored by the Court.

the legislature will be governed by principle II. Certain hazardous activities are, of course, made subject by legislation to a regime of strict liability.[44]

44 E.g. Nuclear Installations Act 1965; Civil Aviation Act 1982. What these Acts in fact do is to impose strict liability on licensed operators rather than the state. See Chapter 5 where I advert to the fact that the argument for strict liability for exceptional harm caused by risky activities seems to extend to such activities even when they are carried on by private operators.

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Chapter 10
Principle I and the Stable and Volatile Parts of Tort Law

I return now to principle I. I shall begin by trying briefly to summarize what I have said on the subject so far. Principle I is the principle that reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. This entails that where a public authority's acts are governed by private law there should be liability for harm-causing breaches of private law and where a public authority's acts are governed by public law there should be liability for harm-causing breaches of public law. There is no doubt that the first of these requirements is satisfied in English law. Whether or not the second is, it is the purpose of this and the next two chapters to find out. English law recognizes no general principle of liability for public law unlawfulness causing harm. But this is not to say that the ordinary law of tort as applied to public authorities might not produce results very similar to those that such a principle might produce. I argued above that public law gives rise to duties to individuals on the part of public authorities. Duties to an individual may arise when, in the exercise of powers whose purpose is to confer benefits on individuals, an authority contemplates conferring a benefit of the type in question on a particular individual; or where the proper exercise of the power would lead the authority to contemplate conferring the benefit on a particular individual. Alternatively, duties to an individual may arise where a reasonable authority would have in contemplation the effect of its exercise of a particular power on a particular individual. The content of the duties in either case is determined by the established norms of public law: they are duties to make decisions affecting the individual in question in accordance with all the principles that define lawful decision making in public law and to execute them as a reasonable authority would, which is to say, with practical competence. Breach of a subclass of these duties will cause harm of the sort that can be repaired by a monetary remedy. In order for principle I to be satisfied there must be reparation in these cases. The kinds of harms that must be recognized for this purpose are the harms which, on the view I have promoted, it is the purpose of public law to avoid. These are: harms to interests that are recognized in private law; harms that consist in the failure to receive some benefit that it is the purpose of the relevant public powers to bestow; and a further class of harms that are peculiarly likely to arise from procedurally improper behaviour on the part of public authorities. The first two types of harm can only arise in those rare cases in which it is possible for the court to say that the proper exercise of the relevant power would have

delivered the benefit or avoided the infringement of the interest in question. By contrast, the third type of harm does not depend on the authority actually arriving at an unlawful outcome. Lastly, I argued that the entitlement to a monetary remedy should have the same conditional character as a claimant's entitlement to the existing public law remedies, although the circumstances in which public interest considerations are likely to defeat the entitlement to a monetary remedy are fewer. These requirements apply to any body or person that is designated by the courts a public authority, including hybrid public authorities in the sense defined in Chapters 6 and 7.

The stable part of tort law

A common approach in assessing the capacity of the law of tort to provide an adequate law of administrative liability is to focus on the kind of cases that tort has the most difficulty dealing with – such as that of the licensing authority that acts unlawfully – and then to examine the torts that hold out the greatest prospect of filling the lacuna that these cases represent, the torts in question being misfeasance in a public office, breach of statutory duty and negligence.[1] I did the same myself in Chapter 1 and I shall do so again later in this chapter. To get a broader picture of how adequate a regime of administrative liability the law of tort currently provides us with, however, it is necessary to consider the whole range of harm-causing wrongs that a public authority might commit and the various torts (and other types of legal action) that might provide a remedy. I shall attempt to do this in a moment but I need first to address a difficulty that the attempt involves.

The difficulty is that it is very hard to say just how far the law extends, or can be extended, to cover the activities most distinctive of public authorities. This, of course, is the problem that this part of the book is intended to address. But that it arises is almost entirely due to the uncertainty that surrounds the law of negligence, and the constant fluctuations to which it is subject. (To a much lesser extent, it can be attributed also to uncertainty as to whether misfeasance in a public office or breach of statutory duty might be expanded so as to cover distinctively public law wrongs like those that might be committed in the licensing case.) What I propose therefore to do is to make, for the purposes of exposition, a division between the relatively stable part of the law of tort and the relatively volatile part and to ask, firstly, how many of the wrongs committed by public authorities are

1 See e.g. the JUSTICE-All Souls Review of Administrative Law in the UK (1988) Ch.11; Amos in "Extending the liability of the State in damages" (2001) 21 Legal Studies 1; Fordham "Reparation for Maladministration: Public Law's Final Frontier" [2003] JR 104; Public Law Team, Law Commission "Monetary Remedies: A Discussion Paper" (October, 2004). The practice is criticized, with particular reference to the Law Commission's 2004 discussion paper by Bagshaw in "Monetary Remedies in Public Law – Misdiagnosis and Misdescription" (2006) 26 Legal Studies 4.

covered by the stable part and then secondly, how many of the remaining wrongs *might* be covered by careful development of the volatile part. The way I propose to make the division is as follows. To the stable part, I shall assign all the torts bar misfeasance in a public office, breach of statutory duty and the uncertain part of negligence.[2] By "the uncertain part of negligence," I mean negligence as it has developed since the House of Lords' decisions in *Anns v Merton Borough Council*[3] – but this requires further explanation.

From 1940, when it was decided, until the 1970s, the orthodox position with regard to the liability of public authorities in negligence for the exercise of discretionary powers was represented by the House of Lords' decision in *East Suffolk Rivers Catchment Board v Kent*.[4] The plaintiff there was a farmer whose land was flooded as a result of a breach in the sea wall next to his land. In the exercise of their statutory powers, the Board attempted to mend the breach but did so incompetently with the result that the plaintiff's land remained flooded for far longer than it would have done if the Board had acted competently. The plaintiff sued the Board in negligence. The House of Lords rejected the claim. The primary ground of their Lordships' judgment was that since the Board had not positively inflicted harm on the plaintiff but had merely failed to act competently so as to assist him, it could only be liable if it owed the plaintiff a duty to mend the wall. But, there being no statutory provision imposing such a duty on the Board in terms, it was not for the court to interfere with the Board's discretion by requiring it to act.[5]

This position – that in the absence of a clear statutory duty the court could not hold an authority liable in negligence for failing to act – remained the orthodox one until it was decisively overturned by the Lords' judgment in the *Anns* case.

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2 I do not mean to assert that all the torts I have assigned to the stable part are as static as the label might suggest. This is obviously not the case. The object is merely to distinguish between the torts that might be developed so as to fill any gaps in our system of administrative liability and those which, from that point of view, can be allowed to remain as they are.

3 [1978] AC 728.

4 [1941] AC 74.

5 This, at least, was the ratio of the judgments of Viscount Simon LC and Lord Romer and is the proposition that the case is generally taken to represent. The picture is complicated by the fact that two of the other members of the House appeared to base their reasoning on causation. (This reasoning is defective since it means that no omission to act can ever be taken to cause harm: for discussion see Rubinstein, "The Liability of Bodies Possessing Statutory Powers for Negligent Failure to Avoid Harm" (1987) 13 Mon LR 75, 84–86.) Contrary to what Bailey and Bowman assert in "Negligence in the Realms of Public Law – A Positive Obligation to Rescue?" [1984] PL 276, there is very little in the case to suggest that the House was influenced by policy considerations about the effect of making the Board liable where there were so many demands on its resources due to the widespread floods. The learned authors here try to make the case conform to their view of how the law of negligence ought to operate.

There the plaintiffs were the lessees of flats who had suffered loss when cracks were revealed in the foundations of the building in which their flats were situated. They sued both the building firm which built the block and the local authority. Their argument in relation to the authority was that it was liable for the loss because it had negligently failed to prevent the builders from building the block on foundations shallower than those shown in the building plans that the authority had approved. Under the relevant statute, the Public Health Act 1936, and byelaws made under it, the authority had a power rather than an explicit duty to inspect the foundations of buildings before they were constructed (although of course, the fundamental purpose of the powers conferred by the Act was to enable the authority to ensure the health and safety of buildings). Their Lordships held that the authority could in principle owe a duty of care to the plaintiffs both to make a reasonable decision as to whether to inspect and having decided to do so, to inspect with reasonable care. The basis of this finding was, on the one hand, attention to the statutory context and the purpose for which the powers were possessed and on the other, rejection of the traditional incremental approach which required that a duty of care should only be imposed in situations analogous to those in which it had been imposed before. In place of the latter, Lord Wilberforce proposed his famous (or notorious) two-stage test. The first stage of the test required the court to ask "whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter." If there was, a prima facie duty arose. The second stage required the court to ask whether there were any policy factors that ought to limit the incidence of the duty.

The *Anns* case is the starting point of all subsequent attempts to extend the law of negligence so as to cover functions of the sort unique to public authorities. Yet such is the uncertainty of the law, that the courts have seemed at some times to go as far as the approach recommended in *Anns* allows but at others to revert to a position as restrictive as that set out in the *East Suffolk* case.[6] For the purposes of determining how many of the wrongs committed by public authorities are covered by what I have called the stable part of tort law, I therefore adopt a version of the law of negligence as it was before *Anns*. In this version, there can be no liability for omissions except in the context of a small number of voluntary, parental or professional relationships; a duty of care is unlikely to be found in relation to activities radically unlike those to which it has previously applied; and the categories of harm in respect of which a duty can arise are restricted to harm to person and property and, in certain narrowly defined circumstances, economic loss and psychiatric injury.[7]

6 As for example in *Capital and Counties v Hampshire CC* [1997] QB 1004.

7 To say I am assuming a version of the law of negligence as it was before *Anns* might raise in some readers mind the question whether this version is after *Home Office v Dorset Yacht* [1970] AC 1004 or *Dutton v Bognor Regis DC* [1972] 1 QB 373. There is no need

How far then does the "stable" part of tort law satisfy principle I? The question arises principally in relation to those activities of public authorities that in Chapter 6 I argued were governed by public law. But it is worth recalling first of all that there are various activities of public authorities that we can think of as governed by private law and where these result in harm to members of the public, the ordinary law of tort provides satisfactory remedies. These consist of practical activities performed for purposes ancillary to the attainment of an authority's assigned purposes. In Chapter 6, I gave the examples of an employee of a local authority driving a van in the course of his duties or of employees of the authority carrying out repairs to its offices. If these activities were conducted carelessly so as to cause harm, then there is no reason why the authority should not be made liable in the ordinary law of negligence. One might add to this category harms which an authority causes in its capacity as an occupier of land. The ordinary law of occupiers' liability is perfectly appropriate where people invited onto an authority's land are injured. The same may be said in relation to certain kinds of nuisance. Suppose, for example, that nuisance is caused to a neighbour by water running off the surface of an authority's car park. Here it is highly unlikely that the authority's powers authorize the nuisance so it can be dealt with in the same way as a nuisance caused by a private person. No doubt other examples could be added to this category of cases in which the ordinary law of tort can be applied without worrying about public law.[8]

A second category covers the large number of cases in which, on the analysis I gave in Chapter 6, a public authority's acts are governed by public law and yet the ordinary law of tort is able to provide a satisfactory remedy where harm results. What all these acts have in common is that they are acts that – considered in their non-legal aspect – could be performed by private persons but are performed by the public authority in direct pursuit of its public law purposes. One large class of cases that falls within this category was discussed in Chapter 6 under the heading "type 3." I argued there that there is no reason in principle for the standards

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to be so precise for present purposes, but I should perhaps say before *Dorset Yacht*, since this case to some extent cast doubt on the approach in *East Suffolk*. I should perhaps say also that I do not mean to imply by what I have said about negligence in the text that there were no significant developments between the *East Suffolk* case and *Anns*. Clearly, there were and some can be very significant in relation to public authority liability, for example the recognition of liability in respect of negligent misstatement and certain forms of pure economic loss in *Hedley Byrne v Heller* [1960] AC 465. But what I have said here, is sufficient for the broad brush account I am about to give of the coverage of public authority wrongs by the "stable" part of tort law.

8 I argued in Chapter 6 that where a public authority exercises what I called type 2 powers – legal powers of the sort possessed by private persons – then it is subject at once to both public and private law norms. This means of course that a public authority exercising type 2 powers may be the subject of a legal action appropriate to the private law rules governing exercise of the power in question. However, this will not usually be an action in tort – typically, it will be an action in contract.

that govern the performance of a practical activity as a matter of public law to differ from the standard of care that would be imposed on the same activity (or the analogous activity performed by a private person) in the law of negligence. What distinguishes public law from negligence, I argued, are the circumstances in which duties towards others to perform an activity to the requisite standard are imposed. Where a duty to persons affected would be imposed whether the activity was subject to public law or to the ordinary law of negligence then it will make no practical difference which body of law governs the case. This occurs, in particular, where the duty is to avoid positively causing harm. Thus, if the fire brigade through its carelessness causes damage to property or loss of life, then it makes no difference whether its actions are governed by public law – as I have argued they must be – or made the subject of an action in negligence. Likewise if a river authority like the one in the *East Suffolk* case positively makes a flood worse or if a highway authority creates a hazard on the road, as opposed to simply failing to remove one, and thereby causes an accident. It follows from this that the ordinary law of negligence is able to provide a perfectly satisfactory remedy in these sorts of case.

It also follows that there are some cases in which public law and negligence would impose identical obligations to confer a benefit. In Chapter 6, I suggested, with significant reservations, that this may be the case with public sector professionals. To the extent that it is, negligence provides a satisfactory remedy where such professionals cause harm by failing to discharge their duties with due care and skill.

The other important class of harm-causing acts that falls within this second category are those which can be made the subject of actions in torts such as trespass and nuisance. In relation to these, the traditional doctrine that an authority can be sued in the same way as a private defendant but has a defence of statutory authority makes it possible to consider the public law lawfulness of an act before making any finding of liability. The doctrine, when one thinks about it, is a strange one. It involves the idea that where public officials act unlawfully they suddenly lose their authority and occupy a position identical to that of private persons committing torts. This means that as with the practical activities which may be made the subject of an action in negligence, the act giving rise to liability must be of a sort that could be performed by a private person. This can be seen most clearly in nuisance, where public authority acts that may give rise to liability genuinely satisfy this condition.[9] In relation to trespass to the person, however, there is sometimes an element of artificiality in pretending that the action giving rise to liability could have been performed by a private person. This can be seen in the case of the police where a wrongful arrest can lead to an action for false imprisonment.[10] The act of

9 Consider, for example *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284 where the alleged nuisance was the washing away of the plaintiff's bridge as a result of the defendant's dredging of a river.

10 As for example in *Mohammed-Holgate v Duke* [1984] AC 437.

a policeman taking a person into custody is not really the same as that of a private person who wrongfully imprisons another. The policeman's ability to carry out the arrest is likely to depend to a high degree on his office.[11] Nonetheless, the action provides in practice an effective way of combining review of the lawfulness of the officer's exercise of his discretion to arrest, with a monetary remedy for the victim where the arrest is unlawful.

A third category is made up of all those acts and omissions to act that would give rise to liability under principle I but are not covered by the stable part of tort. What they all have in common is that either they involve the exercise of powers that private persons do not possess; or, if they involve the exercise of powers that private person do possess, the exercise is undertaken in pursuit of duties to which private persons are not subject. They can be roughly divided into the following classes.

1) Exercises of powers to infringe or override private rights that do not involve (or are not treated as involving) acts that might be performed by private persons. Examples would be the powers of an authority concerned with child welfare to remove a child from its parents or of a financial regulator to impose a fine on a company or bank for breach of some regulatory requirement.[12]

2) Exercises of powers to determine the right of a citizen to perform some activity or her entitlement to some benefit. The former would include the ubiquitous licensing example, which itself covers a large class of cases comprising the exercise of powers as diverse as the power to grant planning permission, to approve the marketing of a drug, or to permit a person to operate a taxi. The latter would include, for example, decisions as to whether a person was entitled to housing, to education at a particular school or to a particular medical treatment.

3) Failures to confer some benefit upon a person that do not involve any formal determination as to the entitlement of the person in question, either because the authority cannot be expected to be aware of the identity of the particular persons likely to receive the benefit or because the benefit must be conferred spontaneously without the making of a formal determination. Such failures might be failures to rescue a person from some hazard that was not the result of the actions of third parties, as where an authority fails to put out a fire or save a person from floods or drowning. Or they might be failures to protect a person from harms or dangers caused by the acts of third persons such as unsafe buildings, child abuse or crime. In relation to many (although not all) of these failures, the exercise of the relevant powers so as to positively inflict harm on a citizen could be remedied by means of an action belonging to the stable part of tort; but no such action is available where the harm is the result of failure to confer a benefit or omission.

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11 Citizens can carry out arrests – but where they do so, they too are acting or purporting to act as public authorities.

12 Exercises of powers to compulsorily acquire land or to confiscate or destroy property are also examples although these are often the subject of statutory compensation provisions and are best dealt with under principle II.

Satisfaction of principle I and the volatile part of tort law

The argument of the last section states what most commentators would consider obvious:[13] that orthodox tort law[14] does a reasonable job of providing redress in cases that fall into the first and second categories outlined but does less well in cases falling into the third category. To put the matter in this way implies, of course, that there *ought* to be redress in cases belonging to the third category. This follows from the argument of Part 1 of this book but many scholars would reject the idea that the law of tort should be developed so as to provide redress in all these cases. I shall advert to the views of some of these scholars in what follows.[15] In the meantime, I embark on the task of considering to what extent the remaining part of the law of tort – the "volatile" part – either does, as currently applied by the courts, or can be made to extend to cases in the third category. The next two chapters are concerned with negligence, but I begin here by briefly considering misfeasance in a public office and breach of statutory duty.

In respect of misfeasance in a public office, there is little to add to what I said at the beginning of the first chapter. It is salutary that there should be a form of action that provides compensation where public officials have knowingly acted unlawfully so as to injure members of the public. Such cases, however, are always likely to form a small proportion of the total number in which harm results from public law unlawfulness. The role of misfeasance in a public office in filling in the gap in legal protection left by the stable part law of tort is thus limited and those limitations have recently been emphasized by the House of Lords' refusal to extend it to cases in which there is no damage to any interest previously recognized as deserving of protection.[16]

One can, of course, imagine an expansive approach to the tort, whereby the requirement that officials have real or constructive knowledge of the unlawfulness of their acts was weakened or removed altogether.[17] The result would be, in effect, a tort of causing harm by an act unlawful as a matter of public law. This would remove at a stroke the remedial lacuna in public law represented by the absence of

13 Although not Bagshaw n.1 above.

14 Or, more exactly, orthodox tort law minus breach of statutory duty and misfeasance in a public office.

15 I do not, however, consider the policy arguments that are the main factor in persuading many people against court-based monetary remedies for public law unlawfulness until the final chapter.

16 *Watkins v Secretary of State for the Home Department* [2006] UKHL 17; [2006] 2 All ER 353. Their Lordships held that in order to found an action there must be (I quote from the headnote) "material damage, which included financial loss, or physical or mental injury and psychiatric illness but not distress, injured feelings, indignation or annoyance." In arriving at this conclusion, their Lordships were influenced by the availability of a monetary remedy under the Human Rights Act.

17 The requirement of knowledge or constructive knowledge with respect to the probability of harm to the victim could remain.

a monetary remedy. It might, on the other hand, be too blunt an instrument. Above all, it would provide no means for withholding the remedy if to grant it in relation to the misuse of powers of a particular kind would tend to stultify the function in the service of which the powers were exercised. It would thus lack a crucial feature that the form of liability I argued for in Part 1 was intended to possess. For this reason, I prefer to advocate the development of negligence as a means of achieving a satisfactory law of administrative liability.

I turn next, however, to breach of statutory duty. As with misfeasance in a public office, this tort, as currently interpreted, does little to fill the remedial gap in the law that exists with respect to harms caused by public law wrongs. In order for there to be a cause of action, it must be possible to discover an intention on the part of Parliament to create a clear and specific duty owed to a small class of people whose breach sounds in damages.[18] Only a tiny proportion of the duties whose breach should, on the view I have advocated here, give rise to liability under principle I are likely to satisfy this condition.

As with misfeasance, one can imagine the tort being expanded so as to provide a remedy in a much higher proportion of the cases in which principle I demands it. A suggestion as to how this might occur is to be found in Sir Robert Carnwath's critique[19] of the House of Lords decision in *O'Rourke v Camden Borough Council*,[20] a case which concerned the Housing (Homeless Persons) Act 1977. Under that Act, a housing authority was required to provide accommodation to an applicant where certain prior conditions were satisfied. Previous case law[21] had held that the decision as to whether the prior conditions were satisfied was a discretionary one, challengeable only on judicial review, but that once the authority had made the decision in the applicant's favour, it was under a strict duty, actionable in private law, to provide accommodation. In *O'Rourke*, Lord Hoffmann held that this created perverse incentives. An authority which wished not to provide housing would be liable in a private law action if it admitted that the claimant satisfied the criteria and then refused to provide accommodation. But it would be immune from a private law action if it perversely denied that the criteria were satisfied. Lord Hoffmann's answer to this problem was simply to hold that a private law right of action could not arise. By contrast, Sir Robert's solution is to expand rather than to contract the action. In his view a right of action should arise where the decision as to whether the prior conditions were satisfied was unreasonable i.e. where not to provide accommodation would be unreasonable.

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18 See *X (Minors) v Bedfordshire* [1995] AC 633. A painstaking account of the methods used by the courts in discovering Parliament's intention is to be found in Stanton, Skidmore, Harris and Wright, *Statutory Torts* (Sweet & Maxwell, 2003) Chapter 2. See also Stanton *Breach of Statutory Duty in Tort* (Sweet & Maxwell, 1986) Chapter 3.

19 Carnwath, "The Thornton Heresy Exposed" [1998] PL 407.

20 [1997] 3 WLR 86.

21 E.g. *Cocks v Thanet DC* [1983] 2 AC 286.

To adopt this solution would be to take one step on the road to a new understanding of breach of statutory duty. According to this understanding, once it was established that the purpose of a statute was to confer benefits on individuals, there could be liability for a failure to exercise a discretion in accordance with public law principles where this led to the failure of a citizen to receive the benefit that proper exercise of the discretion would have conferred upon her. In other words, breach of statutory duty would start to look like administrative liability of the sort that I have argued is required by principle I.

The capacity of breach of statutory duty to develop in this direction is, however, limited for two reasons. Firstly, as I emphasized in Chapters 6 and 8, not all public power is statutory, so an expanded form of the tort could not provide a remedy in every case in which principle I demanded it. Secondly, any given statute which is in some way concerned with the welfare of individuals has as its purpose the conferral on those individuals of specific benefits or their protection from specific harms. Breach of statutory duty is by its nature concerned with the achievement of these purposes and the harms for which it provides a remedy are harms to interests defined or recognized by the relevant statute. Yet misuse of statutory powers can cause harms to interests other those defined or recognized by the relevant statute. So, to take again the standard licensing example, a licensing authority is usually given its powers to achieve some end which has nothing to do with the welfare of the persons subject to the licensing regime and yet, by misusing its powers it may harm those persons. Under principle I, there must be liability in some cases of this type and yet such liability must be outside the remit of breach of statutory duty, however broadly conceived, because the duties breached do not involve harm to interests which it is the purpose of the statute to protect.

We can thus discount the idea that breach of statutory duty might provide the solution to the problem of satisfying principle I. We shall however have cause to consider again its actual as opposed to its potential significance. The criteria that are used in breach of statutory duty to determine whether a duty is owed to an individual by a public authority are about as far as can be imagined from the criteria that I have argued ought to determine that issue in public law. This is important because, as I shall argue in Chapter 12, the practice that prevails in relation to breach of statutory duty often influences the courts' approach to the duties of public authorities in negligence.

Chapter 11
Principle I and the Case Law on Negligence

I come then to negligence. The argument of this and the following chapter will be that the current law of negligence does not fill the gap left by the other torts but that it could be developed so as to do so. The method I adopt is as follows. I begin by considering in the abstract the difficulties involved in applying the law of negligence to public authorities and the possible approaches that might be taken to dealing with these. This provides an analytical framework for the succeeding discussion. I then try to characterize the courts' approach to the problem of applying negligence to public authorities via an account of the leading cases. The purpose of this is twofold. Firstly, it enables me to answer the question of whether the current practice of the courts satisfies principle I. And secondly, the answer being negative, it makes it possible to identify the obstacles to reforming the law so that it does so. I conclude by attempting to explain how these obstacles can be overcome and a law of negligence created which meets principle I's requirements.

Considered at the highest level of generality, the law of negligence imposes standards as to the degree of care persons must take in conducting their activities with respect to the interests of others; it requires that where a person A falls below the requisite standard in conducting an activity and thereby causes harm to B, a person whose interests A ought to have in contemplation in conducting the activity in question, A must compensate B. Put in this way, there is no reason to think of negligence as a branch of the law more concerned with private persons than with public authorities. But there is no doubt that in practice negligence has developed largely in the context of relations between private persons and that this has determined its character. This can be seen especially in relation to the restrictions traditionally imposed on the incidence of the duty of care. The rationale for a number of these makes sense where the defendant is a private party but not where it is a public authority.

The most obvious example is the traditional presumption that there should be no liability for omissions. The justification for this is that to impose upon A a duty to help any person B whom A is able to help and who would forseeably benefit from A's assistance would be an intolerable interference with A's liberty. This reasoning is supported by the further consideration that if a duty of altruism were recognized it would be very difficult to find any principled way of limiting it. As a consequence it would be impossibly burdensome. Clearly neither of these considerations apply to public authorities. Public authorities, as we have seen, exist to serve others and they have no personal liberty. Nor is there any possibility

of their being made subject to a limitless duty of altruism since their duties to members of the public are defined and limited in public law.[1]

To the rule concerning omissions we might add the incremental method of determining the incidence of the duty of care and the traditional limits on the kinds of recognized harm. The incremental method has not always, of course, been the method used by the courts to determine whether there is a duty of care in a particular situation: more flexible methods are possible. Nonetheless, we might think of it as the default approach. To the extent that it is used, it tends naturally to lead to decisions not to find a duty of care in relation to distinctively public law functions (if they have not been made the subject of a duty of care before) because they are so unlike the kinds of activities of private persons in relation to which a duty of care has been found in the past.

To see why the traditional limits on the kinds of harm recognized are inappropriate in the case of public authorities, we need to remind ourselves of the kinds of harms which an adequate law of administrative liability should protect citizens against. I argued above that public law protects a variety of interests of individuals including: interests which it is the purpose of particular public (usually statutory) powers to further or protect; interests generally recognized in private law; and interests peculiarly likely to be harmed by the procedural misuse of public powers. The flexibility of negligence means that it can be extended so as recognize new kinds of harm. Traditionally, however, harm to the first and third of these types of interest has not been recognized as capable of founding an action in negligence, and nor have some kinds of harm recognized by other parts of private law.

One significant kind of harm which negligence only recognizes in very limited circumstances is pure economic loss. There are a number of situations in which it seems likely that principle I would require liability but in relation to which the traditional restriction on liability for pure economic loss would rule it out. The case of the licensing authority which wrongly withholds, suspends or cancels a licence is the most obvious example. Another is the *Anns v Merton Borough Council*[2] type case in which a regulatory authority is alleged to be responsible for failing to prevent what is, strictly speaking, economic harm to the claimant at the hands of a third party.

The explanations usually given for the rule against liability for pure economic loss are of little relevance in the case of public authorities. Two explanations predominate. One is that allowing claims for pure economic loss leads to indeterminate liability. The other is that that pure economic loss usually arises from economic arrangements the claimant has made with some other person, and that, this being so, the claimant could have avoided the risk inherent in the

1 In other words, public authorities are no more obliged than are private persons to help someone in difficulty merely because they are able to. But they are so obliged where they exist to provide help of the sort in question.

2 [1978] AC 728.

arrangement by contracting to that end with the person in question.[3] Both of these rationales lose their force in many of the kinds of cases in which public authority liability might arise.

Consider first cases in which it is alleged that the authority failed to protect the claimant from economic loss at the hands of a third party. Such cases might involve indeterminate liability. But then again they might very well not. The *Anns*-type case involving a defective structure is an example where there is no danger of indeterminate liability. Only the owners who discover the defect can make a claim.[4] So there is no reason, on this ground, for a blanket exclusion of claims based on pure economic loss. Nor is the contract rationale persuasive in such cases. On the view of public law I have promoted here, the claimant is entitled to rely on the authority to perform its regulatory task competently. This does not mean that the claimant is entitled to be protected from every risk. But it casts doubt on any argument based on the assumption that the claimant must be self-reliant and protect herself from economic risks by means of contracts.

Consider next, the type of case in which an authority has the power to cause economic harm to the claimant, as in the licence example. Again, there need be no problem of indeterminacy. As the licence example shows, it may be very easy to identify a determinate class of persons affected by the authority's actions. Nor does the contract rationale have any purchase in the licensing case. The exposure to the possibility of economic loss caused by the authority does not arise from any relationship voluntarily entered into by the licence-holder nor is it open to the licence-holder to make contractual arrangements with the authority to avert the possibility of such loss. The justification for prohibiting any action for recovery of economic loss is thus lacking.[5]

In short, there are several aspects of orthodox or traditional practice in the law of negligence that make it unsuitable as a vehicle for imposing liability of the kind required by principle I. But on the other hand, the nature of negligence is not fixed and immutable. The unpredictability and volatility to which I referred earlier is

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3 The following types of situation all conform to this pattern: where the claimant suffers loss as a result of damage to the property of a third party as in *Cattle v Stockton Waterworks Co.* (1875) LR 10 QB 453; where the claimant purchases a defective building or product as in *Anns*; where the claimant contracts for the supply of a service which is negligently performed as in *Junior Books v Veitchi* [1983] 1 AC 520. A situation which does not so conform is where the claimant enters into a contract on the basis of negligent advice – but this is covered by, and indeed partly explains, the exception to the rule in *Hedley Byrne v Heller* [1964] AC 465.

4 See Cooke, "An Impossible Distinction" (1991) 107 LQR 46.

5 Another rationale sometimes given for excluding actions based on pure economic loss is that they are economically inefficient – see e.g. *Norsk Pacific Steamship Co. Ltd. v Canadian National Railway Co.* (1992) 91 DLR (4th) 289. The argument is that economic losses involve no net social loss, simply the transfer of wealth from one person to another. But this involves the assumption that the sole end of tort law is economic efficiency, a view which is especially questionable in the context of public authority liability.

the result of the courts' attempts from *Anns* onward to adapt negligence in a way appropriate to public authorities.[6]

The private approach and the public approach to negligence

There are, I suggest, two possible approaches to the question of the extent to which the orthodox practice in the law of negligence should be altered to deal with the special problems presented by public authorities. When I say two "possible" approaches, I mean two possible rational and coherent approaches. There are, in the practice of the courts and in the writings of commentators, other approaches that fall between the poles that the two approaches represent but, as I shall try to show, these tend to lead to anomalies. I shall refer to the two approaches I set out here as, respectively, "the private approach" and "the public approach."

The private approach involves cleaving rigidly and consistently to Diceyan orthodoxy by finding a public authority liable in negligence in only those circumstances in which a private person might be found liable if she committed the same act. This means that there can be no liability for omissions to act except where a private person similarly placed would also be subject to such liability. It also means recognition of only the sorts of harms that would give rise to liability if inflicted by private persons. In effect, it means a return to the orthodoxy that preceded *Anns v Merton Borough Council*.

There is one area of difficulty in determining what such an approach might entail. This concerns the relationship between finding an authority liable in negligence on the one hand and public law unlawfulness on the other; or, what amounts to the same thing, the relationship between the standard imposed where there is a duty of care in negligence and the standard imposed by public law. It is natural to assume that, under the private approach, where a duty of care is found to exist in relation to a public authority, the content of the duty – the standard of care – is neither determined nor influenced by the authority's public law duties. This must be so, because the same duty of care will arise whether or not the defendant is a public authority or a private person analogously placed. The duty arises because the defendant is performing a particular activity and stands in a certain relationship to the claimant and these factors are the same whether or not the defendant is performing the activity in fulfilment of some public purpose or is required by statute to perform the activity in a particular way.

The existence, on the one hand, of a public law standard and, on the other, of a negligence standard whose content differs creates in principle the possibility of conflict. However, under the private approach, in most instances in which there

6 Of course, if the courts had been able to agree on a single best way of doing this, there would have been much less uncertainty. But there would have been still less if no attempt to adapt the law to deal with the special problem of public authorities had been made.

is a duty of care in negligence, there will be no conflict. This will be primarily because under the private approach a duty of care will only be imposed in relation to the kinds of practical activities that would also be made the subject of a duty of care if performed by a private person; and in relation to these, what is required of a public authority as a matter of public law is likely to be the same as what is required of either a public authority or a private person as a matter of negligence. In Chapter 6, I described the identity that may exist between, on the one hand, the standard that as a matter of public law a public authority performing a particular activity may be expected to attain and on the other, the standard that as a matter of negligence may be expected of a private person performing a similar activity. The standard to be expected in both cases – where there is nothing about the governing legal conditions to suggest that they should be different – is a unitary standard of reasonableness. A similar idea is sometimes expressed by saying that a public authority is never authorized to exercise a statutory power negligently so that a negligent act on the part of a public authority is *ipso facto* ultra vires.[7] One might invoke in this context the doctrine famously enunciated by Lord Blackburn in *Geddis v Proprietors of Bann Reservoir*:[8]

> [N]o action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized if it be done negligently.

Lord Blackburn was not here talking about committing the tort of negligence but about exercising a statutory power carelessly.[9] Nonetheless, where a public authority commits an act that would give rise to liability in negligence if committed by a private person it will usually be both negligent in Lord Blackburn's sense and in the sense required by the tort of negligence.[10]

One can get an idea of what this might mean in practice by imagining facts like those of the *East Suffolk* case. The standard to be attained by a group of men helping a farmer whose land was flooded by mending the sea wall would be the same whether they were employees of the river authority acting under statutory powers or farmers from nearby farms who had voluntary come to their neighbour's

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7 Cf Wade and Forsyth *Administrative Law* (9th ed., Oxford University Press, 2004) p.758: "No statute can be expected to authorize works to be carried out negligently, and the ordinary law of liability therefore has full scope."

8 (1878) 3 App Cas 430, 455–456.

9 To act "without negligence," in this context, has been defined as to "to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons." See *Allan v Gulf Oil Refining* [1981] AC 1001, 1011.

10 Although this issue is usually discussed in the context of statute (private statute in the Geddis case) the proposition that, under the private approach, an act that would give rise to liability in the tort of negligence is usually unlawful as a matter of public law can be extended to the exercise of public powers that are not statutory.

rescue. In either case, they would have to take care not to make the damage to the wall or the flooding worse. In the case in which the work was undertaken by the public authority, the obligation to do the work reasonably so as not to cause additional harm would be in the first instance, on the conception of public law I have tried to establish, a public law obligation. But breach of the public law obligation would also constitute breach of the duty of care in negligence, and it would thus be possible to hold the authority liable in negligence. By contrast, neither the authority nor the helpful neighbours would be liable in negligence for failing to make the flooded farmer's situation better. There being present, I assume, as in the *East Suffolk* case, none of the factors that in the orthodox law of negligence would make the rescuers subject to a positive duty to improve the farmers situation, there could be no liability in negligence in either case. This would be so even if, as a matter of public law, the authority ought to have exercised its powers so as to end the flooding.

It is possible also to imagine illustrations of the identity of public law and negligence standards under the private approach which do involve liability for omissions. One obvious illustration is the case of doctors. A doctor who has agreed to treat a patient is under an obligation to use due care and skill whether she is a private doctor or working for the NHS. Again, on the view of public law I have promoted, the NHS doctor's obligation to use due care and skill is in the first instance a matter of public law. But the failure to use due care and skill will mean the doctor has both behaved unlawfully as a matter of public law and breached a duty of care owed to the patient.

If every case of negligence by a public authority conformed to his model it would be possible to determine whether there was negligence without ever inquiring into an act's unlawfulness as a matter of public law. However, even under the private approach, there may be cases in which the standard demanded by public law and the standard demanded by negligence are not identical because statute imposes requirements which are at variance with the negligence standard. Since a public authority must be governed by public law standards,[11] this discrepancy will only matter where the negligence standard is higher or more onerous than the standard required by public law. No harm will be done to an authority's ability to conduct its activities in accordance with public law standards if in a subclass of the cases in which it falls below those standards it also exposes itself to liability in negligence. But there *would* be harm if it could be liable in negligence for conducting its activities in a way that was perfectly lawful as a matter of public law. The law of negligence would then be usurping public law's role as the body of law primarily concerned with the proper conduct of public authorities.

Under the private approach, where by definition a duty of care only extends to activities which would attract a duty of care if performed by a private person, it should usually be possible to avoid this sort of undesirable interference. This is because, in the cases in which the two standards are at variance with one another,

11 See the argument of Chapter 6 especially at pp.57–59.

the negligence standard will usually be less onerous than the public law one. This can be made clearer by example. Suppose a highway authority is subject to a statutory duty to paint lines on a road wherever doing so will, in the authority's reasonable opinion, improve the safety of the road. Suppose further that the road is not unsafe but that the authority forms the reasonable opinion that it could be made safer by painting lines. It is thus obliged to paint lines and does so, but performs the task carelessly so that the road with lines is more dangerous than it was without. An accident occurs as a result.[12] Under these circumstances, the authority may be held liable in negligence for positively creating a hazard that caused an accident. Here, the standard of care whose breach leads to liability in negligence is different from the standard of conduct required of the authority in public law. In public law, the authority is required, having formed the reasonable opinion that lines would make the road safer, to paint lines that achieve that end. In the law of negligence, under the private approach, the authority is in the same position as a private landowner who invites motorists onto a stretch of road on her land: it must ensure that the road is safe; and it must not create new hazards; but it is under no obligation to paint lines that make it safer than it already is. The difference between the two standards is unproblematic, however, because the negligence standard, being lower, does not usurp the role of public law in regulating the conduct of the authority.[13]

That example involves an act, but (as with the examples involving identical standards) one can also frame examples to illustrate the same point which involve omissions. Suppose an NHS doctor undertakes to treat a patient but does so negligently so that the patient suffers from some permanent disability that she would have avoided if the treatment had been administered with due care and skill. Suppose further that the NHS doctor is subject to certain statutory requirements that go beyond what is usually held to constitute due care and skill: the statutory requirement might be, for instance, that in relation to conditions of the sort the patient was suffering from, the doctor in charge of the patient's treatment is obliged to monitor the patient's progress at given intervals. Observance of this higher standard would also have led to the patient's disability being prevented. Any action in negligence will, however, be founded on the standard common to doctors in both the private and public sectors and, as in the previous example, this

12 Compare *Bird v Pearce, Somerset County Council (Third Party)* [1979] RTR 369.

13 From the perspective of my larger argument there *would* be a problem if an accident occurred because the authority failed to make the road safer by painting lines, as opposed to making it positively unsafe. Here, there would arguably be breach of a public law duty owed to the victims of the accident so that liability under principle I was appropriate. However, as I explain in the text, the reason for espousing the private approach would be either that its proponent did not think there should be liability for public law wrongs or that principle I was better satisfied by means other than the law of negligence.

will be unproblematic because the negligence standard, being lower, will not usurp the role of public law.[14]

Thus, under the private approach, negligence standards that are at variance with the relevant public law standards are unlikely to interfere with the latter because, where a statute specifies how an activity is to be conducted, it typically requires a standard of conduct higher than might be expected of a private person analogously placed.[15] It is nonetheless possible to imagine examples in which in performing some activity, a public authority is subject as a matter of public law to a standard lower than would apply as a matter of negligence if the same activity were being performed by a private person. Consider the following example. A local authority has a power to issue grants to homeowners whose houses are unsafe and to this end also has a power to provide a structural survey of the house of any householder in its area. In the exercise of this power, the authority provides a survey to any householder who asks for it. A householder avails herself of this service but the survey fails to disclose a defect in her house. The defect in question is not a threat to safety but over time gets worse and costs much more to put right that in it would have done if disclosed in the authority's survey. The householder sues the authority in negligence for the economic loss suffered as a result of not becoming aware of the defect at the time of the survey. Here, if one draws an analogy between the position of a private surveyor and the authority, the standard to be expected of the surveyor in negligence is higher than the standard required of the authority in public law. A competent surveyor would have uncovered the defect whereas the authority can say that it was only required to draw to the householder's attention defects that were a threat to safety. One might, of course, argue that the proper analogy is with a surveyor who makes it clear that his survey is only intended to

14 As with the previous example, there *would* be a problem, from the perspective of my larger argument, if observance of the higher but not of the lower standard would have prevented the harm to the patient. But as again with the previous example, this would not necessarily be a problem from the point of view of the proponent of the private approach.

15 I have used invented examples because it is, in fact, difficult to find examples of public authority activities of a sort that might equally well be performed by private persons in relation to which the governing statute imposes detailed requirements. Of a large number of cases cited by Wade and Forsyth to illustrate the proposition quoted at n.7 above none involves a discrepancy between the standard imposed by negligence and more detailed statutory requirements. This sort of discrepancy is much more likely to arise where the courts attempt to extend negligence so as to cover the kinds of activity performed only by public authorities. The least far from reality of the examples in the text is the highway example. In reality, highway authorities do not have duties to improve road safety by painting lines, putting up signs etc – they have powers. But it is arguable that in the context of their wider duties, there can sometimes be a duty to exercise these powers: see further my discussion of the *Stovin* case below. There could thus be a situation in which, under the private approach, a highway authority owed a duty in negligence not to cause accidents by positively creating a hazard while being subject to a public law duty to actually improve the safety of a road.

uncover defects that are a threat to safety. But the example illustrates the point that a court following the private approach must ensure that the imposition of a duty of care in negligence does not interfere with an authority's public law duties; and that even though, under the private approach, the standard of care does not arise from the authority's public law duties and must be the same whether imposed on the authority or on its private analogue, it may have to be curbed by reference to the authority's public law duties.[16]

In discussion of cases in which the courts have attempted to extend the law of negligence so as to find a duty of care in circumstances in which an analogously placed private person would *not* be subject to such a duty, some commentators have complained that limitation of the duty of care by reference to the limits of an authority's public law obligations is unjustified. Thus the authors of *De Smith, Woolf and Jowell's Principles of Judicial Review* write that:

> [A]rguably this confuses and blurs the boundaries between the tort of negligence and the tort of breach of statutory duty and unduly restricts the development of negligence liability. Since the duty of care in negligence arises from a relationship between the parties, not by virtue of statute as in breach of statutory duty, the purpose for which the public body was given certain powers by statute should at most be no more than a matter to be considered as part of the relationship.[17]

Yet to impose on a public authority via the law of negligence a duty to assist others that goes beyond what it is permitted to do in public law means obliging it to exceed its powers. For instance, in the hypothetical survey example I gave above it would mean requiring the authority to do something that it is not empowered

16 Compare these imaginary facts with those of *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson and Co. Ltd*. [1985] AC 210. There a local authority was held not liable to the owners of a housing development for failing to exercise its powers to inspect drains so as to ensure that the development was not built with defective drains. The House of Lords stated that the purpose of the powers was to protect public health and not to prevent economic loss to developers. Unlike my imaginary example, however, the *Peabody* case was a post-*Anns* case involving the extension of negligence to cover an activity unique to public authorities.

17 *De Smith, Woolf and Jowell's Principles of Judicial Review* (1999) at p.627. In support of the proposition that the duty of care may be limited by reference to statutory purpose the authors cite the *Peabody* case, *X (Minors) v Bedfordshire* [1995] 2 AC 633 and *Stovin v Wise* [1996] AC 923. In support of their argument, they cite Stanton, *Breach of Statutory Duty in Tort* (1986) pp.29–30, Doyle, in Finn ed., *Essays on Tort* (1989) at pp.223–234 and O'Dair (1991) 54 MLR 561, 567. These writings are all concerned with *Peabody* case.

to do, namely to undertake surveys intended to uncover any defect that might cause economic loss.[18] I return to this problem later when I consider the courts' attempts to impose a duty of care in relation to acts of public authorities which are performed in circumstances in which no duty would be imposed on an analogously placed private person. In this latter context, the problem is much more acute.

For now, however, I turn to the public approach. This entails the following. Firstly, it entails accepting the arguments of Part 1 of this book. It entails, that is to say, accepting that public law exists to protect the interests of individuals as well as those of the public as a whole; further, it involves accepting that public law involves duties, a subclass of which are owed to individuals; and that breach of a subclass of the public law duties owed to individuals should lead to liability. Secondly, the public law approach entails accepting that in applying the law of negligence, public authorities are to be treated as a special category in relation to which a duty of care arises in all those circumstances in which a public authority owes a public law duty to an individual whose breach should, under principle I, result in the award of a monetary remedy. Wherever there is a duty of care, the standard of care should, under the public approach, be identical with the standard demanded by public law and breach of the duty of care should amount to the same thing as breach of the public law standard. In this context, a public authority whose conduct is reasonable or non-negligent is one which conducts itself in accordance with the norms of public law, or at least with that subclass of public law duties which is owed to individuals and whose breach gives rise to liability. The idea that the tests and presumptions used to determine the existence of a duty of care in relation to private persons should apply to public authorities is rejected. The obverse of this is that the finding that, in a particular type of situation, a public authority owes a duty of care need not have any direct implications for the question of whether a private person owes a duty of care in a similar situation: the authority's duty of care arises from the fact that it has a public law duty; whereas the analogously placed private person has none.

18 Immediately after the passage just quoted, the authors of *De Smith* add that "Identifying a precise implicit legislative purpose is often a fruitless exercise as it is relatively easy to ascribe a variety of objects or purposes to statutes conferring powers." This is true, but the point remains that a court imposing a duty on an authority in negligence must not thereby require the authority to do what it is not authorized to do in public law. In other words, the question of what a public authority ought or ought not to do must always be considered from the perspective of public law (although not from the perspective of the tort of breach of statutory duty which is something quite different, as I shall seek to show later).

Two further features of the public approach must be noted. One is that it entails recognition, in relation to public authorities alone, of the categories of harm that I have argued should be recognized if principle I is to be satisfied. This means that, as always, there must be the possibility of liability for inflicting the kinds of harms recognized in the ordinary law of negligence; but it also means that where a public authority exercises its powers for some particular purpose, there must be the possibility of liability for harm to the interest that the power is intended to further or protect; and that there must be the possibility of liability in respect of the kinds of harms that may be caused by procedural impropriety such as anxiety, distress and, in some cases, pure economic loss.

The second further feature of the public approach is more problematic. The features of the public approach I have been describing all involve adapting negligence so that it can satisfy the requirements of principle I. In relation to each of these negligence is sufficiently flexible for the desired change to be possible without making an alteration in the character of the existing law which it would be beyond the power of a court to make. But there is one requirement of liability under principle I which could not be made without a court going further than its powers to develop the common law permit. I argued in Chapter 3 that a monetary remedy under principle I should have the same conditional character as any other public law remedy: this meant, in effect, that the court should have the power to withhold the remedy where to grant it would tend to stultify the defendant authority's performance of its functions. Damages in negligence, as with any other tort, are awarded as of right, and this is so fundamental a feature that it is hard to see how this could be altered without it being said that the court was simply creating a new form of legal proceedings from scratch.

On the other hand, a court has tremendous discretion in deciding whether to find a duty of care and I suggest that this could be an adequate substitute for discretion at the remedial level. It follows from the arguments I put forward in Chapter 3 that the likelihood that having to pay compensation would stultify the operation of the function causing loss (or possibly the operation of the authority as a whole) would be the only reason for withholding a monetary remedy. As I pointed out in Chapter 3, damages is a less intrusive remedy than the traditional public law remedies. It does not involve invalidating decisions already made or ordering the authority to act in particular cases. For this reason, it is less important to have discretion as to whether to grant or withhold compensation on particular occasions than it is to have discretion as to whether to grant a quashing order or a mandatory order. Moreover, the danger that awarding damages in relation to the harm caused by the performance of a particular function will undermine the pursuit of the authority's objectives is one that arises in relation to the function as a whole. In other words, the reason that would justify withholding damages in relation to harm caused through the exercise of a particular function on a particular occasion would justify withholding the remedy in relation to the performance of that function generally, rather than on single occasions. This being so, a method of excluding liability that works in relation to classes of decisions rather than

in relation to individual decisions should achieve the same end, in relation to monetary remedies, as remedial discretion is intended to attain.[19]

As will be clear to the reader, the public approach is my invention. It does not exactly correspond to the practice of any court in England or indeed elsewhere but is the approach that I shall argue the courts ought to adopt in order to achieve a satisfactory law of administrative liability. The private approach is not my invention. It roughly corresponds to the practice of the courts before the *Anns* decision and in much of the recent case law the judges have returned to something very like it.

In my view, the public and the private approaches are the only defensible solutions to the problem of how to apply the law of negligence to public authorities. Either one treats public authorities exactly as if they were private persons. Or one recognizes that in virtue of the special obligations that flow from their public status, public authorities ought to be liable in circumstances in which private persons analogously placed would not be. The first alternative, the private approach, is what results if one takes seriously "Dicey's equality principle" – i.e. the principle that the same rules of law must apply to public authorities as to private persons. The second alternative, the public approach, is what results if one accepts that an authority's failure to fulfil its public law duties with respect to some individual may constitute a wrong entitling that individual to a remedy.

My claim that there is no defensible middle way between these two poles is not one I shall attempt to make good here but it is borne out to some extent in Chapter 12 where I outline how various cases would be decided under the public approach. In doing so, I shall point out some of the anomalies that result from extending the law so as to provide a remedy for what are really public law wrongs, while at the same time trying to adhere to orthodox methods of determining the incidence of liability.[20]

I turn now to analyse the cases that define approach of the courts. In brief outline, my account is intended to demonstrate the following thesis. In *Anns v Merton Borough Council*, the courts took an important step towards the public approach

19 This, of course, involves making use of the feature of English negligence law that the European Court of Human Rights disapproved of in *Osman v UK* [1999] 1 FLR 193, 29 EHRR 245. The ECtHR changed its opinion on this point, however, in *Z v UK* and in *TP and KM v UK* [2001] ECHR 28945/95.

20 My argument thus involves implicit rejection of the views of the commentators referred to at n.20 in Chapter 1, all of whom believe in one way of another in the possibility of such a middle way. These same commentators would probably not accept my claim that Dicey's equality principle entails the private approach but would define a Diceyan approach differently, as being satisfied as long as public authorities are dealt with in the same courts and made subject to the same causes of action as private persons, even if the causes of action undergo some alteration when a public authority is the defendant. For the purpose of my argument, it does not really matter how one applies the epithet "Diceyan" or which approach to negligence is most faithful to the spirit of Dicey and thus I do not pursue the matter further.

i.e. towards an approach that involves finding liability, in the way that principle I requires, where a public law wrong has caused loss to an individual. However, the argument that would have justified this step – the argument that certain public law wrongs call for a monetary remedy – was never properly articulated, and partly in consequence of this, the courts quickly began to retreat from the position they had taken. In the subsequent case law, beginning with the House of Lords' judgment in *X (Minors) v Bedfordshire CC*, one sometimes finds an implicit recognition, on the facts of particular cases if not generally, that justice demands administrative liability of the sort required by principle I. One finds also attempts to keep alive the developments brought about in *Anns*. But the general trend of the law is to return to something more closely resembling the private approach.

Home Office v Dorset Yacht and Anns v Merton Borough Council

The present phase in the development of the negligence liability of public authorities begins with *Anns v Merton Borough Council*. But to get to the root of the current approach one has to go back a little further. Ultimately, the approach taken by Lord Wilberforce in his speech in *Anns* can be traced back to the dissenting speech of Lord Atkin in the *East Suffolk* case. It was Lord Atkin who first suggested that, although the court was not empowered to interfere with an authority's statutory discretion, it could make possible a finding of liability by imposing a common law duty of care. More significant, however, is the speech of Lord Diplock in *Home Office v Dorset Yacht Co. Ltd.*[21] which clearly had a profound influence on Lord Wilberforce's speech in *Anns*. This is worth analysing in some detail since it established certain key features of the later treatment of the subject.

The facts were that a party of borstal trainees were sent on a training exercise to an island. They were under the supervision of three borstal officers but escaped during the night and boarded a yacht which they set in motion. This collided with and damaged another yacht whose owner then sued the Home Office. Lord Diplock begins his judgment with a general account of the principles that ought to govern cases in which the courts are presented with a situation of a kind in which they have not found a duty of care before. His lordship recommends what is essentially an incremental approach. The task of the court is to determine whether the new case has all the features of similar cases in which a duty of care was imposed in the past. If some relevant feature is lacking, the court must decide on policy grounds whether it is desirable to extend the law so as to find a duty of care in the new type of case. His lordship expressly disapproves the more expansive approach which involves simply applying Lord Atkin's neighbour principle. Applying the approach he recommends, his lordship judges the instant case to be one lacking in a relevant feature that characterized earlier similar cases in which a duty of care was found. (These are cases in which there was liability for harm caused by a

21 [1970] AC 1004.

failure to control a prisoner but in which the harm was caused to another prisoner rather than to someone outside the prison.)

Lord Diplock then turns to consider the principles that ought to govern the liability of public authorities for harm caused in the exercise of discretionary powers. He begins by considering *Geddis v Proprietors of Bann Reservoir*.[22] The facts in that case[23] were that the defendants had powers under a private act of Parliament to increase the flow of water into a river but that by doing so they caused the plaintiff's land to flood. It was in this context that Lord Blackburn uttered the well-known dictum which, for convenience, I repeat (at greater length) here:

> For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule "negligence" not to make such reasonable exercise of their powers.

As Lord Diplock explains, if this principle were applied directly to modern statutory powers, it would seem to require that wherever the exercise of such a power caused damage, the victim should be able to sue the authority in question and demand that its conduct be reviewed to determine whether it had given sufficient consideration to the risk of harm to the victim's interests. We might note here, parenthetically, that what I have called the public approach does entail something very like this. But, his lordship continues, it would not be right to apply the principle in *Geddis* directly in this way.

In a case like *Geddis* which involved a private act, the only interests to be balanced were the private interests of the holders of the statutory powers on one hand, and the property rights of the plaintiffs on the other. In this context, the form of "negligence" contemplated by Lord Blackburn constituted at the same time a tortious act.[24] By contrast, in the context of a modern statute like the one that gave the Home Office its powers in the instant case, the misuse of a statutory power does not automatically amount to the commission of a tort. Moreover, the interests to be balanced are not just those of the tortfeasor and the victim. Every public authority exercises its powers in pursuit of public interests and it is these that would have to be balanced against the interest of the victim if there were to be liability for the careless exercise of statutory powers. In the instant case, sending the borstal trainees on a training exercise, and thereby subjecting them to

22 (1878) 3 App Cas 430.

23 Which were not actually described by Lord Diplock in his speech.

24 The cause of action is not stated in the judgments in *Geddis* but nuisance is a better candidate than negligence.

a laxer regime, was intended to help reform the trainees and instil in them a sense of personal responsibility. The balance to be struck would therefore be between the public interest and that of the trainees themselves in the achievement of this reformative effect and the risk of harm to the interests of those owning property near the site of the training exercise.

According to Lord Diplock, the judgment as to whether this balance has been correctly struck is not one that a court is equipped to make in the exercise of its jurisdiction as a court deciding a civil claim in damages. The only ground of challenge which a court can entertain to the reasonableness of the exercise of statutory powers of the sort in issue is the public law ground that the exercise is ultra vires. This leads his lordship to advocate a two stage approach to the problem of liability for the exercise of statutory powers. The first stage is the public law stage: the court must determine whether the exercise in question is ultra vires. Only then can it move to the second stage and ask whether there is a duty of care and this is to be done using the traditional technique described at the beginning of the judgment i.e. by analogy with past cases. Thus his lordship holds that if it can be found that the borstal officers were acting ultra vires, for example because they disobeyed their instructions by leaving the trainees unsupervised, then a duty of care could be found; but this would be because the law could be extended, by analogy with those cases in which one prisoner attacked another, to cover cases in which there was danger to persons or property in the immediate proximity of the place of confinement.

Underpinning the judgment is the assumption that public law is exclusively concerned with ensuring that public powers are exercised in the public interest. Lord Diplock rejects the idea that a finding of ultra vires, preliminary to the imposition of a duty of care, could be made on the basis that the policy of applying a relaxed regime to some trainees,[25] or the decision to do so in particular cases,[26] posed too great a risk to members of the public. The policy of applying a relaxed regime could only be ultra vires, his lordship says, if "the system adopted was so unrelated to any purpose of reformation that no reasonable person could have reached a bona fide conclusion that it was conducive to that purpose."[27] The implication is that a policy could not be unreasonable because, although it might succeed in its purpose, it would pose an excessive risk to those likely to be affected by it: only unconduciveness to purpose can constitute unreasonableness in the sense required.[28] Also present is the assumption that there could never be liability

25 See especially p.1068.

26 See especially p.1069.

27 Page 1068 C.

28 We might contrast this with the position that would follow from applying the public approach and the conception of the nature of public law that it assumes. Under the public approach, it would be possible, in principle, to say that a policy of subjecting some trainees to a lax regime was unreasonable because it involved excessive risk to members of the public. It would certainly be possible to judge the decision of a borstal officer, in pursuance

where a public authority acted ultra vires and thereby caused harm in a way which had no parallel in the ordinary law of negligence.

Clearly, the approach recommended by Lord Diplock in *Dorset Yacht* does not agree with the approach I wish to advocate. But as applied to the facts of the case it is perfectly comprehensible and coherent. The result is consistent with the private approach. The private approach does not exclude extension of the law to cover new situations, as long as this is done according to the orthodox method. Moreover, despite the pains Lord Diplock takes to distinguish the modern situation from the situation dealt with in *Geddis*, the fault in the conduct of the borstal officers capable of making it ultra vires is also the kind of fault capable of constituting breach of a duty of care in negligence, as traditionally conceived. The problems begin when Lord Wilberforce takes over elements of the conceptual apparatus developed by his colleague and tries to apply them to a case in which the harm is inflicted in circumstances which would not be recognized as giving rise to a duty of care in the orthodox law of negligence.

Again, for convenience, I repeat here the facts of *Anns*. The plaintiffs were the lessees of flats who had suffered loss when cracks were revealed in the foundations of the building in which their flats were situated. They sued both the building firm which built the block and the local authority. Their argument in relation to the authority was that it was liable for the loss because it had negligently failed to prevent the builders from building the block on foundations shallower than those shown in the building plans that the authority had approved. Under the relevant statute, the Public Health Act 1936, and byelaws made under it, the authority had a power rather than an explicit duty to inspect the foundations of buildings before they were constructed, although of course, the fundamental purpose of the powers conferred by the Act was to enable the authority to ensure that buildings complied with health and safety standards.[29] Their Lordships held that the authority could in principle owe a duty of care to the plaintiffs both to make a reasonable decision as to whether to inspect and having decided to do so, to inspect with reasonable care.

Unlike the state of affairs dealt with in *Dorset Yacht*, the circumstances in *Anns* were quite unlike any in which a duty of care had been found to exist in the past.[30] Considered without regard to its status as a public authority, the defendant was simply a person who had the power to prevent a third party from behaving negligently and who knew that failure to exercise the power (or to exercise it carefully) might lead to loss on the part of the plaintiffs. The identity of the plaintiffs was unascertained at the time at which the defendant exercised or had to decide whether to exercise its powers. There was no assumption of responsibility and the potential harm was of a kind traditionally categorized as pure economic loss.

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of the policy, to classify a particular trainee as suitable for subjection to the relaxed regime as unreasonable. This, however, is a possibility that Lord Diplock excludes altogether.

29 I.e. the powers were to be exercised in pursuit of an overarching duty.

30 Or, as least, before *Dutton v Bognor Regis DC* [1972] 1 QB 373.

In many respects, the approach adopted by Lord Wilberforce in *Anns* comes close to the public approach. He abandons the incremental method recommended by Lord Diplock in *Dorset Yacht* and promulgates in its place his two stage test which, again, for the sake of convenience, I repeat. The first stage of the test requires the court to ask "whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter." If there is, a prima facie duty arises. The second stage requires the court to ask whether there are any policy factors that ought to limit the incidence of the duty.

Availing himself of the freedom this test affords, Lord Wilberforce goes on to establish the possibility of a duty of care in the circumstances of the case. Many features of the way he goes about this suggest that his underlying aim is to mould the duty of care into an instrument for enforcing the public law obligations of the authority. Thus he describes the governing legislation and emphasizes that its purpose is to provide for the health of owners and occupiers of buildings;[31] he asserts that the duty of care should reflect not simply the factual relationship between defendant and plaintiff but also the authority's public law functions;[32] he argues that the duty need not be a duty not to positively cause new harm but can be a duty to prevent harm occurring; he says that the nature of the duty must be closely related to the purpose for which the powers were granted and, indeed, goes on to define the duty as being "to take reasonable care … to secure that the builder does not cover in foundations which do not comply with byelaw requirements." On the subject of damages, his lordship says the following:[33]

> "[T]hese damages may include damages for personal injury and damage to property. In my opinion they may also include damage to the dwelling house itself; for the whole purpose of the byelaws in requiring foundations to be of a certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health or safety of occupants."

And he goes on to add that the measure of damages should be the amount "necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying." In relation to the question of which of the conventional categories the recoverable damages in the case should fall into, his lordship says, as if the matter was of relatively little importance that "[I]f classification is required, the relevant damage is in my opinion material, physical damage." It seems clear from this, that in Lord Wilberforce's view, the real point of damages is to provide compensation for exactly the sort of harm which it is the purpose of the governing statute to prevent. Lastly, his lordship rebuts the

31 Page 753 E-G.
32 Page 754 A.
33 At p.759 F-G.

argument that if there is no duty to inspect there can be no duty to take care in inspection by pointing out that as a matter of public law, the authority is under a duty to give proper consideration to the question whether they should inspect or not.[34] The clear implication of this is that where the only reasonable conclusion to be drawn from giving consideration to the question is that the authority should inspect, then it is under a duty (as a matter of public law) to do so.[35]

If one wanted to find a justification for all these aspects of Lord Wilberforce's approach to the duty of care it would be in the following proposition. Where a public authority has powers for the purpose of preventing a particular sort of harm to citizens and that harm occurs in circumstances in which the proper use by the authority of its powers would have prevented it, then it is unfair for the citizens in question to have to bear the loss involved. This proposition is not identical with principle I but it is implied by it. Principle I states that reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person; and one way in which a public authority can fail to conduct itself in the way reasonably expected of it in law in relation to the injured person is by failing to fulfil a legal obligation to protect that person from a particular harm.

Consistently with this, the features of Lord Wilberforce's approach described above would all characterize the public approach to the same problem. Under the public approach, the inquiry to determine whether a duty was owed to individuals would also begin with an examination of the purposes for which the statutory power was exercised; the duty could be one to prevent harm to citizens if this was the purpose of the statute; the content of any duty owed would be determined by – would indeed be identical with – the authority's statutory obligations; the harm in respect of which damages was payable would be harm of the sort which it was the purpose of the statute to protect against; and there could, in principle, be a duty both to exercise the relevant power, where not to do so would be unreasonable, and to use due care and skill (or practical competence as I called it in Chapter 6) where the decision was taken to exercise the power. This latter duty would arise whether or not there was actually a duty to exercise the power in the first place.[36]

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34 At p.755 C-D.

35 By contrast, Lord Salmon stops short of this view. He rebuts the argument "no duty to inspect, therefore no duty to inspect with care" by saying simply that it would be unlawful for the authority to resolve to make no inspections: see p.762 D. Correspondingly, he concludes that there was no duty to inspect the foundations, but if inspection was undertaken there was a duty to do it with reasonable care and skill. In this, however, Lord Salmon is in a minority of one because the other judges agree with Lord Wilberforce.

36 Lord Salmon clearly states in his speech in *Anns* that there is no duty to inspect but that once the decision to inspect is taken, it must be done without negligence. Lord Wilberforce's speech, however, does not distinguish clearly between two positions. One is that a duty to inspect with care arises where there is a duty to inspect. The other is that even in the absence of a duty to inspect, there is a duty to inspect with care once the decision to inspect has been taken. It seems more likely that the latter represents his lordship's view.

Unfortunately, although Lord Wilberforce rejects the incremental approach advocated by Lord Diplock in *Dorset Yacht*, he preserves the idea that in cases concerning public authorities, the duty of care is quite different from, and in certain respects at variance with, the authority's public law obligations. We can see this particularly in two aspects of his judgment. One is the way he emphasizes the duty of care's status as a common law duty in negligence to answer the objection that there cannot be liability in relation to the exercise of a statutory power. My answer to this objection – the answer given by the public approach – would be to say that public authorities never really have powers which, in the manner of a private person, they are free to exercise as they wish. The Parliamentary draftsman's decision to confer a power rather than imposing a duty is to be taken, at best,[37] as indicating that the authority is to have a wider rather than a narrower discretion as to when or how to exercise the power in pursuit of its assigned objective. This means that there may be circumstances in which the authority is under a duty, as a matter of public law, to exercise the power in a particular way: it may, that is, be under a public law duty to exercise its powers to inspect a building's foundations or, having decided to inspect the building's foundations, to do so carefully. Lord Wilberforces's answer to the objection is that, although a statutory power may be something quite distinct from a statutory duty, this does not matter because in either case it is possible to impose a common law duty of care.[38] That Lord Wilberforce cannot imagine – in the absence of an explicit statutory duty – a public law duty owed to an individual is understandable given his background assumptions. Like Lord Diplock he presumably thinks of public law as being concerned solely with duties to the public.[39] But one is prompted to ask: if (as Lord Wilberforce asserts and as his approach requires) a court can find that an authority has acted unlawfully as a matter of public law by failing to exercise its discretion so as to benefit a particular class of individuals, why cannot one say that as a matter of public law that authority owed a duty to those individuals to confer on them the benefit in question? To hold otherwise, and to say that the imposition of the duty of care is not done in fulfilment of a public law duty, is to encourage a certain view of the extension of the duty of care in circumstances like those in *Anns*. The view in question is that the extension in the law does not arise from the need to provide a remedy for what are really public law wrongs but involves, rather, a decision to expand negligence for reasons that are to do with negligence itself rather than with public law. Viewed thus, the extension is bound to seem somewhat arbitrary or capricious.

The other way in which Lord Wilberforce preserves the idea of the duty of care as being unlike the authority's public law obligations is through his insistence

37 I.e. if the decision is not simply arbitrary

38 See especially at pp.755 H–756 A and p.758 A.

39 He may also be influenced by the thought that statutory duties owed to individuals occur only in the circumstances in which there could be an action in the tort of breach of statutory duty. This is an issue I return to below.

that mechanisms are needed in order to shield parts of the authority's functions from the duty of care. His lordship mentions two such mechanisms. One is the requirement that before a plaintiff can be found liable for breach of a duty of care, he must be acting ultra vires or outside "the limits of a discretion bona fide exercised."[40] The other is the policy/operational distinction. The first of these assumes a different significance in the context of Lord Wilberforce's speech than it has in Lord Diplock's in *Dorset Yacht*. In the context of Lord Diplock's approach, it was clear that an act had to be ultra vires before there could be liability in negligence, because negligence and public law involved quiet different standards. It could not be right to impose the negligence standard on the public law one, and therefore tests drawn from each sphere had to be satisfied one after the other: first ultra vires, then negligence. The ambiguity inherent in Lord Wilberforce's approach means that the significance within it of the ultra vires requirement could be interpreted in either of two ways. It could be interpreted as having the same significance as it does in Lord Diplock's approach. Or it could be interpreted as having the significance that it does in the public approach where public law unlawfulness – once a duty to the individual is established – amounts to fault.

There is less room for doubt as to the significance of the policy/operational distinction. Lord Wilberforce only introduces it in a mild form. He says that it is merely a distinction of degree and that "the more 'operational' a power or duty may be, the easier it is to superimpose on it a common law duty of care." Nonetheless, to say that a duty of care could not be imposed on the exercise of a particular power because it involved policy is to perpetuate the idea that the content of the duty of care must be different from that of an authority's public law duties. To make again the comparison with the public approach, there is no reason, under the public approach, why a policy decision, such as a decision by the authority in *Anns* to inspect only at certain times or to inspect only buildings of a certain type, should not be the subject of a duty owed to the citizens affected and breach of which results in damages. Where an authority makes such a decision, the court will be slow to intervene and will apply a less intrusive standard than if the authority were carrying out some practical activity. Nonetheless, where the authority falls below that less intrusive standard, it may be liable. By contrast, Lord Wilberforce's approach assumes that the duty of care must always entail a more intrusive standard than can be justified in the case of policy decisions and that it can therefore only be applied to the more practical of the authority's activities.

The overall effect of Lord Wilberforce's speech is thus profoundly equivocal. On the one hand, it points towards the public approach. On the other, it provides all the materials necessary for a reaction – a reaction which subsequently occurred – on the grounds that, viewed from the perspective of negligence, *Anns* expanded the law in an arbitrary and unsustainable fashion. As a consequence, one finds in later cases two warring elements. One is the perception, often implicit rather

40 Page 755 F.

than fully articulated, that justice demands a remedy where a public authority fails in its duty to help citizens. The other is the view that liability should be limited by means of restrictions developed in the context of negligence actions between private persons, restrictions which, as we have seen, can only really be justified on the assumption that exactly the same rules should apply to public authorities as apply to private persons. These two impulses tend to produce diametrically opposed results. They are not competing considerations that one can weigh against each other in the way that one can, for example, weigh the importance of attaining some public interest against the importance of respecting the interests of some individual. They are flatly contradictory; and the impossibility of reaching some principled accommodation between them goes some way towards explaining the extreme instability of the law in this area.

The reaction to Anns

A good example of the hostile reaction to *Anns* in some quarters is Smith and Burns' well-known article "Donoghue v Stevenson – The Not So Golden Anniversary."[41] The authors lament the abandonment of a method that involves the careful step-by-step extension of the law to new categories and the use of Lord Atkin's neighbour principle to justify a less controlled approach. In particular, they attack the two-stage test set out by Lord Wilberforce in *Anns*. They argue that Lord Wilberforce's test implies the end of the traditional distinction between misfeasance and nonfeasance and threatens a situation in which anybody who is in a position to help another in any way may be made liable for the failure to do so. The authors do not appear to recognize that there might be a special reason for extending the law in relation to public authorities that would not apply in relation to private persons. They note that "Lord Wilberforce's preamble to his decision in *Anns* outlining the prima facie duty of care doctrine is clearly not confined to the facts of that case and extends to relationships between private persons and public bodies."[42] They also disclaim any interest in the specific question of whether there should be liability where a building inspector fails to carry out his statutory duty.[43] On the next page, however, they complain that "[t]he widespread assumption of courts that a failure to carry out a statutory duty or power falls under the 'neighbour principle' of *Donoghue v Stevenson* would indicate that the distinction between misfeasance and nonfeasance is no longer considered to be legally significant." What is lacking is any consideration of the possibility that the fact that a public authority is under a duty to achieve a particular end or possesses a power for the purpose of achieving a particular end might provide a reason for making the authority liable which would be absent in the case of a private person

41 (1983) 46 MLR 147.
42 Ibid. p.154.
43 Page 155.

who merely happened to have the ability to provide assistance to another: or that, looked at in this way, the finding of a duty of care in a case like *Anns* need not be interpreted as licensing the imposition of duties of care in an uncontrolled and ad hoc fashion but can be seen instead as involving the extension of the law of negligence to cover a new and clearly defined category of cases, albeit a very large and significant one.[44]

Influenced, no doubt, in part by criticisms like those of Burns and Smith, the courts began to retreat from *Anns*. The retreat took the form, not of an explicit rejection of the notion that the law of negligence could apply to distinctively public law functions, but of a general reassertion of orthodox methods of determining liability in negligence. Thus, in *Murphy v Brentwood District Council*,[45] *Anns* was overruled, not on the ground that there could not be a duty of care to protect citizens from the negligence of third parties but because the harm suffered was pure economic loss. And in *Caparo v Dickman*,[46] the primacy of the incremental approach as a way of deciding whether there should be a duty of care in new types of case was reasserted.[47]

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44 A similar indifference or blindness to arguments of this sort can be found in many subsequent writings on negligence. One example appears in an article by the Canadian judge Sopinka, "The Liability of Public Authorities: Drawing the Line" (1993) 1 Tort Law Rev 123 at 148–9. He echoes the claims of Burns and Smith in his assertion that "tort liability for nonfeasance amounts to asking the government to make the world safe for everyone." Another is to be found in Stapleton's well-known article "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 LQR 301. Stapleton suggests that courts should refuse to find public authorities liable for failure to prevent harm by third parties on the grounds that the authorities are "causally peripheral." In this way, potential claimants can be discouraged from battening on public authorities whom the claimants choose as targets, Stapleton seems to assume, purely because they have "deep pockets." To describe in this way a public authority which is under a duty to protect citizens from certain sorts of harm – or has a power to do so which it possesses in order to serve that end – is to assume that it is in the same position as a private person who is merely able to prevent harm of the sort in question, and thus to ignore the authority's special obligations.

45 [1991] 1 AC 398.

46 [1990] 2 AC 605.

47 The retreat was also evident in the restrictive approach taken by the House of Lords in a number of cases from this period on the negligence liability of public authorities: *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson and Co. Ltd*. [1985] AC 210 ; *Yuen Kun-yeu v AG of Hong Kong* [1988] AC 175; *Rowling v Takaro Properties Ltd*. [1988] 1 AC 473; *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

X v Bedfordshire

It is against this background, that one must consider the House of Lords' judgment in *X v Bedfordshire County Council*[48] which, despite being in certain ways discredited, remains one of the leading authorities on the negligence liability of public authorities. It contains the fullest summation of the principles that apply in this area and the framework it established continues in significant respects to dictate the way such cases are decided. For these reasons (and at the risk of boring anyone already familiar with the case), I devote special attention to it here.

The case involved two sets of appeals arising out of alleged failure on the part of local authorities to discharge duties relating to the welfare of children. The sole judgment was given by Lord Browne-Wilkinson, with whom the other judges agreed.[49] He begins his judgment by setting out his general approach to the questions raised by the appeals. He distinguishes, first of all, between claims based on breach of public law rights and claims based on private law actions in damages. The former, even where they succeeded do not, by themselves, give rise to any claim for damages. He then classifies private law claims for damages into three different types: A) actions for breach of statutory duty simpliciter (by which he means that no claim of carelessness is necessary for the action to succeed); B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; and C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it.[50]

His lordship proceeds to analyse each of these in turn. In relation to breach of statutory duty he gives a restrictive and entirely orthodox account of the kind described in Chapter 10. He notes the rarity in the case law of cases in which a right of action in breach of statutory duty is found in relation to regulatory or welfare legislation, even where the legislation in question in fact benefits individuals as well as the general public.

In relation to actions based solely on the careless performance of a statutory duty, Lord Browne-Wilkinson considers again the famous dictum of Lord Blackburn in the *Geddis* case[51] and reaches the same conclusion as the House of Lords did in the *Dorset Yacht* case. Negligence in the exercise of a statutory power, of the sort referred to by Lord Blackburn, is not to be equated with breach

48 [1995] 2 AC 633.

49 Lord Nolan dissented in one minor respect. He did not accept Lord Browne-Wilkinson's finding in the Newham case that one reason for excluding a duty of care on the part of the psychiatrist and social worker towards the mother and child was that their duties were owed to the authority alone. He thought that only public policy provided a good reason for excluding the duty of care.

50 His lordship in fact added a fourth type, misfeasance in a public office, but this did not arise on the facts of the case and nothing more was said about it.

51 Quoted above at p.152.

of a duty of care in the tort of negligence. Negligence of the former type deprives an authority of a defence of statutory authority when it is sued in tort. But there has to be a common law cause of action for any such claim to succeed. Thus, there cannot be liability simply because an authority's careless performance of its statutory duty causes harm.

His lordship then turns to category C) actions based on a common law duty of care. Here, he distinguishes between a) cases in which it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion; and b) cases in which a duty of care is alleged to arise from the manner in which the statutory duty has been implemented in practice. An example of a) in the educational field is a decision whether or not to exercise a discretionary discretion to close a school, being, his lordship says "a decision which necessarily involves the exercise of a discretion." An example of b) is the actual running of the school pursuant to the statutory duties. "In such latter case a common law duty to take reasonable care for the physical safety of the pupils will arise."[52]

Next, Lord Browne-Wilkinson considers the relationship between the duty of care and discretion, justiciability and the policy/operational test. Here he reasons that an authority could not be liable for doing what it has been authorized to do by Parliament so that a decision will have to fall "outside the ambit of the discretion" conferred upon it before there can be common law liability. What will take a decision outside the ambit of statutory discretion is "unreasonableness." But his lordship is at pains to emphasize that he does not mean to introduce public law concepts into the law of negligence. In this respect, he contrasts the speeches of Lords Reid and Diplock in *Dorset Yacht*. Lord Diplock explicitly introduced the public law notion of ultra vires but Lord Reid, whose approach was more representative of the majority, managed to avoid this. Avoidance of public law concepts is preferable for two reasons. Firstly, a decision can be ultra vires for reasons other than Wednesbury unreasonableness (e.g. breach of the rules of natural justice) but these other reasons have no relevance to negligence. Secondly, the use of public law concepts can lead to mistaken claims that, in accordance with the principle of *O'Reilly v Mackman*,[53] the negligence claims in question can only be brought as part of proceedings for judicial review.

In seeking to determine whether or not an authority was acting outside the ambit of its discretion, his lordship goes on, "the court has to assess the relevant factors taken into account by the authority in exercising the discretion. Since what are under consideration are discretionary powers conferred on public bodies for public purposes, the relevant factors will often include policy matters, for example social policy, the allocation of finite financial resources between the different calls made upon them (as in the *Dorset Yacht* case) the balance between pursuing desirable social aims as against the risk to the public inherent in so doing. It is established that the courts cannot enter upon the assessment of such 'policy'

52 Page 735 G.

53 [1983] 2 AC 237.

matters. The difficulty is to identify in any particular case whether or not the decision in question is a 'policy' decision."[54]

Where a question is a policy decision, then it is not open to the court to inquire whether it falls outside the ambit of the authority's discretion. Only where a decision does not involve matters of policy can the court go on, firstly, to determine whether it falls outside the ambit of the authority's discretion and secondly, to decide whether to impose a common law duty of care. Lord Browne-Wilkinson refers to decisions involving questions of policy as non-justiciable and decisions not involving such questions as justiciable. His lordship uses this terminology to replace the terminology of the policy/operational distinction although he gives no explicit reason for this.

Where a decision is justiciable then the question of whether there is a duty of care is determined in accordance with the principles set out in *Caparo v Dickman*[55] i.e. the court must ask whether the damage suffered was foreseeable, whether the relationship between plaintiff and defendant was sufficiently proximate and whether it would be fair, just and reasonable to impose a duty.

The final part of Lord Browne-Wilkinson's exposition of general principles concerns the distinction between direct and vicarious liability. An authority can be under a direct duty to a plaintiff whether or not its servants owe a duty individually. In such circumstances, the acts constituting breach are acts of servants even though the servants owe no duty on their own account. Conversely, the servants of an authority – for example, the social workers and psychiatrists who advise a local authority in the exercise of its child protection powers - might be under a duty to the plaintiff without any corresponding duty being alleged on the part of the authority itself.

Of the two sets of appeals with which the judgment was concerned, the first set (referred to as "the abuse cases") consisted of two cases arising out of the exercise or non-exercise of the defendant authorities' child protection powers. In the first ("the *Bedfordshire* case"), the action was brought against the authority by five children whom the authority had failed to remove from their parents during a period of several years despite being warned by numerous informants of the dreadful abuse and neglect the children were suffering. In the second ("the *Newham* case"), the action was brought by a mother and daughter who were mistakenly separated by the authority in the belief that the daughter had been sexually abused by the mother's boyfriend. The mistake arose because when the daughter was interviewed by a psychiatrist and a social worker employed by the authority, the daughter gave as the name of her abuser a name that was also the first name of the boyfriend. In both of the abuse cases, the plaintiffs argued breach of statutory duty and negligence and in both their claims had been struck out as disclosing no cause of action. This meant that the House of Lords' judgment was based on assumed facts.

54 Page 737 F-G.

55 Note 47 above.

The second set of appeals ("the education cases") consisted of three cases arising out of alleged failures of local education authorities to fulfil their duties to provide for those with special educational needs. In the first ("the *Dorset* case") the basis of the claim was that over a number of years the authority had failed to correctly diagnose the plaintiff's learning difficulty and had failed to place him at a suitable school. The plaintiff argued breach of statutory duty and negligence.[56] In the second ("the *Hampshire* case") the plaintiff alleged various failures on the part of employees of the authority to recognize and diagnose his learning difficulties. His claim was based on negligence alone. In the third ("the *Bromley* case") the plaintiff alleged that at different times, the authority had impaired his educational development by putting him in a special school when he did not have special educational needs, failed to find him any school and failed to make a statement assessing his educational needs. His claim was based on both breach of statutory duty and negligence. The appeals were all either, as in the abuse cases, against decisions of the lower courts to strike out the pleadings or against decisions not to strike them out.

At the centre of both sets of appeals were the elaborate statutory schemes that governed the authority's powers. In the abuse cases, the Children and Young Persons Act 1969, the Child Care Act 1980 and the Children Act 1989 created between them a plethora of powers and duties to provide for the welfare of children in their area, including duties to identify children in need and to remove them from their parents where necessary to protect them from harm. Legislation also provided a complaints procedure in relation to local authorities' child protection powers and the authorities were under a statutory duty to act under the general guidance of the Secretary of State. Lord Browne-Wilkinson laid great stress on the guidance that had been issued by the Secretary of State and that emphasized a multi-disciplinary approach (i.e. one involving the police, medical practitioners and the education services as well as local authority social services departments) to the solution of child protection problems. In the education cases, the Education Acts 1944 and 1981 imposed general duties on local authorities to provide education for the children in their area and an elaborate system designed to ensure that particular provision was made for children with special educational needs. This involved the creation of a statement in relation to the child in question which took into account the views of teachers, doctors, educational psychiatrists and the parents themselves. On the basis of the statement a decision was made as to what form of education to give the child, and if special provision was needed, whether to move the child to a special school or to make provision for the child at the ordinary school at which she was enrolled. The system provided for various rights of appeal on the part of the parents including a right of appeal to the Secretary of State, as well as for procedural rights to participate at various stages of the process.

56 The claim based on breach of statutory duty was struck out in the lower courts, however, and the plaintiff did not appeal against this striking out to the Lords.

Lord Browne-Wilkinson's orthodox analysis of breach of statutory duty meant, however, that all the claims based on that tort were dismissed. This left the claims in negligence. In relation to these, the distinction between direct and vicarious claims assumed great prominence. In the abuse cases, the *Bedfordshire* case involved allegations of both direct and vicarious liability. The *Newham* case was based on allegations of vicarious liability alone, it being claimed that the psychiatrist and social worker responsible for the mistaken identification of the mother's boyfriend owed duties of care to the mother and daughter on their own account. In relation to the direct claims, his lordship found that the decisions made by the authorities were justiciable because they were practical decisions about what to do in relation to particular children. It was also conceivable that they could be held to be outside the ambit of the authorities' discretion. The question then was whether the *Caparo* tests were satisfied. The authority accepted that harm was foreseeable and that its relationship with the plaintiffs was sufficiently proximate but his lordship held that it would not be fair, just and reasonable to impose a duty. In support of this finding, he cited six policy considerations. Firstly, he claimed that a duty of care would cut across the multi-disciplinary system established by the scheme and that it would be difficult to apportion responsibility as between the different agencies involved. Secondly, he pointed to the delicacy of the task involved in deciding whether or not to remove a child from its parents and the possibility of causing harm whichever decision was made. Thirdly, he suggested that the imposition of a duty of care could lead to defensive practice and to an excessively cautious approach which might lead to delay in the taking of decisions affecting children. Fourthly, he thought that if the exercise of the powers in issue were made the subject of a duty of care it would be peculiarly likely to lead to costly and vexatious litigation. Fifthly, he claimed that the need for a duty of care was lessened by the presence of the statutory complaints procedure and the possibility of application to the local government ombudsman. Lastly, he emphasized that a duty of care had not been found in relation to similar welfare and regulatory powers in the past. The closest analogy, his lordship said, was with the powers of the police to prevent harm considered in *Hill v Chief Constable of West Yorkshire*[57] and the powers of the financial regulators in *Yuen Kun-yeu v AG of Hong Kong*[58] in neither of which a duty of care was found. He quoted with approval the view of the Privy Council in the latter case that if the regulators there were held liable the principles leading to such liability "would surely be equally applicable to a wide range of regulatory agencies, not only in the financial field, but also, for example, to the factory inspectorate and social workers, to name only a few."[59]

In relation to the claims in the abuse cases based on vicarious liability, Lord Browne-Wilkinson found that the social workers and psychiatrists involved in making the decisions did not owe duties to the plaintiffs but owed them instead

57 [1989] AC 53.

58 [1988] AC 175.

59 *Yuen Kun-yeu* n.48 above at p.198, quoted by Lord Browne-Wilkinson at p.751 F.

to the authorities that employed them. If this were wrong, his lordship held, any duties owed to the plaintiffs would be excluded in any case by the same policy considerations as applied to the claims based on direct liability.

In the education cases, as in the abuse cases, Lord Browne-Wilkinson's orthodox analysis of breach of statutory led him to uphold the decision to strike out the one surviving claim for breach of statutory duty (that in the *Bromley* case). The claims base on direct liability of the authorities in negligence in the *Dorset* and *Bromley* cases were excluded on the basis of reasoning similar to that in the abuse cases. The claims were justiciable and might be outside the ambit of the authorities' discretion. It would also not be right to strike them out on the grounds that the harm to the plaintiffs was not foreseeable or that there was no proximity. But they could not be permitted for three reasons of policy. Firstly, to allow actions in negligence would interfere with a statutory scheme which already provided both for appeals by dissatisfied parents and for the participation of the parents at many points in the process of assessing a child and providing for its educational needs. This was so, even though the parents in the *Dorset* case had in fact availed themselves of all the relevant mechanisms of participation and appeal: if a duty of care was allowed, then it would not be possible to exclude the making of claims by parents who had not used the statutory machinery. Secondly, there was the possibility of a flood of hopeless claims which would expose the authorities to great expense. Thirdly, as in the abuse cases, the courts should be reluctant to impose a duty of care in relation to statutory welfare schemes and the ombudsman provided a more appropriate means for dealing with administrative failures.

The only category of claim that Lord Browne-Wilkinson was prepared to allow in either set of appeals was that of claims based on vicarious liability of the education authorities for the failures of the education professionals working for them. In the *Dorset* case, his lordship thought, the educational psychologists employed by the authority were offering a professional service to the public and were therefore obliged to use due care and skill in giving their advice to parents and children. Their situation was unlike that of the child protection professionals in the abuse cases because there was no potential for conflict between their duties to the plaintiffs and their duties to the authority; nor was there potential for conflict with the statutory scheme. The *Hampshire* case involved duties of a headmaster and educational advisers to a pupil of a sort that might arise in any case, regardless of the statutory scheme while in the *Bromley* case, although a similar claim had not been properly pleaded, it could not be ruled out.

In order to evaluate Lord Browne-Wilkinson's judgement one needs to understand a distinction that plays a central role in it. This is the distinction between cases in which an authority is alleged to owe a duty of care in the manner in which it exercises a statutory discretion and cases in which a duty of care is alleged to arise from the manner in which a statutory duty has been implemented in practice. As we saw above, he gives as an example of the former, the duty alleged to arise in relation to a decision whether or not to close a school and of the latter, the duty that arises in the day to day running of a school to take reasonable care for the safety

of the pupils. This distinction is linked to another, that between cases in which any duty owed must be a duty of the authority itself, and cases in which an employee can owe a duty on her own account for which the authority will then be vicariously liable. The claims in which the House held that there could be a duty of care fell into the latter category.[60]

These distinctions correspond to yet a third distinction, that between on the one hand the kind of case in which the finding of the duty of care involves the extension of the law to encompass a new kind of situation, and on the other, the kind of case in which a duty of care can arise in negligence on orthodox principles. That the claims in which the House holds that there can be a duty of care fall into the latter category can be seen from the way in which Lord Browne-Wilkinson emphasizes that the duty is of a sort that arises independently of the governing statute and would have been imposed on a private person similarly placed. Thus in the *Dorset* case, his lordship says:[61] "[t]he claim is based on the fact that the authority is offering a service (psychological advice) to the public … once the decision is taken to offer such a service, a statutory body is in general in the same position as any private individual or organization holding itself out as offering such a service." And in the *Hampshire* case, he states that:[62] "[t]he duty of care in no sense arises from the statutory machinery laid down by the 1981 Act; the negligence complained of has nothing to do with the 1981 Act … [t]he claim is a pure common law claim based on a duty of care owed by a headmaster and educational adviser to a pupil." By contrast, in the former type of case – the type which involves extension of the law – the argument in favour of a duty of care arises not on the basis of analogy with the kind of cases in which a duty had traditionally been found in the past for there is no such analogy. The argument in favour of a duty arises from the perception that since the authority in question was given its powers and duties to provide certain protections or benefits to persons in need, there ought to be liability in certain cases where it fails to do so.

Once one has these distinctions in mind, one can observe, first of all, that Lord Browne-Wilkinson preserves certain of those elements of Lord Wilberforce's approach in *Anns* that tend towards the public approach. Thus he accepts, in principle, that there can be a duty of care in the manner in which a statutory discretion is exercised and again, in principle, that such a duty of care can arise

60 It is presumably possible, in Lord Browne-Wilkinson's typology, for an authority to owe a direct duty as a result of the way in which it has implemented its statutory duty in practice. However, on the facts of *X*, as interpreted by Lord Browne-Wilkinson, the claims that the authorities owed direct duties all seemed to be based directly on the statutes rather than on what the authorities had done in the exercise of their powers under them, while the vicarious claims were all based on the relationships arising from the way in which the statutory powers had been exercised. Compare Lord Slynn's account of Lord Browne-Wilkinson's typology in *Barrett v Enfield LBC* n.79 below at p.91 A.

61 At pp.762 H–763 A.

62 At p.765 D-E.

in relation to the particular statutes examined in the case. Implicit in this is an acceptance that there could be liability for nonfeasance as well as misfeasance in the exercise of statutory powers.[63] There are also oblique references to the argument that would support the imposition of a duty of care of this type. Thus in the *Dorset* case, one finds the following:[64]

> In favour of imposing a duty of care is the fact that it was plainly foreseeable that if the powers were exercised carelessly a child with special educational needs might be harmed in the sense that he would not obtain the advantage that the statutory provisions were designed to provide for him. Further, for the reasons that I have given, a common law duty of care can only arise in relation to an authority which has decided an issue so carelessly that no reasonable authority could have reached that decision. Why, it may be asked, should such a grossly delinquent authority escape liability?

In addition, there is Lord Browne-Wilkinson's agreement with the view that "the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-considerations are required to override that policy."[65] This dictum has been repeated in many subsequent cases and commentators have puzzled over its exact meaning. It is an odd principle to adopt when trying to decide whether to find a duty of care since unless it has been established that there is a duty of care and, consequently, that the person to whom it is owed has a right, there can be no wrong to be remedied. Booth and Squires suggest a meaning that makes it an expression of Dicey's conception of the rule of law.[66] This is that where a private person would be liable for causing harm by committing a particular act then so must an analogously placed public authority that commits substantially the same act. This interpretation has plausibility to the extent that the dictum first appears in the context of a judgment – that of Sir Thomas Bingham MR in the Court of Appeal's decision on the abuse cases[67] – that is impeccably orthodox in its reliance on precedents to establish the existence of the duty of care. It is also a suitable interpretation if one wants to make it appear that in their recent decisions the courts have actually followed the principle that the dictum expresses. But it cannot bear this meaning in the context of Lord Browne-Wilkinson's speech in *X*. Lord Browne-Wilkinson cites the dictum just before setting out the policy considerations that in his opinion

63 The judgment has however been criticized for its failure to discuss explicitly the question of liability for omissions: see Bailey and Bowman, "Public Authority Negligence Revisited" (2000) 59 CLJ 85 at 97–98 and 101.

64 At p.761 D-E.

65 Page 749 G.

66 *Negligence Liability of Public Authorities* 4.07–4.10.

67 *X v Bedfordshire CC* [1995] 2 AC 633 at 663 C-D.

preclude finding that the authorities in the abuse cases owe a direct duty of care. In other words, the principle contained in the dictum weighs in favour of finding a duty of care in cases in which there is no private analogy. If it means anything then, the dictum must express a sentiment similar to that expressed in the passage from the part of Lord Browne-Wilkinson's judgment concerned with the *Dorset* case quoted immediately above i.e. it must mean that there should be a remedy where the authority has acted wrongly by failing egregiously to provide to certain individuals the protections or benefits that it exists to confer. In other words, the duty of care should be extended to cover certain public law wrongs just because they are public law wrongs and not because they resemble acts which in the past have been held to be subject to a duty of care or would be so held if committed by a private person.

In the respects just outlined then, the House of Lords in *X* follows *Anns* in countenancing the use of negligence to provide a remedy for harm caused by acts that are unlawful when considered from the perspective of public law but which would not count as wrongs when viewed from the perspective of the orthodox law of negligence. On the other hand, the end result of the judgment is to firmly exclude these putative duties. Lord Browne-Wilkinson finds that it is only fair, just and reasonable to impose a duty of care in those situations which have a clear private analogy viz those in which the manner of exercise of the statutory discretion by the authority's employees has given rise to a professional relationship of the traditional sort and in relation to which there can be vicarious liability. The immediate justification for reaching this conclusion comes in the form of the policy considerations that Lord Browne-Wilkinson advances. Most of these are, however, unconvincing as various commentators have pointed out.[68] We can see this if we take one by one the considerations that his lordship advances in relation to the abuse cases.

The first consideration was that the system of child-protection is multi-disciplinary and that the finding of a duty would cut across the system and entail either the unfair imposition of liability on one of the bodies involved or the impossible task of assigning responsibility as between the different bodies. Bailey and Bowman point out there is no reason why the claimant should suffer just because of the supposed difficulty of determining how to apportion blame between a number of defendants,[69] while Wright points out that Lord Browne-Wilkinson's argument is (or was at the time) based on a misapprehension as to the roles of the different agencies involved in the child protection system: the key agency and the one responsible for all the important decisions is social services.[70]

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68 For a list of authors who question the kinds of policy arguments that have been used in by the English courts in a large number of cases from *Hill v Chief Constable of West Yorkshire* and *X v Bedfordshire* onwards, see n.1 to Chapter 13.

69 "Public Authority Negligence Revisited" n.64 above p.95.

70 Wright, "Local Authorities, the Duty of Care and the European Convention on Human Rights" (1998) 18 OJLS 1 at p.9, citing Hamilton and Watt, "Are children owed a

The second consideration is the delicacy of the task in child care cases where the authority must both act where necessary to remove a child in danger but must also be sure not to remove a child from its parents where it is not necessary. But this is merely an argument for being slow to find a breach rather than for refusing a duty of care altogether.

The third consideration is the danger that the threat of liability will lead to excessively cautious and defensive practice on the part of the authority thereby putting children at risk. As with all argument of this type, this one carries little weight if not supported by empirical evidence because the opposite seems equally plausible: that the threat of liability will encourage the authority to perform its functions in accordance with the standard that the duty of care requires.

The fourth consideration is that the conflict between parents and social workers might give rise to costly and vexatious litigation. As Bailey and Bowman point out,[71] this argument cuts both ways. The fact that persons affected by the performance of a particular function may feel a sense of grievance is as much a reason for allowing litigation as denying it. There are moreover ways of eliminating vexatious litigation – both Wright and Bailey and Bowman point to the difficulty of obtaining legal aid – which fall short of preventing litigation altogether.

The fifth consideration is the availability of a statutory complaint mechanism and the possibility of application to the local government ombudsman. Since neither of these lead to a compulsory award of compensation they are not an adequate substitute for the award of damages by a court.[72]

The sixth consideration is unlike the first five in that it is not concerned solely with the likely effects of liability on the functions in question in the particular case. I return to it in a moment. So far as the first five are concerned, their flimsiness prompts one to look outside the policy considerations for other indications in the judgment as to why a duty of care in the manner of exercise of the statutory discretions is so firmly excluded. When one does this, one finds that, alongside the admission that in principle such a duty of care is possible, there are several other features of Lord Browne-Wilkinson's theoretical framework that seem, from the outset, to militate against it.

Much of what Lord Browne-Wilkinson says in setting out the theoretical framework suggests a desire to keep common law and statutory duties apart. One example of this is his lordship's anxiety to avoid the use of the public law notion of unlawfulness. The attempt is futile because as long as one is attempting to impose a common law duty of care on the exercise of a statutory discretion,[73] one can hardly avoid the question of the inter-relationship of negligence and

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duty of care?" *Childright* [August, 1995] 6–7.

71 Ibid. p.96.

72 Wright describes this argument as "disingenuous" ibid. p.12.

73 In this case, a discretion that, in the typology of powers I used in Chapter 6, belongs to type 1 i.e. is the kind of power to override the rights of private persons that only a public authority can possess.

public law unlawfulness. This, presumably, is why his lordship's notion of an authority acting outside the ambit of its discretion appears identical to Wednesbury unreasonableness.[74] The ambition of avoiding altogether the mention of public law concepts makes sense however if one never intends to extend the duty of care to situations that have no private analogue i.e. if one intends to adhere to the private approach.

The same wish to keep common law duties of care apart from statutory decision making also appears in Lord Browne-Wilkinson's holding that there can never be a duty of care in relation to decisions that involve considerations of policy. In the exposition of his theoretical framework, his lordship actually gives the impression that the line between decisions that do and decisions that do not involve policy corresponds to that between cases in which an authority is alleged to owe a duty of care in the manner in which it exercises a statutory discretion and cases in which a duty of care is alleged to arise from the manner in which a statutory duty has been implemented in practice. The section succeeding his discussion of the correct treatment of policy decisions is headed "*[i]*f *justiciable, the ordinary principles of negligence apply*" and it begins with the statement that "[i]f the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (e.g. the running of a school) the question whether or not there is a common law duty of care falls to be decided by applying the usual principles, i.e. those laid down in *Caparo Industries v Dickman*." Thus the same example is used to illustrate the distinction between non-justiciable and justiciable decisions as is used to illustrate what appears to be a distinction between cases in which a duty of care would not and cases in which a duty of care would be found on the application of orthodox negligence principles. When one reads the judgment for the first time it therefore comes as something of a surprise to discover that Lord Browne-Wilkinson thinks that a direct duty of care in relation to the exercise by the authorities of their statutory discretions is not excluded on the ground that they are non-justiciable.

Another noteworthy feature of Lord Browne-Wilkinson's exposition of his theoretical framework is the way in which he addresses the issue of the compatibility of a common law duty of care with an authority's statutory discretion. The relationship seems to be conceived in purely negative terms: the common law duty must not interfere with exercise of the statutory discretion. So from the proposition that "the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done" his lordship moves quickly to the conclusion that "a common law duty of care cannot be imposed on a statutory duty if the

74 One of the reasons Lord Browne-Wilkinson gives for avoiding the notion of public law unlawfulness is that the other grounds on which an act might be found unlawful besides unreasaonableness have no relevance to negligence. As Cane points out, there is no obvious reasons why this should be so and his lordship gives none: see Cane, "Suing Public Authorities in Tort" (1996) 112 LQR 13.

observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties."[75] There is no suggestion, as there is in Lord Wilberforce's speech in *Anns*, that the common law duty of care might be a duty to do exactly what the authority is required to do as a matter of public law.[76] As in the private approach I set out above, the assumption seems to be that the duty of care is something different in nature from the authority's statutory duty, something that arises from relationships that the authority enters into which are analogous to relationships into which a private person might enter. On this view, the existence of a duty of care necessarily gives rise to the possibility of conflict with the authority's statutory duties.

These aspects of the theoretical framework are reflected in the conclusions that Lord Browne-Wilkinson eventually reaches in relation to the alleged facts. Wherever it is a matter of a duty of care in the manner of exercise of the statutory discretions being imposed, the duty is excluded. Only where it appears feasible to find a duty of care on orthodox negligence principles – a duty which arises from "the manner in which the statutory duty has been implemented in practice" – is the possibility of a duty of care admitted. His lordship justifies these eventual conclusions by reference to policy arguments. But, as we have seen, these policy arguments – or at least those relating specifically to the powers at issue in the appeals – are unconvincing. In the light of this, it is tempting to regard them as makeweights and to see the theoretical framework as predisposing the judgments against liability in the novel claims from the outset.

Overall, despite the acceptance that in principle there can be a duty of care in the manner of exercise of a statutory discretion, Lord Browne-Wilkinson's theoretical framework resembles the one set out by Lord Diplock in *Dorset Yacht* more closely than it resembles that of Lord Wilberforce in *Anns*. This can be seen most obviously in Lord Browne-Wilkinson's adoption of the incremental approach to determining whether a duty of care should be found in a new setting. The use of this approach is crucial to the final and apparently clinching policy consideration

75 Page 739 D. Note also the earlier statement when discussing the co-existence of a statutory duty and a common law duty of care: "[t]he fact that the school is being run pursuant to a statutory duty is not necessarily incompatible with a common law duty of care arising from the proximate relationship between a school and the pupils it has agreed to accept" (p.735 G-H).

76 Conversely, where Lord Browne-Wilkinson finds that in the education cases there can be a duty of care on the authorities' employees, for whose negligence they will be vicariously liable, he puts great emphasis on the independence of the duties from any statutory requirement. Thus see the *Dorset* case at pp.762 H–763 A: "The claim is based on the fact that the authority is offering a service (psychological advice) to the public … once the decision is taken to offer such a service, a statutory body is in general in the same position as any private individual or organization holding itself out as offering such a service." See also the *Hampshire* case at p.765 D-E: "The duty of care in no sense arises from the statutory machinery laid down by the 1981 Act; the negligence complained of has nothing to do with the 1981 Act … [t]he claim is a pure common law claim based on a duty of care owed by a headmaster and educational adviser to a pupil."

in both the abuse and the education cases, namely that a duty of care has not been found in relation to the most closely analogous welfare and regulatory functions in the past and that to find it in the instant case would imply that it ought to be found in relation to a wide range of similar functions in the fields of welfare and regulation. The worry manifested here is not about the effects of liability on the particular authorities in the case but about the increased liability that would result from allowing damages actions in relation to the exercise of welfare and regulatory powers generally. The argument both confirms that the theoretical framework militates against the imposition of a duty of care in circumstances in which the orthodox method would not support it, and explains why such a framework should have been adopted.

To conclude, then, Lord Browne-Wilkinson firmly takes away with one hand what he gives with the other. He allows in principle that there can be a duty of care in the manner of exercise of a statutory discretion, but at the same time, he adopts a theoretical outlook that tends from the outset to exclude such a possibility. It is true that to allow a duty of care in relation to one set of welfare or regulatory powers strengthens the case for doing so in relation to others, so that to extend the duty of care in such a case requires a large leap rather than a small step of the sort that the incremental approach provides for. Lord Wilberforce appeared to have made such a leap in *Anns* – on one reading, at least, his judgment can be taken to have pointed the way towards the fusion of the duty of care with public law standards. The purpose of Lord Browne-Wilkinson's judgment in the *X* case seems to be to return the law to the state it was in before *Anns* without, however, explicitly overruling it. The reason seems to be a generalized apprehension that allowing the expansion of liability so as to cover the welfare and regulatory functions of public authorities will lead to excessive liability.

After X v Bedfordshire

In the years since its judgment in *X*, the House of Lords has retreated (or advanced) from many of the positions taken in *X*.[77] It has ceased to use many of the policy arguments relied on in that case and it has allowed a duty of care in circumstances in which the approach in *X* would have ruled it out. Nonetheless, certain basic features of the framework established in *X* remain, as a brief review of subsequent leading authorities shows.

Over these authorities hangs the spectre of the European Convention. The House of Lords' judgments in *Barrett v Enfield LBC*[78] and *Phelps v Hillingdon LBC*[79] were delivered in the aftermath of the European Court of Human Rights

77 I consider below the House of Lords' judgment in *Stovin v Wise* [1996] AC 923 which reinforced the restrictive approach adopted in the *X* case.

78 [2001] 2 AC 550.

79 [2001] 2 AC 619.

judgment in *Osman v UK*.[80] In that case, the European Court held that the use of policy considerations to strike out a claim in negligence as disclosing no cause of action constituted a breach of the applicants' right under Article 6 of the Convention to have a claim relating to their civil rights determined by a court.

In *Barrett*, the plaintiff had been in the care of the defendant authority from the age of 10 months until the age of 17. He claimed that he had suffered personal injury in the form of deep-seated psychological and psychiatric problems as a result of various failures on the part of the authority including the failure to find him suitable foster parents and to obtain psychiatric treatment for him. His claim was struck out by the lower courts and came before the House of Lords on appeal against the Court of Appeal's decision to uphold the striking out. The House allowed the appeal, the two main judgments being given by Lords Slynn and Hutton. Their lordships made little of the distinction, prominent in *X*, between direct and vicarious liability, perhaps because, regarded as a whole, the long list of failures alleged could not be easily assigned to either category.[81] Perhaps for the same reason, their lordships set aside the aspect of the approach in *X* that presented the most immediate obstacle to finding a direct duty of care on the part of the authority. Thus they found that the policy considerations that played such a central role in *X* were less persuasive on the facts of the instant case.[82] They also effected a modification in the use of the concepts of justiciability and acting outside the ambit of an authority's discretion. The end result of the modification is that a duty of care may still be excluded in relation to policy decisions – decisions involving the weighing of competing public interests or dictated by considerations which the court is not fitted to assess – but it is no longer necessary to show in addition that the authority has acted outside the ambit of its discretion.[83] In the course of making this modification, both Lord Slynn and Lord Hutton emphasized their agreement with Lord Browne-Wilkinson's dicta in *X* about the undesirability of bringing public law concepts into negligence.

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80 (2000) 29 EHRR 245; [1999] FLR 193.

81 The Court of Appeal had held that a claim based on vicarious liability could not succeed because, in the words of Evans LJ, there was "no prospect of the evidence establishing that there were individual acts of negligence which singly or taken together could be said to have caused … the injury": see [1998] QB 367, 380–381. Considering this finding as an argument against causation, Lord Hutton dismisses it by saying that "the issue of causation arises in a different way if, as I would hold, the plaintiff is entitled to allege negligence against the defendant in the exercise of its statutory discretion" (p.590 G).

82 See per Lord Slynn at p.568 D on, per Lord Hutton at p.588 G on.

83 The reasoning by which Lords Slynn and Hutton bring this modification about is far from clear. In Lord Hutton's case, it is done by conflating the reasons given by Lord Browne-Wilkinson in *X* for excluding a duty in relation to a policy decision with those Lord Browne-Wilkinson gives for excluding a duty in relation to a decision taken within the ambit of discretion, so that if a decision is not one of policy there is no need to establish that it is outside the ambit of an authority's discretion before a duty can be imposed: see p.584 C–585 G.

Despite these departures, the House of Lords in *Barrett* remains true to the features of *X* that are of most concern from the point of view of my present argument. First, it has to be established that the decisions alleged to give rise to liability do not involve considerations of policy and second, the *Caparo* criteria must be satisfied. In relation to Lord Browne-Wilkinson's crucial distinction between cases in which an authority is alleged to owe a duty of care in the manner in which it exercises a statutory discretion and cases in which a duty of care is alleged to arise from the manner in which a statutory duty has been implemented in practice – or as Lord Slynn put it, between a duty of care arising from the existence of a statutory duty and a duty of care arising because in the performance of the statutory duty, the defendant assumes an obligation to exercise reasonable care towards the plaintiff – the arguments in favour of a duty of care are all based on the second limb of the distinction. Their lordships were, in a sense, saved from having to think about the first limb by the fact that the relationship between plaintiff and defendant was of a sort that could be assimilated to others in relation to which a duty of care had been found in the past. It was thus possible to argue for a duty by using the traditional incremental method.

It is hard to know to what extent the judgements in *Barrett* represented the considered views of the House and to what extent they were simply a reaction to the position which the ECtHR had put them in. The short judgment of Lord Browne-Wilkinson in *Barrett* suggests the latter. He does no more than emphasize the importance of not striking out claims whose true nature cannot be ascertained without hearing the evidence and note that the courts are obliged to be cautious by *Osman*, a ruling which he clearly regards as based on a misunderstanding of English law. Near the conclusion of his judgment,[84] Lord Hutton states that having concluded on common law principles that the claim should not be struck out, he finds it unnecessary to consider *Osman*. This seems to imply that the ECtHR's ruling had no influence on his reasoning, but in the light of Lord Browne-Wilkinson's remarks, this is difficult to credit.

Phelps v Hillingdon LBC involved what, from the point of view of the orthodox law of negligence, are significant innovations. However, it added no further alterations to the basic framework established with respect to public authorities in *X* to those made in *Barrett*. The appeals heard by the House of Lords in *Phelps* involved a number of claims that local education authorities had failed to discharge their duties to diagnose and provide for the special educational needs of the claimants. In each claim it was argued that the authorities' failure to ameliorate or mitigate the claimants' educational difficulties constituted personal injury. The innovative aspect of the case consists in the House's willingness to recognize the new forms of injury. Otherwise the framework is as in *Barrett*. The finding that a duty of care is possible was almost entirely based on the traditional principle that the teachers and educational psychologists employed by the authorities had entered into a proximate relationship with the claimants and owed them a duty to use due

84 At p.590 D.

care and skill in diagnosing their conditions and giving advice to the authorities as to what educational provision was appropriate. The potential liability of the authorities was thus vicarious. The House declined to strike out claims of direct liability but only on the ground that it might prove premature to do so without full knowledge of the facts, and, in one case, because the direct claim could not easily be disentangled from the vicarious.[85] A notable feature of the case is the extent to which their lordships emphasized that if imposed, the common law duties would not interfere with the discharge of the authorities' statutory duties. Thus, for example, Lord Slynn said:[86] "[i]f a duty of care would exist where advice was given other than pursuant to the exercise of statutory powers, such duty of care is not excluded because the advice is given pursuant to the exercise of statutory powers." And Lord Clyde said:[87] "[h]owever, at least in the *Phelps* case the procedures and systems contained in the statutory provisions were not directly in issue. In the *Phelps* case what was alleged to have gone wrong was a failure to diagnose the existence of a dyslexia. The psychologist was not carrying out any particular function under the statute. There is no statutory provision in the case which is inconsistent with the existence of a duty of care on the part of an educational psychiatrist." In other words, the question of the compatibility of common law and statutory duties was dealt with in the negative way which I characterised above as a feature of the private approach. In dealing thus with the matter, their lordships were, again, following the lead of Lord Browne-Wilkinson in *X*.

The decisions in *Barrett* and *Phelps* were seen by some commentators as heralding a move from duty to breach as the main mechanism for controlling liability in negligence claims against public authorities[88] and it is indeed true that in many cases in the lower courts subsequent to those two authorities, the courts strove to avoid striking claims out thereby making it necessary to determine liability after a full trial. By the time of the next major House of Lords judgment in the child protection area, however, the wind had shifted again. When the claimants in *X v Bedfordshire* and *M v Newham* took their cases to the European Court of Human Rights, the court took the opportunity to overturn its ruling in *Osman*. It repudiated the idea that exclusion of a duty of care as not fair, just and reasonable amounted to breach of Article 6, but found in the first case that there had been a failure on the part of the state to protect the claimants from inhuman and degrading treatment, as required by Article 3, and that the denial of the possibility of damages

85 The appeal in question was *Jarvis v Hampshire CC*. The first two appeals concerned strikings out. The third (Jarvis) was an appeal arising from the original trial at which the judge had found in the claimant's favour.

86 At p.653 C.

87 At p.673 G.

88 See especially Craig and Fairgrieve, "Barrett, Negligence and Discretionary Powers" [1999] PL 626; Fairgrieve, "Pushing Back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom" [2002] PL 288.

constituted a breach of the right to an effective remedy under Article 13.[89] In the second case, the court found, similarly, that there had been a breach of Article 8 and that the denial of the possibility of damages constituted breach of Article 13.[90]

The effects of this change can be seen in the House of Lords judgment in the set of joined appeals heard under the name *D v East Berkshire Community Health NHS Trust*.[91] The three appeals all concerned parents whose children were separated from them when they were wrongly accused of child abuse. In each case, the judge had found as a preliminary issue that no duty was owed to the parents and it was on this issue that the appeals came before the House of Lords. Deciding the issue naturally implicates the question of whether a duty could be owed to the children, the very question to which a negative answer was given in *X*. The Court of Appeal had asserted however that the decision in *X* could not survive the Human Rights Act[92] and this view was accepted more or less without demur by the House. This did not, however, lead either the Court of Appeal or the House to reconsider the difficulties raised by trying to impose a common law duty of care on statutory duties. The issues in the appeals were discussed on the footing that they involved duties of professionals to third parties, any liability of the authorities being vicarious. The existence of a duty to the children was accepted, but to impose a duty to the parents was held not to be fair, just and reasonable on the basis of a variety of policy considerations. Chief amongst these were the arguments that in child abuse cases the interests of the child may be at odds with those of the parent suspected of abuse so that to impose duties to both on the doctors and social workers involved might create a conflict; and that if the duty were extended to cover the parents, it would be hard to find a principled way to avoid extending it to other persons who might be suspected of abuse. Thus the House's decisions continued to be dictated by the jurisprudence of the ECtHR, but freed from difficulties created by *Osman*, their lordships reverted to their old habit of excluding a duty of care on policy grounds without full knowledge of the facts. That the decision signalled a return to pre-*Osman* methods was highlighted in the judgment of Lord Nicholls, who considered the attractions of an approach based on using breach as the primary mechanism for controlling the extension of liability but concluded by expressing his preference for the traditional reliance on duty.[93]

89 *Z and others v UK* [2001] 2 FLR 612.

90 *TP and KM v UK* [2001] 2 FLR 549.

91 [2005] UKHL 23; [2005] 2 AC 373.

92 [2003] EWCA Civ 1151; [2004] QB 558 at [83]. The propriety of this way of proceeding is questioned in Wright, "'Immunity' no more: Child abuse cases and public authority liability in negligence after *D v East Berkshire Community Health NHS Trust*" (2004) 20 PN 58.

93 By contrast, Lord Bingham dissenting, welcomed the shift from duty to breach: see at [49].

Running in parallel with the judgments in which the courts have followed an approach derived from *X* have been a number of judgments which, for a while, kept alive the spirit of *Anns*. The first of these is the dissenting judgment of Lord Nicholls in *Stovin v Wise*.[94] The facts of the case were that the plaintiff had suffered injury when a car entering the main road from a side road had knocked him from his motorcycle. Part of the reason for the accident was that at the junction in question, the motorist's vision was obscured by the presence of a mound of earth. The plaintiff had brought his action against both the motorist and the highway authority, Norfolk County Council. The latter had powers under the Highway Act 1980 to serve a notice requiring the occupier of the land on which the mound was situated to remove it in order to improve the safety of the junction. It had, in fact, planned to do this work but had failed, apparently through pure inadvertence, to execute its plan. The first instance judge and the Court of Appeal found against the authority. The authority appealed on the ground that it did not owe the plaintiff a duty of care to exercise its powers so as to make the junction safe.

The judgment of the majority, given by Lord Hoffmann, may be considered a sort of companion to *X*, similar in effect, but different in emphasis. In Lord Hoffmann's view, the only arguable claim in *Stovin* was of nonfeasance rather than misfeasance and there were no plausible analogies between the duties of the defendant authority and duties which similarly-placed private persons might owe. He thus concentrated on the question of whether and in what circumstances a common law duty could be imposed on a statutory discretion. (In other words, his inquiry corresponded entirely to the part of Lord Browne-Wilkinson's judgment in *X* that was concerned with whether there could be a duty of care in the manner of exercise of a statutory discretion although with the added problem that the statutory provision in question conferred a power not a duty.) In Lord Hoffmann's view, whether there could be such a duty would depend to a high degree on the policy of the relevant statute. If the statute did not directly confer actionable rights – i.e. if it did not give rise to the possibility of an action for breach of statutory duty – then it would be unusual for it to support a common law duty of care: "[i]f the policy of the act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care."[95] There was a further obstacle to imposing a duty of care if Parliament had chosen to confer a power rather than impose a duty but this might be overcome where it would be irrational not to exercise the power. Thus, his lordship concluded that:

> [T]he minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the

94 [1996] AC 923.

95 Page 953 A.

> statute requires compensation to be paid to persons who suffer loss because that power was not exercised.[96]

Applying this test to the facts of the case, Lord Hoffmann found no duty of care. The authority had not acted irrationally in failing to improve visibility at the junction. There was no evidence to suggest that it was not open to the authority to decide against doing the work in the first place. It was therefore under no duty to do the work, and it followed, a fortiori, that it could not be liable simply because it decided to do the work and then failed to execute its decision: "the question of whether anything should done about the junction was at all times firmly within the area of the council's discretion."[97]

Moreover, even if the failure to do the work had been irrational, there were no special grounds for holding that the policy of the statute required there to be a duty of care, quite the contrary:

> In my view, the creation of a duty of care upon a highway authority, even on grounds of irrationality in failing to exercise a power, would inevitably expose the authority's budgetary decisions to judicial inquiry. This would distort the priorities of local authorities, which would be bound to try to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services. I think that it is important, before extending the duty of care owed by public authorities, to consider the cost to the community of the defensive measures which they are likely to take in order to avoid liability. It would not be surprising if one of the consequences of the *Anns* case and the spate of cases which followed, was that local council inspectors tended to insist upon stronger foundations than were necessary. In a case like this, I do not think that the duty of care can be used as a deterrent against low standards in improving the bad layout. Given the fact that the British road network largely antedates the highway authorities themselves, the court is not in a position to say what an appropriate standard of improvement would be. This must be a matter for the discretion of the authority. On the other hand, denial of liability does not leave the road user unprotected. Drivers of vehicles must take the highway network as they find it. Everyone knows that there are hazardous bends, intersections and junctions. It is primarily the duty of drivers of vehicles to take due care. And if, as in the case of Mrs Wise, they do not, there is compulsory insurance to provide compensation to the victims. There is no reason of policy or justice which requires the highway authority to be an additional defendant.[98]

On the issue of whether there can be a duty of care in the manner of exercise of a statutory discretion, Lord Hoffmann thus arrives at a similar conclusion to Lord Browne-Wilkinson in *X*. Both judges admit the possibility of such a duty but both put formidable obstacles in the way of finding it. Conceptually speaking,

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96 Page 953 D-E.
97 Page 957 D.
98 Page 958 B-E.

the obstacles are different. We might say that Lord Browne-Wilkinson interposes a private law obstacle and Lord Hoffmann a public law one. The former insists on the difficulty of finding a duty where there is no analogy with cases in which a duty has been found in the past and where there is a battery of policy reasons for not doing so; the latter insists that there must be evidence of some exceptional policy on the part of the legislature. The end result is the same: a duty of care will, in practice, never arise. Lord Hoffmann does not rely as explicitly on policy arguments to exclude the duty as Lord Browne-Wilkinson does, but as the passage immediately above demonstrates, he is influenced by very similar considerations. Moreover, as in *X*, a number of these considerations are not limited in their significance to the powers and duties in issue in the particular case but apply to statutory functions generally.

The speech of Lord Nicholls (with whom Lord Slynn agreed) shares with Lord Hoffmann's speech its public law orientation but comes to very different conclusions. His lordship began by considering the reasons why the common law had traditionally been slow to impose liability in respect of omissions to act and observed that these reasons had little force in relation to public authorities. He noted that, despite this, it had not been possible before 1978 to find an authority liable in negligence for failure to exercise a statutory power. However, the decision *Anns* had, as he put it, "liberated the law from this unacceptable yoke"[99] and "articulated a response of growing unease over the inability of public law, in some instances, to afford a remedy matching the wrong. Individuals may suffer loss through the carelessness of public bodies in carrying out their public law functions. Sometimes this invokes an intuitive response that the authority ought to make good the loss."[100]

Turning to the instant case, Lord Nicholls pointed out a number of features that in his view established a prima facie case in favour of finding a duty of care. He distinguished between, on the one hand, the case in which an authority exercising a statutory power limits its discretion to act and incurs a common law duty of care by making a promise or otherwise inducing reliance on the part of some person or class of person, and on the other, the case in which the authority's sole duty is to act as its public law obligations require. This is very like the distinction made by Lord Browne-Wilkinson in *X* between a duty in the manner of exercise of a statutory discretion and a duty arising from the way in which a statutory discretion has been exercised. But whereas Lord Browne-Wilkinson (while admitting it was possible) appeared to regard a duty of the former type as deeply problematic, Lord Nicholls appeared to regard it as relatively *un*problematic because any common law duty imposed would be a duty merely to do what the authority was obliged to do in any case. As he put it, "the extent of the obligation would march hand in hand with the authority's public law obligations."[101] If a duty of care were imposed in the instant case, Lord Nicholls

99 Page 391 F.
100 Page 933 F-G.
101 Page 936 B.

held, it would be a duty of this type, a duty to act as a reasonable authority would as a matter of public law. If there were such a duty, there would, moreover be liability. The unexplained failure to bring about the planned improvement was not the behaviour of a reasonable authority, as the authority itself accepted.

These factors telling in favour of a duty of care were not, however, sufficient by themselves to establish its existence. The will of Parliament was paramount and where Parliament had not created the kind of statutory duty whose breach sounded in damages, more was required. This was true where there was a statutory duty whose breach did not sound in damages, but all the more true where, as here, there was a mere statutory power. In short it was necessary to establish proximity (an ingredient which his lordship noted earlier was not lacking from Lord Wilberforce's test in *Anns*). Lord Nicholls listed a number of factors which he thought, taken together, established proximity on the facts of the case. These were as follows. 1) The subject matter of the case was physical injury. 2) The authority knew of the danger. 3) If the authority had complied with its public law obligations, the danger would have been removed. Here his lordship argued that no sensible distinction could be drawn between an authority creating a new danger on the highway through the negligence of its road workers and an authority failing in its public law obligation to remove a danger through the negligence of its office workers. 4) Parliament had recognized that highway authorities should be liable for omissions, by abrogating the old rule that exempted them from liability for failure to maintain the highway. No sensible distinction could be made between failure to maintain and failure to remove dangers – between for example the failure to remove a fallen tree from the road and the failure to remove a dangerous overhanging branch – and therefore liability should be possible in both cases.5) The purpose of the highway authority's statutory powers was to protect users of the highway by enabling the authority to remove dangers. Where public law afforded no remedy for the failure of the authority to do so then the common law had to step in. 6) A common law duty would not represent a step into a wholly novel field because the relationship of the highway authority to highway users resembled that of an occupier to a person who entered his land. 7) The common law duty imposed an obligation no more onerous than existed at public law. 8) It was right that the cost of accidents caused by the failure to remove dangers should fall on the authority and not on the victim. This last point was, his lordship thought, debatable where the accident was also caused by the negligence of another driver but beyond doubt where the injured road user had no such claim. He added that "if the existence of a duty of care in all cases, in the shape of a duty to act as a reasonable authority, has a salutary effect on tightening administrative procedures and avoiding another needless road tragedy, this must be in the public interest."[102]

Concluding, Lord Nicholls reserved judgment as to what the position would be if the authority did not know, but ought to have known, of the existence of the danger. He then went on, however, to rebut the argument that the imposition

102 Page 941 C.

of a duty of care would induce highway authorities to decide not to act. Public authorities were, he said, responsible bodies that could be relied on to discharge their duties conscientiously. A decision by an authority to act fixed a starting point for the inquiry into whether the authority had been unreasonable to act. But the absence of a decision would merely mean that the inquiry started at an earlier stage.

The same willingness to identify a common law duty of care with an authority's public law obligations is to be found in a number of subsequent judgments of Lord Woolf in the Court of Appeal. In *Kent v Griffiths*,[103] the claimant suffered an asthma attack and her doctor summoned an ambulance to take her to the casualty ward of the hospital, where she was expected. The ambulance did not arrive for another forty minutes, and by the time the claimant reached hospital she had suffered respiratory failure and hence brain damage. The record prepared by the ambulance crew was falsified to make it appear that they had arrived twelve minutes after the doctor's call. The claimant's action against the ambulance service succeeded at first instance, and the ambulance service's appeal was rejected by the Court of Appeal.

Much of the judgment was devoted to establishing proximity and to distinguishing the position of the ambulance service from that of rescue services in earlier cases in which it had been held that there was no positive common law duty to assist members of the public who asked for it.[104] A key feature of the case was that the ambulance service had accepted the doctor's call and thereby induced detrimental reliance.[105] In this connection, Lord Woolf cited[106] the distinction made by Lord Browne-Wilkinson in *X* between a duty of care in the manner of exercise of a statutory discretion and a duty of care arising from the manner in which a statutory duty has been implemented. The duty alleged in the instant case was of the latter type and therefore easier to find.

The judgment thus fits, to some extent, the pattern of cases in which a duty is found on orthodox principles of the sort that would apply between private parties. It is also noteworthy, however, in the emphasis that Lord Woolf puts on his view that the authority's conduct was unreasonable as a matter of public law. His lordship draws attention to this in rejecting the relevance of cases showing that a volunteer cannot be liable for failure to improve the position of the persons he is trying to assist.[107] Later, his lordship argues that it is the public law unreasonableness of

103 [2001] QB 36.

104 The main cases to be distinguished were *Alexandreou v Oxford* [1993] 4 All ER 328, *Capital and Counties Plc v Hampshire County Council* [1997] QB 1004 and *OLL v Secretary of State for Transport* [1997] 3 All ER 897.

105 The doctor who made the call gave evidence that if she had been told that it would take 40 minutes for the ambulance to arrive, she would have driven the claimant to hospital herself.

106 At [42].

107 At [19].

the authority's actions that makes it possible to found a common law duty on a statutory power[108] and, in discussing Lord Slynn's warning against the introduction of administrative law concepts into the law of negligence states that "it is clear that Lord Slynn is not suggesting that the fact that an authority has acted perversely in a public law sense is to be ignored."[109] In seeking to differentiate it from other rescue services, Lord Woolf also emphasized that the ambulance service was part of the NHS and that it would therefore be anomalous to deny that it could be subject to a duty to use due care in delivering the benefits it had undertaken to provide when doctors and nurses *were* so subject. The basis of this argument was not an appeal to the duties of professional persons – there was no suggestion that the members of the ambulance service were members of a profession – but the common statutory framework under which both doctors and the members of the ambulance service operated.

A more whole-hearted embrace of *Anns*-style reasoning is to be found in a case decided in the same year as *Kent, Larner v Solihull Metropolitan Borough Council.*[110] There two statutory provisions formed the foundation of the claimant's case. Section 39 of the Road Traffic Act 1988 provided:

> (2) Each relevant authority – (a) if it is a local authority, must prepare and carry out a programme of measures designed to promote road safety … (3) Each relevant authority – (a) must carry out studies into accidents arising out of the use of vehicles (i) if it is a local authority, on roads or parts of roads … within their area … (b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents, including … the construction, improvement, maintenance or repair of roads for the maintenance of which they are responsible and other measures taken in the exercise of their powers for controlling, protecting or assisting the movement of traffic on roads.

Section 65 of the Road Traffic Regulation Act 1984 authorized the council to cause or permit traffic signs to be placed at or near a road.

The facts of the case were that the claimant motorist was injured in an accident when her car collided with another vehicle at a junction. She had entered the junction from the lesser of the two roads that crossed there and so did not have right of way but alleged that she was unaware of this due to inadequate signage. She sought damages against the authority on the grounds that in pursuance of its duty under s.39 of the 1988 Act and in the exercise of its powers under the Act of 1984, it should have added an extra sign. The judge at first instance held that the authority owed the claimant no common law duty of care but in case he was

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108 Here Lord Woolf is trying to show that the case satisfies the condition for the imposition of a common law duty on a statutory power laid down by Lord Hoffmann in *Stovin v Wise*.

109 See [43]–[44].

110 [2001] RTR 32.

wrong, he held the claimant two-thirds and the authority one third responsible for the accident. The claimant appealed to the Court of Appeal.

Giving the judgment of the court, Lord Woolf rejected the appeal. What is striking about the judgment, however, is his lordship's willingness to use public law concepts in determining both the existence and the content of any common law duty. He noted the importance traditionally attached to the distinction between a statutory duty and a statutory power but then went on "that simple distinction cannot always be decisive … a statutory body must give proper consideration to the exercise of its powers, and a failure to exercise a power may in a particular factual situation be so unreasonable as to amount to a breach of duty … Any statutory discretion can be transformed into a statutory duty once the body decides to exercise its discretion to act in a particular manner. If it then unreasonably fails to do so the courts may make a mandatory order compelling it to act in accordance with its decision. Again, if the only reasonable way in which it could exercise its discretion is to act in a particular way the body becomes under a duty to act in that manner. In these situations there can be a duty to act at common law as well as statute."[111]

There are echoes here of Lord Hoffmann's observation in his judgment in *Stovin v Wise* that where a common law duty arises in relation to a statutory power it must be because it is unreasonable not to exercise the power. However, Lord Woolf's judgement appears unaffected by Lord Hoffmann's insistence that this should happen extremely rarely and that Parliaments' decision to confer a power rather than impose a duty should generally be taken as a sign that it is contrary to the policy of the relevant act to confer actionable rights on individuals. When it comes to the question of justiciability, Lord Woolf appears to turn the modification of the law made in *Barrett* and *Phelps* on its head as can be seen from the following passage.

> "However, so far as section 39 of the 1988 Act is concerned, we would accept that there can be circumstances of an exceptional nature where a common law liability can arise. For that to happen, it would have to be shown that the default of the authority falls outside the ambit of discretion given to the authority by the section. This would happen if an authority acted wholly unreasonably … But, absent that scale of behaviour, in our judgment the council would owe no duty of care pursuant to a common law duty running in parallel with or superimposed upon the provisions of section 39. As long as any common law duty is confined in this way, there are no policy reasons which are sufficient to exclude that duty. An authority could rely on lack of resources for not taking action and then it would not be in breach."[112]

Thus Lord Woolf appears to abandon the insistence on establishing justiciability and reinstate the requirement that the authority's acts be unlawful as a matter of public law. The question of whether there are reasons of policy to justify an

111 [9].
112 [15]–[16].

authority's behaviour are to be taken into account in deciding whether the authority has acted unlawfully as a matter of public law. If it has been acting unlawfully, there are no further "public law hurdles" – restrictions reflecting the authority's special status as a public body – to be overcome.

In accordance with this approach, Lord Woolf upheld the judge's refusal to find a duty not on the ground that there could not, in principle, be such a duty but because, in seeking to fulfil its duty under s.39, the authority had acted reasonably: it had surveyed the evidence as to the number of accidents at the junction in question and decided, on reasonable grounds, not to give the junction priority as a place at which improvements were necessary. His lordship made it clear that if the council's decision had been unreasonable it would have been right to find a duty and adopted the reasoning of Lord Nicholls in *Stovin* to support this view. Overall, the Court of Appeal's judgment in *Larner* can be seen as an application of Lord Nicholl's approach.

In *Gorringe v Calderdale Metropolitan Borough Council*,[113] the Court of Appeal (without Lord Woolf himself) followed the approach adopted by Lord Woolf in *Larner*. Like *Larner*, *Gorringe* concerned a road accident and as in *Larner*, the claimant alleged that, pursuant to its duty under s.39 of the Road Traffic Act 1988, the defendant council should have obviated the danger that led to it. The accident occurred at the top of a steep hill on a stretch of country road. The lie of the land was such that as a car drove up the hill, vehicles coming from the other direction were not visible; nor could it be seen that just past the crest of the hill, the ground fell away sharply and the road curved to the left. At some time in the past, the word "slow" had been painted on the road as it approached the crest but this appeared to have been obliterated by subsequent resurfacing. The claimant drove up the hill at a speed of 50 m.p.h., saw a bus coming in the opposite direction just as she reached the crest and braked suddenly with the result that the brakes locked and she hit the bus, suffering serious injury. The claimant argued that the authority owed a common law duty of care to act reasonably in the fulfilment of its duty under s.39 to improve the safety of the roads in its area and that the duty had been breached by the authority's failure to give further warning of the dangerous nature of the crest.

The first instance judge found for the claimant. The Court of Appeal allowed the authority's appeal. In order to arrive at its conclusion, however, and in application of Lord Woolf's approach, the court conducted a review of the reasonableness of the programme undertaken by the authority in fulfilment of its duties under s.39. This programme comprised two elements. Firstly, the authority had a system for assigning priority amongst the accident black spots which required the largest sums to improve. These were identified via the systematic collection of data about the frequency of accidents and applications were made to central government for the necessary funds. Secondly, there was a local fund to be used where dangers could be eliminated in the short term by making cheaper improvements. In relation

113 [2002] EWCA Civ 595 [2002] RTR 27.

to dangers of this second type, there was no systematic collection of data. Instead the authority relied on complaints from the public as its guide.

Potter LJ, dissenting, found this system irrational. He held that for a very small outlay, the authority could have greatly reduced the danger that led to the claimant's accident and that its omission to do so was due to its failure to collect systematic data as to dangers that could be eliminated cheaply. By contrast, the majority – May and Stuart-Smith LJJ – found the authority's system a rational one. They pointed out that a report commissioned by the authority as part of the first element of its programme showed the stretch of road on which the accident occurred as requiring priority, but did not show the particular site of the accident as any more dangerous than a number of other black spots on the stretch in question.

None of these judgments approximate quite to what I called above the public approach, but, as I suggested above, they keep alive the spirit of *Anns*. The line of thought they represent was crushed, however, when the defendant authority in *Gorringe* appealed to the House of Lords. In the House's judgment,[114] earlier equivocation as to the possibility of basing a common law duty of care on a statutory discretion in the absence of some private law analogy was cast aside. Lord Hoffmann, who gave one of the two main speeches, doubted the wisdom of having speculated in *Stovin* as to the circumstances in which such a duty would arise. It would, he implied, have been better simply to deny its possibility: "[s]peaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide."[115] He firmly disapproved the approach adopted by Lord Woolf in *Larner* and pointed to what he took to be its bad effects, the inquiry it brought about into the authority's decision-making processes and the consequent danger that highway authorities' road safety budgets would be consumed in litigation.[116] He reiterated the policy concerns he had expressed in *Stovin* and emphasized that the primary responsibility for the accident rested on the shoulders of the claimant herself for driving too fast. The duty in s.39 was a broad public one, like the general duties contained in s.1 of the National Health Service Act 1977. It might be made the subject of judicial review, but could not give rise to a right of action for damages in individuals. The instant case was unlike *Barrett* or *Phelps* because in those cases, the authority had entered into a relationship with or undertaken responsibilities towards the claimant. In the case, for example, of an NHS doctor, "[t]he duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it. The law in this

114 *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057.

115 See at [32].

116 [33].

respect has been well established since Geddis v Proprietors of Bann Reservoir."[117] In *Phelps*, "[t]he fact that the doctor-patient relationship was brought into being pursuant to public law duties was irrelevant except so far as the statute provided a defence."[118]

Lord Scott, who gave the other main speech, adopted the same approach as Lord Hoffmann but was, if anything, still more emphatic. He quoted the passage from *Stovin* in which Lord Hoffmann said that it would be unusual to impose a common law duty of care on a statutory duty if the statute did not give rise to a right of action for breach of statutory duty and then continued:[119]

> I respectfully agree with these passages from his judgment in Stovin v Wise. Indeed, I would be inclined to go further. In my opinion, if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care that would be broken by a failure to perform the statutory duty. I would respectfully accept Lord Browne-Wilkinson's comment in X (Minors) v Bedfordshire County Council, at p.739, that "the question whether there is such a common law duty and if so, its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done." But that comment cannot be applied to a case where the defendant had done nothing at all to create the duty of care and all that is relied on to create it is the existence of the statutory duty. In short, I do not accept that a common law duty of care can grow parasitically out of a statutory duty not intended to be owed to individuals."

The other judges agreed with Lords Hoffmann and Scott. Only Lord Steyn, although agreeing with the others, sounded a softer note. He quoted Lord Bingham's dictum about the importance of remedying wrongs and insisted on the importance of distinguishing between two questions. The first arose in the context of breach of statutory duty and was whether the statute created a private law remedy. The second arose in the context of negligence and was whether the statute excluded a private law remedy. His lordship then considered the test of when a common law duty can be imposed on a statutory power set out by Lord Hoffmann in *Stovin* (i.e. that the power must have been exercised unreasonably and that there are exceptional grounds for holding that the policy of the act requires it). He thought that the House's judgments in *Barrett* and *Phelps* had qualified Lord Hoffmann's test and referred with approval to the dicta in those cases disapproving the introduction of public law concepts into the law of negligence. He finished by quoting a passage from Craig's *Administrative Law*,[120] in which the author approved the dicta from

117 [38].
118 [40].
119 [71].
120 2003 edition, pp.888–904.

Barrett and *Phelps* in question and welcomed an approach to negligence actions against public authorities in which the possession of statutory discretion was treated as primarily relevant at the breach stage.

Despite the qualifying remarks of Lord Steyn, the House of Lords judgment in *Gorringe* brings to completion the restrictive movement implicit in the judgments of the majority in the House from *X* onwards. The dominant tendency throughout this period has been to downplay the surviving elements of *Anns* and to allow a common law duty of care only in those circumstances in which it might be imposed on a private person analogously placed. As we have seen, there have been significant deviations from this course. This is most obvious in the line of cases deriving from Lord Nicholls' speech in *Stovin*. The judgments of the House in *Barrett*, *Phelps* and to, a lesser extent, the *East Berkshire* case also represent a significant liberalization when seen from the perspective of orthodoxy. But they are inspired to a high degree by the need to conform to judgments of the European Court of Human Rights and are also perfectly compatible with an orthodox approach. In this context, it is worth observing that although Lord Steyn expresses the view that the judgments in *Barrett* and *Phelps* qualify the test introduced by Lord Hoffmann in *Stovin* and confirmed as correct in *Gorringe*, it is hard to see what the qualification consists in. The tone of the judgments in *Barrett* and *Phelps* (Lord Browne-Wilkinson's in *Barrett* apart) is certainly very different. But as Lord Hoffmann explains in *Gorringe*, there is no incompatibility between holding: on the one hand, that a body acting in fulfilment of a statutory duty can be subject to a common law duty of care where it has entered into a relationship which would give rise to a duty of care if entered into by a private person; and on the other, that where a body is acting in fulfilment of a statutory duty and has entered into no such relationship, then it cannot be subject to a duty of care. To conclude then, the courts have returned to something very like the private approach, and the reason for doing so is a generalized apprehension about the dangers of extending the liability of public bodies.

Chapter 12
Implementing the Public Approach to Negligence

The courts' present approach and the wider case law

Up to this point, I have insisted that the question of whether the present law of tort satisfied principle I remains open. It might turn out to be the case, I have argued, that the pattern of liability produced by applying existing tort law to public authorities is the same as would be produced by a regime consciously faithful to the requirements of principle I. The basis for saying this was that principle I, as I have interpreted it, allows that liability might sometimes be excluded where to allow it would stultify the performance of an authority's functions and that once this was taken into account, it might transpire that, despite not recognizing principle I, the present law of tort made liability possible and excluded liability in roughly the same cases in which principle I would do the same. Just because the pattern of liability that principle I would produce depends in part on factors peculiar to particular cases and particular governmental functions, it is very hard to say with any confidence what pattern of liability it would produce. Nonetheless, having identified the principal features of the courts' approach to the negligence liability of public authorities it is now possible to say with confidence that the pattern of liability it produces is highly unlikely to correspond to the pattern that would be produced by following principle I. An approach to negligence based on principle I – the public approach – would not involve finding a duty of care in every case in which the courts have excluded it, but nor would it involve excluding it in the wide categories of case that the courts have done.

I set out above the features of the law of negligence as traditionally conceived that inhibited the giving of a remedy in cases involving public law wrongs: the presumption against liability for omissions, the incremental approach to extending the categories of conduct giving rise to a duty, the restrictions on the kind of harm recognized as well as the difficulty of imposing a duty of care where it might conflict with standards of conduct required by public law. The House of Lords' decision in *Anns* hinted at the possibility that these difficulties might be overcome where, from a public law public perspective, it was necessary. But in its present state, the law has not advanced far beyond the position that preceded *Anns*. In *Anns*, the existence of a statutory power seemed to tell in favour of a duty of care whose effect was to oblige the defendant authority to exercise the power in the way that public law required. The House of Lords' position in *Gorringe* is that we should never expect a duty of care to arise from statutory powers or duties unless

some exceptional policy demands it, and perhaps not even then. One corollary of this concerns the classes of harm that an authority can be under a duty of care to avoid causing. Statutes often impose on public authorities an obligation to protect or further interests that have not traditionally been recognized in the common law, such as the interests in education or in safe and healthy accommodation. In the light of the dicta in *Gorringe*, the fact that an authority is under such an obligation cannot be a reason for holding the authority to be under a duty of care to protect or avoid infringing interests of the sort in question. Another corollary concerns the place of public law in determining the existence of a duty of care. By insisting that tortious duties corresponding to statutory ones are only to be expected where they are provided for in the statute, the House of Lords has effectively excluded the possibility that the existence of a public law duty – other than one belonging to the tiny class capable of giving rise to an action for breach of statutory duty – can furnish a reason for imposing a duty of care. And this means the continuation of the position that the standard that a public authority must observe in order to avoid breaching a duty of care in negligence will always be one to which a private person might be subject. Hence it is no part of the function of the law of negligence to enforce a public authority's duties to undertake actions affecting the interests of individuals in accordance with the norms of public law: the errors that constitute grounds for judicial review can never amount per se to negligence.

All this leaves open the possibility of developing the law of negligence according to the traditional private law method and, in principle, the courts can thereby impose liability in some of the circumstances in which principle I demands it but in which it would not have been provided by the pre-*Anns* law of negligence. It was by development along these lines that the possibility of a duty of care was recognized in the *Barrett* and *Phelps* cases. However, these decisions were clearly inspired by the need to respect convention rights, and outside the area in which the European Convention has an influence, there is less willingness to develop the law. I shall argue below that, in any case, an approach to negligence that only permits the imposition of a duty of care in circumstances in which a duty of care might equally well be imposed on a private person cannot consistently satisfy principle I and thus cannot produce a satisfactory law of administrative liability.

If the present approach does not make it easy to impose a duty of care in fulfilling statutory objectives, nor does it encourage the imposition of a duty to take care to avoid harming those who are affected by the exercise of statutory powers but are not among its putative beneficiaries. The *East Berkshire* case involved, on the one hand, a significant extension of liability, inspired again, as we have seen, by the need to satisfy the European Convention. But on the other hand, the duty to avoid wrongfully removing a child from its parents was held not to be owed to the parents on the ground that such a duty would conflict with the authorities' primary statutory objective. In their work on the subject, Booth and Squires claim to find a general trend to exclude duties of care where they might conflict with authorities'

primary statutory aims in this way.[1] According to those authors, this ground of exclusion is distinguishable from the equivalent policy arguments used in the *X* case and its progeny because it is applied in a more nuanced fashion, with greater sensitivity to the facts of particular cases.[2] It is probably too early to say whether it is correct to characterize the trend in this way. If it is, then it is consistent with the

1 *The Negligence Liabilty of Public Authorities* (Oxford University Press, 2006), see especially at 4.74–4.79. See also 4.95–4.98, 10.30, 13.22–13.25. Besides the *East Berkshire* case, the authors cite *Harris v Evans* [1998] 1 WLR 1285; *A v Essex County Council* [2004] 1 WLR 1881; *L v Reading Borough Council* [2001] 1 WLR 1575; *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 WLR 1421 and *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495. The foregoing cases are all ones in which the authority in question positively injured a person who did not belong to a class which it was the purpose of the authority's statutory powers to protect. Booth and Squires also refer in this connection to a number of cases in which the claim concerned a failure by the authority to assist a person but in which the court held there was no duty of care because it was not the purpose of the authority's powers to assist in the way in question e.g. *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648; *Cowan v Chief Constable for Avon and Somerset Constabulary* [2002] HLR 44. From Booth and Squires' point of view, both types of case illustrate the same principle. From the point of view of the argument of the present book, however, the two types are very different. Under principle I, there is no reason at all why an authority should be under an obligation to provide a benefit which its public powers do not require it to provide. By contrast, where an authority can positively cause foreseeable harm to a person whom its powers are not intended to benefit, then prima facie it owes a duty to that person, although the duty could be excluded if it could be shown that its imposition would stultify the exercise of the authority's powers.

2 At least, the ground of exclusion is explained in that way at some points in Booth and Squires' book e.g. at 10.30. Elsewhere – see especially 4.95–4.98 – the authors ascribe to the ground a more formalistic or doctrinal justification. This is that the separation of powers requires the courts to avoid interfering with decisions made by public authorities in seeking to carry out the tasks assigned to them by the legislature. Booth and Squires contrast this with what they call the "consequential" grounds for exclusion used in the *X* case and its progeny. By this they mean policy arguments such as the floodgates and defensive practice arguments that focus upon the supposed effects of imposing a duty of care. I have two observations to make about the "separation of powers" explanation of the practice of excluding a duty of care where it might conflict with an authority's primary statutory duty. The first is that it is highly doubtful whether the practice can be explained in this way. In cases such as *East Berkshire* and *Brooks*, the courts do seem to be concerned with the consequences of the imposition of a duty of care for the conduct of authorities, just as they were in the *X* case. If anything plays the role that Booth and Squires ascribe to the "conflict with primary duty" ground of exclusion, it is the notion of justiciability. But in any case – and this is the second observation – arguments for restricting liability based on the separation of powers are bad arguments if their tendency is to show that there cannot be a duty sounding in damages where there is already a public law duty. If the courts can already hold a certain course of action unlawful as a matter of public law, then how will the separation of powers be infringed by holding that there should be compensation for harm caused by the same unlawful act? There may be other reasons for denying compensation – "consequential" reasons – but that is another matter.

ground for excluding a duty of care which I suggested could apply under the public approach. If (as I suspect) the trend represents in reality a return to something like the *X* approach in cases not affected by the European Convention then it is not so consistent. Either way, the law of negligence remains subject to limitations that prevent it from satisfying principle I.

We can see this more clearly by considering to what extent the current law makes possible a finding of liability in the classes of case in which it may be required by principle I but is not provided for by the stable part of the tort law. In Chapter 10, I identified three broad classes of this type.[3] The first is made up of cases involving the exercise by a public authority of powers that enable it to infringe or override private rights and that do not involve acts of the sort that might be performed by a private person. The second is made up of cases involving the exercise by a public authority of powers to determine the right of a citizen to perform some activity or her entitlement to some benefit. The third is made up of cases involving the failure of a public authority to confer some benefit upon a person, the failure being one that does not involve any formal determination as to the entitlement of the person in question. A formal determination may be absent either because the authority cannot be expected to be aware of the identity of the particular persons likely to receive the benefit or because the benefit must be conferred spontaneously without the making of a formal determination.

The first and second classes both involve the making of formal determinations. Where these determinations are made in a way which is unlawful and which causes harm, the law of negligence will usually provide no remedy because it does not encompass duties to make decisions in accordance with the norms of public law. The oft cited *Maguire* case[4] provides an illustration of this. The applicants in the case were persons who had applied to the defendant council for licences to operate taxis. Under the terms of the relevant legislation, the council was obliged to issue a licence to any fit and proper person who applied for it as long as there was an unmet demand in the area in question. In May 1988, the council promulgated a policy in compliance with this requirement and in reliance on the policy the applicants acquired and fitted out taxis ready for use. In September, however, as a result of a legal challenge, the council suspended its policy and resolved in the meantime to issue licences only to certain persons who stood to suffer hardship as a result of their reliance on the earlier policy. Although the applicants fell into this category, their applications to the council for licenses were refused because they had owned and sold taxis before purchasing new ones in reliance on the May policy. The applicants sought judicial review of this decision and the judge held that the council had acted ultra vires the legislation and unreasonably and also held that the applicants had a legitimate expectation. The licences were eventually

3 See p.135.

4 *R v Knowsley MBC ex p Maguire* (1992) 90 LGR 653.

granted but in the interim the applicants had suffered financial loss. In seeking compensation, they invoked various grounds of action, all without success. In relation to their claim of negligence, Schiemann, J., citing *Rowling v Takaro Properties Ltd*[5] held that although an act involving misconstruction of a statute might conceivably amount to negligence, it did not do so here.

This case was decided in 1992 but there is no reason to think it would be decided differently now. The more recent case of *Banks*,[6] concerned the powers possessed by the Secretary of State for the Environment for the purpose of eradicating BSE. These included powers to inspect farms and to serve Movement Restriction Notices (MRNs) on herds of animals. Inspectors working for the defendant believed they had found evidence on the claimant's farm that, contrary to the governing regulations, he had been giving his herd feed containing mammalian protein. On this basis, an MRN was served and remained in force for several months. During this period, the Secretary of State refused to disclose the evidence on which the decision to serve the MRN was based and the claimant was thus ignorant of the case he had to meet. In fact, he had an innocent explanation and when he sought judicial review, the MRN was lifted. The loss suffered by the claimant during the period between the time at which the MRN should have been lifted and the time at which it eventually was lifted was thus attributable to the Secretary of State's failure to observe the principles of procedural propriety.[7] Sullivan J dealt with the claim for damages by saying simply that counsel for the claimant had been unable to find any workable way of framing it.

Claims falling into the first two classes I identified above are also subject to other disadvantages under the current law. A claim falling into the first class – i.e. one arising where a public authority infringes a right recognized in common law by means of some administrative determination – may fail in negligence because the loss suffered is purely economic or because of the policy, referred to above, of excluding duties which might conflict with the attainment of the authority's primary statutory objective or for both reasons together. Thus in *Harris v Evans*,[8] the plaintiff ran a business which offered bungee jumping using a mobile telescopic crane. The defendant was an inspector from the Health and Safety Executive. Powers to enforce safety standards were divided between the HSE and local authorities. After inspecting the plaintiff's crane, the defendant advised a local authority to issue an improvement notice requiring the plaintiff to make certain improvements in safety and a certification notice requiring him to obtain certification for his crane. The plaintiff complied with the improvement notice but

5 [1988] AC 473.

6 *Banks v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 416; [2004] NPC 43.

7 The judge did not in fact find that the MRN should have been lifted at a particular point – given the impossibility of a claim in damages, it was not necessary for him to do so – but his judgment makes it appear strongly arguable that it should have been.

8 Note 1 above.

claimed that it was impossible to obtain certification of the sort required by the certification notice. As a result, the plaintiff was prohibited from carrying on his business in the area of the local authority in question and in the areas of two other local authorities in which he was accustomed to operate. The prohibition was lifted on the intervention of the Secretary of State who stated that the inspector's advice to the local authorities was not consistent with HSE policy. The plaintiff's claim in negligence was struck out by a master and this was eventually upheld by the Court of Appeal. In doing so, the Court of Appeal relied on a number of grounds amongst which was the argument that the imposition of a duty of care would discourage the HSE in the performance of their primary duty to protect the health and safety of the public. The case was decided when *X v Bedfordshire CC* was still the leading authority and the policy arguments relied upon reflect his fact. It seems very likely, however, that if the case were decided today, the same argument would be invoked. Whether it would be applied in the blanket fashion encouraged by the *X* case or in accordance with the trend towards a more sensitive, nuanced approach purportedly identified by Booth and Squires is, as I suggested above, hard to say. But to the extent that it was the former, there would be an additional barrier to deciding cases in the way that principle I demands.

The difficulties in the way of making a claim falling into the second class – in addition to the problem of negligence's non-recognition of public law grounds of review – are still greater. The courts have never in principle recognized that interests which public authorities have powers to further or protect should also be protected by the law of negligence. This can be seen especially from the cases on the inspection of buildings that followed *Anns*.[9] The confirmation in *Gorringe* that statutory powers and duties should seldom or never, by themselves, give rise to a duty of care entrenches this position. More broadly, it means that one should never expect unlawful failure to exercise a statutory power so as to confer a benefit to result in negligence liability unless there is some private law analogy.

The third class can be divided into two subclasses. One comprises cases in which no formal determination is made with respect to the claimant because the authority cannot be expected to be aware of her identity at the time it performs the relevant act. In this subclass belong failures of the highway authority to improve dangerous parts of the road system, failures by the police to catch criminals who go on to cause harm to citizens and failures of authorities with powers to inspect buildings to ensure that buildings are safely built. The other subclass comprised cases in which no formal determination is made with respect to the claimant because the benefit must be conferred spontaneously. In this category belong failures by public authorities to protect persons from hazards such as fires, floods and drowning.

All the cases falling into the third class involve practical activity on the part of the defendant authorities and in many the authority's failure will consist in a failure of practical competence. In others however, despite the fact that by definition none

9 See especially *Murphy v Brentwood DC* [1991] 1 AC 398.

of the cases in the third class involve a formal determination with respect to the claimant, the failure in question may be unlawful because it results from some formal determination or some policy decision.[10] Thus, as we saw in Chapter 6, the failure of the fire brigade may be due to some mistake made at the scene of the fire or it may be traceable to some policy decision about what kind of equipment to provide or which fires to attend. Where the unlawfulness of an authority's failure is attributable to the kind of breach of a public law norm not recognized in the law of negligence, then liability in relation to cases in the third class is impossible for the same reason as it is in classes one and two.

Putting this aside, however, there are other formidable obstacles to the finding of liability in cases falling into the third class. Almost all claims in the first subclass fall foul of the strictures in *Gorringe* against basing a duty of care on a statutory power or duty.[11] Principle I would not necessarily demand liability in all cases belonging to this subclass because a public law duty to secure some public benefit does not always entail public law duties to individual members of the public. Even if one accepts the arguments I made in Part 1, it is not beyond dispute that highway authorities should owe duties to individual members of the public injured as a result of failure to improve the highway to the requisite standard or that authorities charged with inspecting buildings owe duties to their future occupants. Nonetheless, the strictures in *Gorringe* would usually exclude a duty of care whether the authority in question owed public law duties to individuals or not.

The same strictures also exclude a duty of care in cases belonging to the second subclass. All the actual cases in this subclass precede the decision in *Gorringe* but for the most part their outcomes are compatible with the principles it lays down.[12] The default position in cases involving rescuers is that there is no liability for failure to rescue but there may be liability for making the claimant's situation worse. In other words, there has been no real departure from the orthodoxy established in the *East Suffolk* case.

In all three classes of case, litigants and the courts themselves attempt to circumvent the difficulties that the prevailing orthodoxy puts in the way of attaching liability to what are essentially public law wrongs by making use of concepts

10 Conversely, the failure to confer a benefit involved in cases belonging to the second class may result from failures of practical competence as, for example, where a determination is made that the claimant is entitled to a benefit but they do not receive it purely because of a clerical error cf. *R (N) v Secretary of State for the Home Department* [2003] EWHC 207 (Admin); *Neil Martin Ltd. v Revenue and Customs Commissioners* [2007] EWCA Civ 1041; [2007] All ER (D) 393.

11 Since their basic powers are not statutory in origin, an exception is the police. A duty of care on the part of the police towards potential victims of crime is usually excluded, as in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, on policy grounds.

12 See e.g. *Capital and Counties v Hampshire CC* [1997] QB 1004; *OLL v Secretary of State for Transport* [1997] 3 All ER 897.

which make most sense in the context of private law. Thus in their more expansive moments, in cases such as *Phelps* and the *East Berkshire* case, the courts have leaned heavily on the notions of professional negligence and vicarious liability. In cases involving regulatory powers, the concepts of negligent misstatement and assumption of responsibility have been invoked in order to distinguish the circumstances in which there should be liability.[13] And, as we saw above, in *Kent v Griffiths*, Lord Woolf used the concept of reliance to justify his decision to hold the ambulance service liable for its failures in assisting the claimant when a duty to assist had been excluded in relation to other rescue services. However, as I shall argue below, the use of these concepts in relation to public law wrongs leads to positions that are artificial and unsatisfactory.

Obstacles to developing the public approach to negligence

As presently interpreted, then, the law of negligence falls far short of satisfying principle I. The next question to be addressed is what obstacles lie in the way of developing the law of negligence so that it does satisfy principle I. In my view there are two such obstacles. The first is obvious from all that has been said up to this point. It is simply the fact that, out of a generalized fear of the consequences, the courts refuse to extend the law so as to cover wrongs with no private law analogue.

The second major obstacle to instituting the public approach is the existence of the tort of breach of statutory duty. This is so for two reasons. Firstly, as we have seen, the circumstances in which an action for breach of statutory duty is available are extremely restricted. Secondly the availability of such an action is supposed to reflect Parliament's intention with respect to the question of whether there should be liability for the failure to fulfil the duties arising under any given statute. This being so, it is natural to infer that the imposition of other duties sounding in damages on statutory authorities – beyond those permitted in the tort of breach of statutory duty itself – is contrary to the intention of Parliament. The idea that the existence of an action for breach of statutory duty represents the intention of Parliament is often said, of course, to be a fiction. This is true if by "intention of Parliament" one means something expressed in terms in the statute or which appears from examination of the statements made by the government at the time of the legislation's passing. But the fact remains that if the rules governing breach of statutory duty are treated as authoritative on the question of whether there can liability in respect of failure to fulfil a statutory duty, it is hard to see how one can ignore them when deciding whether a common law duty of care can be imposed on the exercise of statutory powers. This thought is expressed in an influential article

13 See e.g. *Welton v North Cornwall DC* [1997] 1 WLR 570; *Neil Martin Ltd. v Revenue and Customs Commissioners* n.10 above.

by Bailey and Bowman, in which the authors consider the circumstances in which statutory authorities should owe a common law duty of care:

> [T]he very fact that the body in question and the functions it exercises have been established, or at least recognized, by statute is a pointer in favour of imposing a duty, since it is an indication that the community, through its elected representatives, is entrusting its well-being to that agency in a particular context. This pointer is not a particularly strong one, however, and may well be overborne by other factors. Indeed, it is clear that in many situations where Parliament has imposed a statutory *duty* to act, the courts have not been prepared to countenance a civil action consequent upon a breach of that duty. It would be curious indeed if the plaintiff had an easier task in establishing a common law duty to confer a benefit where the statutory function was merely a *power*.[14]

The influence of this line of thought can be seen in many cases. The most obvious example, and the most important from the point of view of my argument, is Lord Hoffmann's linking of the incidence of an actionable breach of statutory duty with the incidence of a common law duty of care in *Stovin* and the House of Lord's approval of this approach in *Gorringe*. If one goes back to *Anns* itself, Lord Wilberforce seems to have thought that it was necessary to invoke the common law where, as in the instant case, the defendant authority had exercised a power but not where a statutory duty was in issue; the implication being that a statutory duty could be made the subject of an action for breach of statutory duty. There is also the example of the former Chief Justice of Australia, Sir Gerard Brennan. With uncompromising orthodoxy, as Lord Hoffmann described it in *Stovin*, Sir Gerard rejected the idea in *Sutherland Shire Council v Heyman*[15] that a common law duty could be superimposed on a statutory power. In subsequent cases, he insisted that only where there lay an action for breach of statutory duty could liability in relation to failure to fulfil a statutory duty arise.[16]

In the case of Lord Hoffmann, the insistence that a duty sounding in damages will be rare if it does not arise from the statute, is no doubt inspired by his view that such duties generally are undesirable on policy grounds. Existing doctrine is thus used as a peg on which to hang the preferred solution. But if one is not persuaded by the sort of policy arguments that lead Lord Hoffmann to want to minimize the incidence of actionable duties, breach of statutory duty remains, nonetheless, a conceptual obstacle. As long as it continues to exist, it tends to suggest, at least in its present narrow form, that all there is to be said about liability must be deducible from the statute itself. It is, in this sense, a survival of what

14 Bailey and Bowman, "Negligence in the Realms of Public Law – a Positive Obligation to Rescue" [1984] PL 277.

15 (1985) 157 CLR 424.

16 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330, HCA; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, HCA.

Beatson has stigmatized as the "oil and water" view of the relationship between statute and common law i.e. the view that "statute and common law flow next to but separately from each other in their separate streams."[17] This view is antithetical to the picture of the relationship between statute and common law that I tried to promote in Chapter 8.

An obvious step, if one wants to institute what I called above the "public approach" to negligence, is to abolish the tort of breach of statutory duty altogether. This raises the question whether there is any good reason not to. The answer is that there is not. In the most in-depth study of the subject, Stanton describes it as lacking any coherent theory and its history as "a remarkable example of how the common law evolves by ad hoc development with little reference to any underlying purposes."[18] More recently, the same author has canvassed the possibility of its abolition.[19] The most well-established use of breach of statutory duty has been in relation to the Factory Acts where breach of well-defined duties to take certain safety measures has been held to give rise to liability. In circumstances of this sort, where the purpose of a statute is to regulate the behaviour of a private person, it makes sense to tie liability to breach of requirements clearly defined in the statute. As long as the law of negligence can be used, however, to create liability for the failure to fulfil statutory duties, this beneficial feature of breach of statutory duty can be preserved without perpetuating the tort itself.

The public approach to negligence

Let us imagine then a state of affairs in which the obstacles just considered have been overcome: the action for breach of statutory has been abolished; and the presumption against liability for public law wrongs has been abandoned. The way is thus clear for the adoption of the public approach, an approach to negligence that will produce a form of liability that satisfies principle I. I offer here some examples of how the approach might work in practice. In the course of doing this, I shall attempt to show that the solutions entailed by the public approach are superior to those provided by the courts. I shall also suggest at several points that difficulties in past judgments arise from the fact that while, on the one hand, the prevailing approach when applied consistently prohibited the finding of liability or of a duty of care, on the other, the court in question was moved by the desire to give a remedy for the public law wrong that the case involved. The cases I discuss are organized roughly into the three classes which I identified in Chapter 10 as

17 See Beatson, "Has the Common Law a Future" [1997] CLJ 291, 300. See also Zimmermann, "Statuta Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective" [1997] CLJ 315; Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 LQR 247.

18 Stanton, *Breach of Statutory Duty in Tort* (Sweet & Maxwell, 1986) p.152.

19 See Stanton, Skidmore, Harris and Wright *Statutory Torts* Chapter 2.

those in which the stable part of the law of tort failed to provide solutions that satisfied principle I.[20]

The hallmark of the public approach is that it involves the identification of the duty of care with those public law duties owed to individuals whose breach demands compensation under principle I. This facilitates liability in both the first and second class of cases referred to in the previous paragraph: i.e. it facilitates liability in cases involving the exercise by a public authority of powers that enable it to infringe or override private rights and that do not involve acts of the sort that might be performed by a private person; and in cases involving the exercise by a public authority of powers to determine the right of a citizen to perform some activity or her entitlement to some benefit. In cases in the second class, it will allow there to be liability in the following circumstances. Firstly, the purpose of the powers in issue is to confer benefits on individuals. Secondly, the authority has decided to exercise the power with respect to a particular individual or group of individuals – i.e. it has decided whether or not to confer the relevant benefit on that individual – so that there is, in effect, proximity between the authority and the individual or individuals concerned. The individual or individuals must belong to the class of persons which the authority's powers are intended to benefit. In other words, they must be persons whom the authority is empowered to assist. Thirdly, the authority has breached its duty to make the decision in accordance with the relevant norms of public law. An alternative way of expressing this would be to say that the authority has breached a sub-duty – the duty to act reasonably, the duty to act for a proper purpose etc – towards the claimant. Fourthly, the breach of duty must have caused harm to the individual or individuals concerned. The harm may consist in failure to receive the benefit which it is the purpose of the authority's powers to confer or it may consist in the anxiety or distress caused by the procedural failings of the authority. Damages would also be payable for loss consequential on the authority's unlawful failure to confer the benefit in question.

In the typical case in the second class, as just outlined, proximity will arise because the authority consciously makes a decision with respect to a particular individual. There may also be proximity, however, where the authority did not act with respect to a particular individual, but ought to have done. This would occur, for example, where someone entitled to claim some benefit applies for it and, perhaps through pure inadvertence, the application is ignored. There will be liability in such a case if it can be shown that the only reasonable decision the authority could have made would have been to confer the benefit.[21]

In cases in the first class, the conditions to be satisfied are as follows. Firstly, the authority acts with respect to some individual e.g. it addresses an order to an individual (or, again, group of individuals). Thus, again, there is, in effect, proximity between authority and claimant. Secondly, it is foreseeable that the result of the act will be harm to some recognized interest of the claimant. Thirdly,

20 See p.135 and pp.192–6 above.

21 See the discussion in Chapter 8 at p.100.

in acting, the authority breaches its duty to conform to the principles of public law. Again, one can say that the authority breaches a sub-duty towards the claimant to act in accordance with whichever public law norm is in question. Fourthly, the unlawful act causes harm to the claimant. The harm might be harm of the sort foreseen – i.e. harm to an interest recognized in private law – or it might be anxiety or distress caused by the authority's breach of norms of procedural propriety.

While in relation to both classes, the public approach involves identifying the duty of care with public law duties to individuals, in neither class does the existence of such a public law duty necessarily entail the existence of a duty of care. A duty of care can be excluded in relation to a particular power on the ground that to impose a duty sounding in damages would be likely to frustrate the authority in question in the attainment of its purposes. In cases in the first class, this means that a duty of care can be denied on a ground roughly equivalent to the ground on which it was in fact denied in cases such as the *East Berkshire* case and *Harris v Evans*, described above. The process of deciding to exclude a duty of care would differ from that in the current law in two respects, however. Firstly, whereas the starting point in the current law is that there is no duty of care in cases of this type[22] so that the imposing a duty is something to be done warily, the public approach begins with the presumption that a duty of care exists. Secondly, under the public approach, the decision to exclude a duty of care cannot be influenced – as it appears to be under the current approach – by the view that liability for public law wrongs is generally undesirable and likely to have bad effects. Nor can the basic fact that the proposed duty of care and the authority's primary purpose conflict be taken as sufficient reason, in itself, to exclude the duty. Instead, there must be good evidence that imposing a duty of care will seriously damage the authority's ability to perform its functions.

Clearly, the public approach would overcome the difficulty faced by litigants whose cases were lost because public law wrongs were not recognized as constituting breach of a duty of a care in negligence. Thus in *Maguire*, the authority's unlawful and unreasonable refusal to grant the applicants a licence would constitute breach of a duty or duties of care. There would be no place for the argument, accepted in *Rowling v Takaro*, that the only duty of care with respect to the lawfulness of a public authority's acts is a duty of individual officials to take and follow legal advice.[23] In *Banks*, the failure to inform the claimants of the case against them would likewise amount to breach of a duty of care. Unreasonable delay or delay caused by breach of other public law norms could also constitute

22 I.e. in cases in which public authorities cause harm to interests recognized in private law but in a way not traditionally recognized in the law of tort.

23 But note in this respect the argument, made at point 8 of the final section of Chapter 8 that public authorities should be given a degree of latitude in the interpretation of their powers.

breach of a duty of care where these cause anxiety, distress or other forms of foreseeable loss to the claimant.[24]

It is worth noting, further, that frustration of a substantive legitimate expectation would also constitute breach of a duty of care under the public approach. Such breach could give rise to damages whether or not the court reached the conclusion that the claimant's legitimate expectation entitled her, in the final analysis, to receive the benefit she expected. Frustration of the expectation constitutes a harm even if the public interest is better served by the authority resiling from its promise or altering its policy or if the expectation could not be fulfilled because to do so would be beyond the authority's powers.[25]

There is no place in the public approach for the distinction between justiciable and non-justiciable decisions, as it is applied in recent case law. The distinction's purpose is to prevent the imposition of a duty of care where it might conflict with the exercise of an authority's public law discretion but there is no need for this where the content of the duty of care is identical with that of the authority's public law duties. A rationale sometimes given for the distinction is that it safeguards the separation of powers by ensuring that the courts cannot intervene in the making of policy decisions that are properly the province of the executive. But the question of the extent to which it is proper for the courts to interfere in such decisions is already taken into account in determining whether they can find a decision unlawful as a matter of public law: under the public approach there is no need for the class of non-justiciable decisions to have a different membership than it does in public law.[26]

In class 2 cases the public approach would overcome another problem currently facing claimants, the difficulty of classifying failures by public authorities to confer benefits as forms of harm recognized in negligence. We can see an instance of this problem in the cases concerning educational negligence. It follows from the House of Lords decision in *Phelps* that the failure to ameliorate a congenital condition which affects educational performance, such as dyslexia, counts as a form of personal injury in the same way as does the failure of a doctor to treat a disease.[27] This leaves open, however, the question of how to classify the failure to educate a pupil who has no congenital condition. The loss suffered by such a pupil

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24 For recent examples where this occurred, see *Rowley and others v Secretary of State for the Department of Work and Pensions* [2007] EWCA Civ 598, [2007] All ER (D) 186; *Neil Martin Ltd. v Revenue and Customs Commissioners* [2007] EWCA Civ 1041, [2007] All ER (D) 393.

25 However, as Craig argues, where it would cost the authority more to compensate the claimant than to confer the benefit withheld, the court ought to be able to order the latter: see Craig, *Administrative Law* (5th ed., Sweet & Maxwell, 2003) p.680.

26 As set out, for example, by Lord Roskill in *Council of Civil Service Unions v Minster for the Civil Service* [1985] AC 374.

27 See also *Adams v Bracknell Forest Borough Council* [2005] 1 AC 76; *Robinson v St Helen's Metropolitan Borough Council* [2002] ELR 681.

might be classified as a form of pure economic loss. Or it might be argued that the simple lack of education should not be treated as an actionable injury at all. As Booth and Squires point out, neither of these answers is entirely satisfactory.[28] It is not at all clear that schools should be made responsible for the economic welfare of their pupils, while to deny a state school pupil a remedy where she has not been properly educated involves an invidious contrast with the privately-educated pupil who can sue on the contract with her school. Under the public approach, where the claimant suffers harm as a result of the unlawful failure of a public authority to confer a benefit, the primary harm is the lack of just the type of benefit which it was the purpose of the authority's powers to deliver. In the case of special educational needs, this would mean, as in the current law, the failure to ameliorate congenital conditions affecting educational performance. Where there was no such condition however it could also, in principle, mean the simple failure to confer the educational benefits which it is the purpose of an education authority to supply.[29]

To allow damages for lack of education obviously raises many difficulties. It would be hard to define and quantify the loss, to fix the time at which the relevant wrong occurred and to determine to what extent disadvantages suffered by the claimant could be attributed to poor schooling and to what extent they could be attributed to other factors. The same difficulties arise in relation to failures to ameliorate congenital conditions but are lessened to a degree by the possibility of linking the harm suffered to specific failures of diagnosis. In the case of simple failure to educate, it would not be desirable or feasible to allow people to bring claims purely on the basis that the education they received was of a standard lower than the state aspires to provide. It might be feasible, however, to allow claims where the claimant's lack of education could be attributed to very specific failures on the part of the education authority e.g. the unlawful exclusion of the claimant from school over a prolonged period.[30] The mechanism for distinguishing between cases where there should be liability and cases where there should not, would simply be that of determining whether there is breach of the authority's duties. Under the public approach, this means determining whether the authority has acted unreasonably or fallen below the standards of practical competence that, as a matter of public law, citizens are entitled to expect. Cases in which an authority

28 Booth and Squires *Negligence Liability of Public Authorities* 9.81–9.92.

29 For the purposes of limitation, such harms could be treated as not involving personal injury. To admit many new categories of harm, as the public approach entails, might in any case require the law governing time limits in relation to different types of injury to be redrawn.

30 Cf. *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14; [2006] 2 AC 363. It is doubtful whether exclusion from school can count as negligence where, as in the *Phelps* line of cases, educational negligence is said to consist of failures of individual teachers or educational advisers to discharge their duties as professionals. It can count as such under the public approach however.

was guilty of nothing worse than providing education of a standard lower than that to which it aspired would be unlikely to lead to a finding of a breach.

Whether or not this particular consequence is found to be a desirable one, the position remains that under the public approach a public authority may be liable for its failure to achieve its assigned purpose *vis-à-vis* a particular individual. This means in practice a failure of the authority to exercise its powers with respect to the individual in accordance with the norms of public law, these norms being taken to include a duty of practical competence and it entails that the harm suffered is the lack of the kind of benefit which it is the purpose of the authority's powers to deliver. Thus a housing authority might be held liable for failure to supply to persons in need of accommodation the assistance that it exists to provide;[31] and a local authority with powers to ensure the safety of new buildings, like the one in *Anns*, could in principle be held liable for the cost of making a potentially unsafe building safe rather than for the pure economic loss that someone suffers who buys a defective building or the personal injury that occurs when a building collapses.[32]

I turn now to cases belonging to the third class. This is made up of cases in which an authority fails to confer some benefit upon a person but which involve no formal determination as to the entitlement of the person in question. Above, I divided this class into two subclasses. One comprises cases in which no formal determination is made with respect to the claimant because the authority cannot be expected to be aware of her identity at the time it performs the relevant act. The other comprises cases in which no formal determination is made with respect to the claimant because the benefit must be conferred spontaneously.

To begin with the latter, the cases in this subclass are predominantly cases involving the rescue services and the police.[33] These present fewer problems than the cases in the other subclass because proximity between authority and claimant is established in the same way as in cases belonging to class 2. Typically, failure by the rescue service will occur when it is attempting to assist particular persons, or where it has been informed that particular persons require assistance and can therefore be taken to have those persons in contemplation. As in the second class of cases, where an authority is apprised of the fact that individuals require assistance of the sort that it is the authority's duty to provide, the authority owes a duty to those individuals. As always, the duty is not a duty to succeed in providing the assistance in question. Rather it is to make a decision as to whether to assist the individuals in question that conforms to the norms of public law; and if the decision is affirmative, to undertake the provision of the assistance, again in

31 On this basis, the authority in *R (Bernard) v Enfield LBC* [2002] EWHC 2282; [2003] LGR 423 could have been held liable without invoking convention rights.

32 The *Anns* type case belongs in the third class of cases in which the law currently provides no remedy, but for convenience I mention this aspect of it here.

33 The only police cases that fall into this category, however, are ones in which the police are present or are called to assist at a scene at which a citizen requires assistance.

accordance with the norms of public law. In the latter case these norms would be taken to include a duty of practical competence. The default position under the public approach is that these public law duties are identified with the duty of care. The harm where it occurs is the absence of the assistance in question: the failure to protect from fire, flood, drowning, harm to person and property and so on.

The normal position under the public approach is thus the reverse of that established in cases such as *Capital and Counties v Hampshire CC*[34] and *OLL v Secretary of State for Transport*,[35] nor is there any need to invoke the notion of reliance as Lord Woolf did in *Kent v Griffiths*.[36] The result of identifying the duty of care with the public law duties identified in Part 1 is that there will be liability in this type of case in the various circumstances examined in Chapter 8. Thus an authority may be liable if it should, as a reasonable authority, have rendered assistance to a citizen, and would have succeeded in rendering that assistance if it had acted with reasonable competence. Conversely, the duty of practical competence arises wherever an authority has undertaken to assist a particular person and this is so even if there is no reliance and even if the authority could have decided, in the lawful exercise of its discretion, to assist someone other than the claimant. As we saw in Chapter 8, this gives rise to the further question of what should happen where a reasonable authority would assist *someone* – i.e. the authority is under a duty to assist at least one of a number of people requiring assistance – but the authority in fact assists no-one. Where this occurred, the solution would have to be the award of damages in the appropriate proportion for loss of a chance to each of the persons who might have received assistance.

The other subclass includes cases involving failures of the highway authority to improve dangerous parts of the road system, failures by the police to catch criminals who go on to cause harm to claimants and failures of authorities with powers to inspect building to ensure that buildings are safely built. Clearly, such cases raise more difficult questions of proximity than do cases belonging to the other subclass under class 3 or to classes 1 and 2. As in these other case, the starting point is to consider the purpose of the authorities' powers. Usually, this will be a matter of interpreting a statute and will yield a definition of the kind of harm which it is the duty of the authority to prevent. Except, however, in relation to powers which cannot be plausibly interpreted as intended to benefit identifiable individuals, neither statutory interpretation nor the ascription of purpose to an authority's common law powers will yield a clear answer to the question whether public law duties are owed to individuals. This must be primarily a matter of asking whether the reasonable authority would have in contemplation some identifiable class of person in exercising the power in question. Where the answer to this question is positive then one can say that public law duties are owed to the members of this class. Whether there is found to be a duty of care then becomes

34 [1997] QB 1004.
35 [1997] 3 All ER 897.
36 [2000] 2 WLR 1158.

a matter of asking whether such a duty should be excluded on the grounds of its tendency to prevent the effective exercise of the authority's powers.[37]

It is not necessary for the purpose of giving a general outline of the public approach, to decide how each of the examples given in the preceding paragraph would be decided. To take one, however, a strong case can be made that under the public approach there would be a duty of care in highway cases like *Stovin* and *Gorringe*. Little significance should be attached to fact that the particular acts which the authorities failed to perform in these cases involved the exercise of powers. The powers of highway authorities are aids to the performance of their general duties to improve and to make the highway safe, and as we saw in Chapter 6, core public authorities never have unconstrained power to act but must exercise their powers in fulfilment of duties. Where it could be said with confidence that a reasonable highway authority would improve a particular junction or stretch of highway, or where, as in *Stovin*, a highway authority decides to improve a particular junction, then the authority owes a duty to carry out the improvement with reasonable competence. This duty is owed to the general public but it could also be argued that it is owed to a fairly clearly defined subclass of the public made up of the motorists who use the junction or stretch of road in question. In order to establish proximity, it would not therefore be necessary to invoke the analogy between highway authorities and occupiers of land as Lord Nicholls did in *Stovin*.

A duty of care would be excluded if it could be shown that to allow a remedy in damages would prevent the authority from performing its functions but there is nothing in *Stovin* or *Gorringe* to demonstrate this. Lord Hoffmann's claim that imposing a duty of care would distort the priorities of local authorities and lead to their budgets being consumed in litigation is pure assertion. It overlooks the fact that, whether or not subject to a duty of care in exercising their powers to improve the roads, highway authorities are subject in any case to a number of other legal liabilities: they may be sued for breach of statutory duty for failure to maintain the highway[38] and they may be sued in negligence where their efforts to

37 An illustration of just how difficult such a decision might be is the Australian case of *Graham Barclay Oysters Pty Ltd. v Ryan* [2002] HCA 54; (2002) 211 CLR 540. There a large number of consumers were poisoned by oysters that had been grown in a lake. The oysters had been contaminated when heavy rainfall washed human faeces from the sewerage system and from private septic tanks into the lake. As well as suing the oyster producers, the consumers sued the state of New South Wales and the Great Lakes Council. The former was responsible for the regulation of the oyster industry while the latter was responsible for sewerage and for preventing water pollution. In relation to the claims against both public authorities, it was necessary to decide, and would be necessary to decide under the public approach, whether in addition to their duties to the general public the authorities were under a duty to prevent harm of the sort in question to the individuals who stood to be poisoned by contaminated oysters if the powers were not properly exercised.

38 See Highways Act 1980 ss.41 and 58.

maintain or improve the highway create new dangers.[39] Residents living near a dangerous junction or stretch of road could also seek judicial review if they were unhappy at the authority's failure to exercise its powers of repair, maintenance or improvement. Lord Hoffmann's claim must be set against the argument – embraced by Lord Nicholls – that tightening administrative procedures might prevent further needless accidents. (The argument can be expressed in the kind of economic terms of which Lord Hoffmann is fond: relatively minor extra expenditure on road improvement can avoid the much greater social cost involved in road accidents.) No empirical evidence is presented in the cases to support either Lord Hoffmann or Lord Nicholl's proposition, but the latter surely much more accurately reflects the intention behind section 39 of the Road Traffic Act 1988.[40]

The Crown

In setting out the implications of principle I in Chapter 6, I argued that it would entail liability of the Crown for acts that were unlawful as a matter of public law. There I mentioned the possibility of liability in a case such as *ex part Everett*[41] in which it was accepted that there could be judicial review of the Foreign Secretary's exercise of the prerogative power to issue passports. Another candidate for liability would be a case such as *Chagos Islanders v Attorney-General*,[42] where the claimants were removed from the island of their birth on the basis of unlawful prerogative orders.[43] Mention of this case also highlights a problem, however. As Sedley LJ emphasized in his judgment,[44] while the Crown's servants can be liable for their unlawful acts, and via the servants the Crown itself, the Crown cannot be liable in tort in for acts which are its own in law. Consequently, acts of the

39 As for example in *Bird v Pearce* (1979) 77 LGR 753.

40 Quoted above at p.183. A further argument of Lord Hoffmann's which can be easily dismissed is the following. His lordship claims that given that the road network antedates the highway authorities, the courts are not in a position to say what an appropriate standard of highway improvement would be. This seems to involve the assumption that the courts can only make a judgment as to what is an acceptable standard where there is some kind of established historical practice. Yet there is no warrant for this assumption. How, after all, do the courts reach a judgment in medical negligence cases that some new procedure has not been performed with due care and skill? They can always call on expert evidence and their task is not to identify an appropriate standard of improvement generally but merely to find that the failure to make certain particular improvements is, in all the circumstances, unreasonable.

41 [1989] QB 811.

42 [2004] EWCA Civ 997.

43 Such a case would be a prime candidate for the application of principle II. But in the absence of any judicial mechanism for its application, principle I would also afford a solution.

44 At [20].

Crown that are unlawful as a matter of public law cannot give rise to liability in tort. This state of affairs derives from the Crown Proceedings Act 1947. The Act made a distinction between proceedings on the civil side (what we would now call private law proceedings) and proceedings on the Crown side (what we would now call public law). On the civil side, the old immunity from suit of the Crown was removed by making the Crown vicariously liable for the torts of its servants. The underlying common law doctrine that the Crown itself could not be sued was left intact, however, and has not been seriously questioned since. By contrast, on the Crown side, the doctrine of the Crown's immunity from legal challenge has been abrogated in *R v Criminal Injuries Compensation Board, ex p Lain*[45] and in *Council of Civil Service Unions v Minster for the Civil Service*.[46]

From the point of view of the public approach to negligence, this creates a curious paradox. The purpose of the public approach is to make it possible to obtain a remedy in damages for harm cause by public law unlawfulness. Acts of the Crown which are unlawful as a matter of public law may be challenged in judicial review, but even if the public approach were implemented they could not be made the subject of a remedy in damages. The paradox is greater because, under current procedural arrangements, a claim against the Crown based on the public approach to negligence would almost always be appended to a claim in judicial review. It would be greater still, if, as I shall suggest in the final chapter would be desirable, the procedural divide between public and private law were abolished or effectively abandoned.

One can imagine two possible approaches to this problem. One would be to adhere to the old doctrine and continue to insist that whatever the position in relation to public authorities generally, the Crown should be immune from actions for damages where it has committed acts unlawful as a matter of public law. The other would be to abrogate the old doctrine. This course could be justified by reference to a number of factors: firstly, the exercise of prerogative powers is now subject to judicial review; secondly, the Crown is already liable for the torts of its servants, and hence, in practice, for the great majority of the wrongful harms that it is likely to commit; thirdly, it was the general intention of the Crown Proceedings Act to remove the immunities which the Crown traditionally enjoyed; fourthly, there has been a steady and continuous move away from doctrines of executive immunity since the passing of the Act (consider, for instance, the development of the law on public interest immunity); fifthly, the adoption of the form of liability I propose would constitute another significant step in the movement to provide citizens with redress for governmental wrongs; and sixthly, there is no good justification for a general doctrine of executive immunity – the doctrine of the

45 [1967] 2 QB 864.

46 [1985] AC 374. These and other developments in the remedial law concerning the Crown are explained in Cornford, "Legal Remedies against the Crown and its Officers before and after M" in Sunkin and Payne eds. *The Nature of the Crown: A Legal and Political Analysis* (Clarendon Press, 1999).

immunity of the Crown from suit and its companion, the doctrine that the King can do no wrong, are relics which have no place in a modern system of law. In the light of these factors, the second of the two solutions is, I submit, to be preferred.

Public and private law concepts

As will be clear, from the foregoing account, the public approach does not provide a straightforward answer to all the difficult questions that arise in connection with the liability of public authorities. Some of these questions must be solved, moreover, using the same or very similar tools to those already employed in the orthodox law of negligence. The public approach, one might say, involves a fusion of concepts and techniques traditionally thought of as belonging exclusively to the sphere of judicial review and concepts belonging traditionally to the law of negligence. In thinking about liability one cannot avoid certain questions – such as whether there is proximity between claimant and defendant and what kinds of harm are actionable – which in our system are traditionally framed in the language of negligence. If one did not use these concepts one would be obliged to use others equivalent in effect. At the same time, if one wishes to attach liability to a higher proportion of the wrongs committed by public authorities than is possible under the current law, one cannot avoid thinking about what is required of authorities as a matter of public law. In the recent case law of the House of Lords, the moves towards liberalization have come from a group of judges who on the one hand have argued that the emphasis should be more on the breach than on the duty stage of the inquiry, but on the other, have tended to insist that public law concepts should be excluded from the discourse of negligence.[47] This no doubt reflects the fact that public law concepts often seem to have been used to reduce the likelihood of liability and, perhaps also reflects the influence of certain commentators who regard public law concepts as an alien presence in the law of negligence.[48] If, however, one believes that questions about the desirability of imposing liability on a public authority should often be determined at the breach stage and not at the duty stage, then one must wish to see the existence of a duty accepted in a wide range of circumstances in which currently it is not; and the logic of wishing for this is that the duties which public authorities are under as a matter of public law should be treated at the same time as duties whose breach is capable of giving rise to a right to damages. Calls for a focus on the breach stage appear to be influenced,

47 See the accounts above of the speeches of Lord Slynn in *Barrett* and of Lord Steyn in *Gorringe*.

48 I am thinking here especially of Bailey and Bowman, see the writings referred to at n.20 in Chapter 1.

after all, by the examples of French and European Community law,[49] and in these systems liability attaches to breach of public law norms.[50]

In the current state of the law, the courts are often tempted to impose liability for harmful acts or omissions which are essentially public law wrongs by using concepts originally developed to give force to obligations incurred by private persons. This threatens to produces unsatisfactory results.

One example is the courts' reliance, in liberalizing cases such as *Phelps* and *East Berkshire*, on the notions of professional negligence and vicarious liability. Booth and Squires argue that the insistence on vicarious as opposed to direct liability, at least in the educational context, is a hangover from Lord Browne-Wilkinson's judgment in the *X* case.[51] His lordship thought that direct liability of education authorities should be excluded on policy grounds but that the educational psychologists in the education cases were offering a direct service to the public and, on that basis, could owe a duty of care to members of the public as professionals. As his lordship admitted in his speech in *Barrett*, this view rested on a misapprehension. The psychologists did not offer a service direct to the public but merely advised authorities on the exercise of their powers. This being so, Booth and Squires reason, any policy considerations that apply to exclude a duty against the authority itself should also apply to exclude it against the psychologist; and conversely if such considerations do not exclude a duty against the psychologist, nor should they exclude it against the authority. The insistence on vicarious liability is thus otiose.

I suggest, however, that there is another reason for the courts preference for vicarious liability. This is that it helps to maintain the illusion that the question of whether an authority has acted negligently can be kept separate from the question of whether it has acted unlawfully as a matter of public law.[52] This is achieved

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49 I refer here to the writings of Craig and of Fairgrieve: see Craig, "Once More Unto the Breach: the Community, the State and Damages Liability" (1997) 113 LQR 67; Craig, "The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?" in Beatson and Tridimas eds., *New Directions in European Law* (Hart, 1998); Fairgrieve, *State Liability in Tort* (Oxford University Press, 2003); Craig and Fairgrieve, "Barrett, Negligence and Discretionary Powers" [1999] PL 626; Fairgrieve, "Pushing Back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom" [2002] PL 288 and the passage from Craig's *Administrative Law* approved by Lord Steyn in *Gorringe* (5th ed., Sweet & Maxwell, 2003, pp.888–904).

50 My present proposal is not, of course, a proposal which permits policy considerations to be taken into account at the breach stage. Policy considerations are taken into account in deciding whether to treat a public law duty as a duty of care sounding in damages; once this decision is made, breach of the duty automatically gives rise to a right to damages.

51 *Negligence Liability of Public Authorities* 9.102–110.

52 Note in this context a remark of Cane's in his case note on *X*: "[i]t is slightly surprising that Lord Browne-Wilkinson felt able to reach the conclusion that a duty of care could be imposed in respect of the conduct of the psychology service without identifying the statutory provision under which it was assumedly set up and run, and without interpreting

in the first instance by insisting that, first and foremost, the form of liability in question is professional liability. Such insistence does not, of course, alter the reality of the situation. If an act is one of a statutory authority then it must involve the exercise of statutory powers and a duty of care should not be imposed if its effect might be to oblige the authority to do something which it would be unlawful to do as a matter of public law. But to impose the duty of care on an individual rather than on the authority helps to foster the illusion that the two kinds of duties can be kept apart: we usually think of professional duties as attaching, after all, to individual professional persons.

Whatever the reason for the preference for vicarious liability, it might, if adhered to strictly, have unfortunate consequences.[53] Booth and Squires argue that it would rule out actions against education authorities based on managerial or systemic failures.[54] They point out that in cases in which schools fail to protect the safety of pupils, the principle *res ipsa loquitur* applies so that it is not necessary to identify negligent acts of particular individuals and suggest that the same method might be adopted in cases of purely educational failure. An answer to this might be that it would be undesirable to apply this principle in cases of the latter sort if it meant that the mere fact that someone emerged from the school system, say, unable to read was treated as evidence that the educational authority had been negligent. Many factors might contribute to such an outcome and it should not be blamed on the authority in the absence of evidence of specific failures on the part of individuals.[55] On the other hand, it is easy to imagine a case in the sphere of child protection in which a social services department did nothing to save an abused child, despite being informed of the child's plight, and yet there were no records to show that any particular individual was at fault. There would be no principled reason to distinguish between this case and one in which the individuals responsible for the failure could be identified, but the policy of only attaching duties of care to individual employees would result in such a distinction being made.

Reliance on the notion of professional negligence as a means of determining when there should be liability might also produce anomalous results in the spheres of education and child protection. Thus far, the courts have found that teachers,

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the provision in its statutory context." See Cane, "Suing Public Authorities in Tort" (1996) 112 LQR 13, 14.

53 It has not, in fact, been strictly adhered to in the sense that, as described above, the House of Lords was prepared in *Phelps* to leave open the possibility of direct liability. On the other hand, where litigants in later cases have tried to argue direct liability, the courts have not been especially sympathetic: see e.g. the remarks of Gibbs J in *Carty v Croydon LBC* [2004] EWHC 228 (QB), [2004] All ER (D) 220 at [75].

54 Ibid. See also Fairgrieve, "Pushing back the Boundaries of Public Authority Liability" n.49 above at pp.290–291.

55 The case of *Marr v Lambeth London Borough Council* [2006] EWHC 1175 (QB), [2006] All ER (D) 354 tends to bear out this view.

educational psychologists and education officers – the officials charged with the statutory task of compiling a statement of the special educational needs of a child with learning difficulties[56] – owe duties to the children affected by their decisions. Suppose, however, a claim in negligence were made on the basis that a child had been excluded from school and had not been given admission to another school or provided with adequate home teaching.[57] Suppose further that the failures involved were administrative – that they occurred because the schools in the authority's area were oversubscribed and because of the mixing up of files, the constant turnover of staff and so forth. Ex hypothesi, the failures in such a case would not be failures to exercise the skill expected of a professional and yet the end result for the excluded pupil might be very similar to the result giving rise to a claim in damages in one of the properly professional cases. To discriminate between the professional and the non-professional case, given the existence of the authority's legal – public law – responsibility for the education of the child in each case, would be unfair.

The answer to criticism of this sort may lie in the obiter dicta of Mummery LJ in *Carty v Croydon LBC*.[58] His lordship was at pains to emphasize the importance of not ascribing to the education officer in the case a duty of care identical with, or derived directly from, the statutory duties that he performed on behalf of the authority. To do this, he said, would be to introduce an action for breach of statutory duty by the back door.[59] On the other hand, his lordship was unimpressed by the argument that the education officer was not really a professional person.

> Classification as a "professional" is irrelevant in the present context … The crucial point is that the relevant duty of care in this case does not depend on the professional status of Mr McCormack any more than it depends on the statutory obligations and discretions of the London Borough of Croydon, or on the policy decisions made by it, or on the kind of statutory machinery set up by it to implement the statutory functions … The common law duty of care in relation to specific advice given or not given by Mr McCormack to the London Borough of Croydon about Leon Carty and in relation to his specific decisions, acts and omissions concerning Leon arose not out of the terms of the 1981 Act, but from the fact that Mr McCormack (a) acted as a person with special skills and relevant experience in operating in the statutory framework established to cater for special educational needs; (b) actually undertook specific educational responsibilities towards Leon Carty; and (c) did so in the course of the particular relationship entered into by him with Leon Carty (d) who was a child with special educational needs.

On this view, the key element is not professional status, but the wider notion of assumption of responsibility. This too brings problems, however, and takes us to the nub of what is wrong with relying on private analogies to extend the liability of

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56 See *Carty* n.53 above.

57 Cf. *A v Head Teacher and Governors of Lord Grey School* n.30 above where the claim was, however, based entirely on human rights grounds.

58 [2005] EWCA Civ 19, [2005] 1 WLR 2312.

59 [83].

public authorities further than strict orthodoxy might seem to permit. Two obvious difficulties are the following. Firstly, while assumption of responsibility is an ill-defined notion, it seems at least to require some positive act on the part of the person who assumes responsibility which brings her into relation with the person to whom a duty is then owed. As a matter of public law, as I have tried to show, a public authority charged with assisting some class of person does not need to have acted in some way with regard to a particular person's interests in order to owe that person a duty. So, for example, a child protection authority is under a duty towards a child as soon as it receives information that the child may need its help, whether or not it acts in any way on the information or does anything voluntary which might be taken as a sign that it has assumed responsibility. To allow that there might be a duty of care in a case in which the authority had performed some positive act so as to bring itself into a relation with the child but not to allow one where, through sheer incompetence or inertia, the authority had done nothing would be to make, I suggest, an indefensible distinction.

A second difficulty is that it is hard to see how the idea that an authority is assuming a responsibility towards the citizen whom its actions affect can be made to apply in cases which involve the exercise by the authority of coercive power. As soon as an authority decides to exercise its coercive power with respect to a particular individual then it has that individual in contemplation. If the concept of assumption of responsibility is to have any utility in this context it must pick out some subclass of the persons with respect to whom the authority exercises its power. Yet, given that the authority has in contemplation all the persons with respect to whom it exercises its power it is not easy to see how this could happen. It would seem more natural to say that, subject to policy reasons for excluding a duty, the authority owes a duty of care to all persons with respect to whom it exercises its power: to do otherwise, on the basis that the authority has assumed a responsibility to some of them, is likely again to produce indefensible distinctions.

One can find illustrations of these difficulties in the case law outside the areas of education and child protection. Various attempts have been made to employ assumption of responsibility and the cognate notion of negligent misstatement in the public authority context. Take, for example, *Neil Martin Ltd. v Revenue and Customs Commissioners*.[60] This case concerned legislation designed to ensure that building subcontractors paid their taxes. The legislation provided that a subcontractor could apply for a registration card or for a certificate. If a subcontractor did not possess either document then a main contractor was forbidden to pay him. If a subcontractor possessed a registration card, he could be paid but the main contractor was obliged to deduct tax and National Insurance payments from the sums owed to the subcontractor and pay them direct to the Revenue. Certificates were only issued to subcontractors who could be trusted to pay their taxes and where a subcontractor possessed one, main contractors were not obliged to make deductions from their payments to him. Because of

60 Note 10 above.

the inconvenience involved in making deductions, contractors were reluctant to take on subcontractors who lacked a certificate, and this made certificates a very valuable commodity. To obtain a certificate, a subcontractor had to pass a number of tests designed to ensure that he could be trusted to pay his taxes. If he satisfied these tests, he was entitled to the certificate. The legislation also provided that if a subcontractor held a certificate but changed his status from that of sole trader to limited company, or vice versa, he had to reapply for his certificate. One of the tests to be passed to obtain the certificate was the turnover test which required the applicant to submit his accounts for the period prior to the submission of either three or six years. Where a subcontractor was applying because he had changed his status, he could submit accounts relating to his earlier incarnation as long as there had been no substantive change in the business. If there had, he had to submit accounts for the previous six months of the new business as soon as possible.

The claimant in the case had changed his status from sole trader to limited company and applied accordingly for a new certificate. The issue of the certificate was delayed as a result of the following series of errors at the local tax office.

1) H, the tax officer whom the claimant dealt with, insisted wrongly that the claimant had to produce company accounts;
2) When H finally accepted the claimant's sole trader accounts, he failed to ensure that the claimant signed the relevant forms while he was at the tax office;
3) The forms were sent back to the claimant and he returned them signed, but unbeknownst to H, an unidentified employee in the tax office mistakenly treated them as applications for a registration card, endorsed them accordingly and sent them off to the national office dealing with the scheme. This eventually resulted in the issue to the claimant of an unwanted registration card.
4) H, unaware of the fate of the first set of forms, thought they must be lost in the post and so issued a new set of forms to the claimant which were duly filled in, signed and returned to the local office. Unfortunately, unidentified employees in the tax office marked the forms with the URT ("unique tax reference") of the claimant himself rather than his new company and this caused further delay.
5) When the certificate was eventually issued, it was sent to the claimant's parents' address rather than to the company's thereby occasioning further delay.

The claimant alleged that as a result of the delay the company had suffered significant financial loss and had had to lay off the majority of its employees. His claim before the courts was based on breach of both a statutory and a common law duty to process applications within a reasonable time. The common law claim was originally framed as involving a direct duty but the claimant was later given permission to add to it a claim of vicarious liability. The questions whether

an action lay for breach of statutory duty and whether there were common law duties were tried at first instance as preliminary issues and decided in favour of the defendants. On appeal, the Court of Appeal upheld the finding that there could be no action for breach of statutory duty. The Court of Appeal also upheld the finding that there was no direct duty on the part of the Revenue to process the application with reasonable expedition. In this connection, the Court cited the dicta of Lord Hoffmann in *Stovin* and of Lords Hoffmann and Scott in *Gorringe* about the undesirability of basing a common law duty on a statutory power or duty where the statute did not provide for an action for breach of statutory duty. The Court was, however, prepared to entertain the possibility that the Revenue's employees owed the claimant a duty, although not in relation to all the errors in the case. Giving the sole judgment, Chadwick LJ held that the first and second errors – those that could be laid at the door of the named officer H – were primarily the responsibility of the claimant.[61] Of the remaining three errors, his lordship held that 4 and 5 were merely administrative. To impose a common law duty in respect of them would be to allow an action for breach of statutory duty for delay in issuing the certificate, contrary to the dicta of Mummery LJ in *Carty* which I referred to above. The third error was different, however. By taking it upon him or herself to treat the claimant's application as an application for something other than what the claimant was actually seeking, the anonymous employee responsible for the error had assumed a responsibility towards the claimant and could be taken to owe him a duty.

This decision might be thought too egregious to serve as evidence of anything. Nonetheless, it illustrates nicely several points in my argument. Firstly, it is a good example of the possible effects of delay in administrative decision-making. Secondly, it illustrates the absurdity of the idea that vicarious liability might amount to something different from direct liability when an authority's employees are engaged in the fulfilment of its statutory duties. Thirdly, it demonstrates how inapposite the concept of assumption of responsibility is in such a setting. Error 3 was a simple administrative error like all the others. There was no ground for distinguishing it. Much more persuasive was the first instance judge's view that the involuntary nature of the Revenue's involvement ruled out any assumption of responsibility on the part of the officials. If there is any explanation of the Court of Appeal's decision it must lie in the Court's desire to avoid the obvious unfairness involved in denying the claimant a remedy for the loss occasioned by the rank incompetence of the Revenue. The case thus illustrates a fourth point which is that the desire to avoid the unfairness that results from being unable to impose liability for administrative wrongs can lead the courts to distort the private law concepts they are obliged to rely on.

61 Clearly, this was highly unconvincing in relation to the first error: Chadwick LJ held that the claimant could have insisted that his sole trader accounts were sufficient and then appealed against the officer's refusal to accept them.

Neil Martin falls into what I called above class 2, i.e. the class made up of cases involving the exercise by a public authority of powers to determine the right of a citizen to perform some activity or her entitlement to a benefit. A decision which exhibits similar defects but which belongs to class 1 – the class of cases in which an authority overrides private rights – is *Welton v North Cornwall District Council*.[62] Here the plaintiffs were the owners of a guest house which was visited by an environmental health officer. The officer informed the plaintiffs that the kitchen in their guest house required extensive improvements to bring it up to the standards required by the relevant legislation and that failure to carry them out could lead to the guest house being closed down. Having carried the improvements out at great expense, the plaintiffs discovered that the great majority of them were unnecessary. They therefore sued the officer in order to recover the wasted expenditure. The Court of Appeal held that the officer had, in effect, been offering an advisory service which went beyond the discharge of his statutory duties. He could thus owe a duty of care to the plaintiffs and be liable for negligent misstatement. However, as Sir Richard Scott VC pointed out when distinguishing *Welton* in his judgment in *Harris v Evans*, the officer's giving of advice could not plausibly be differentiated from his statutory functions in this way. The plaintiffs did what he told them to do not simply because he was an expert on the subject who had proffered advice but because he had coercive powers which they believed he would use against them: the officer's giving of advice in this context was itself an exercise of coercive power.

One can imagine an argument being made that if the officer in *Welton* had issued a formal order to make improvements, this too would have been a form of negligent misstatement. Certainly, it would have involved a false representation as to what the law required and certainly also the officer would have borne responsibility towards the plaintiffs to ensure that the representation was accurate. But if this argument is accepted, then all unlawful exercises of coercive power must be seen as a form of negligent misstatement. In every such case the officer issuing the order can be said to make a representation as to his entitlement to act; and in every such case, the representation is false. Moreover, if the making of unlawful coercive orders is treated as a form of negligent misstatement, why should the same analysis not be extended to exercises of powers to determine a citizen's status or right to perform some activity of the sort in issue in the *Neil Martin* case? An unlawful decision determining a citizen's status is more unlike the typical negligent misstatement than is a straightforward coercive order to do or desist from doing something. This is because it is addressed, in effect to third parties as well as to the persons whose status is being determined. Under the powers in issue in *Neil Martin*, for instance, the decision to grant or withhold a certificate determined whether or not building contractors could avail themselves of a subcontractor's services without having to deduct tax from the sums he was paid. Nonetheless, a determination of this sort is much more like a coercive order

62 [1997] 1 WLR 570.

than a coercive order is like a negligent misstatement made by one private party to another. If a coercive order was treated as a form of negligent misstatement it would be hard to see why a determination of status should not also be treated as such. Once again, the lesson is that concepts such as assumption of responsibility or negligent misstatement are of no assistance in identifying some subclass of any given type of administrative act as suitable for the imposition of a duty of care: using them is always likely to produce arbitrary distinctions.

Similar criticisms can be made of Lord Woolf's use of the notion of reliance in *Kent v Griffiths*[63] (a case belonging to class 3 in my typology). Lord Woolf held that proximity was established between the claimant and the ambulance service by the fact that, by promising to come within a short time, the service had induced detrimental reliance. Compare this case, however, with one in which a third party with no means of transport sees someone lying injured in the road and phones for an ambulance. There can be no detrimental reliance here, but it cannot be right to distinguish this case from *Kent v Griffiths* on that basis. The ambulance service should surely owe a duty of care in both cases or in neither.[64]

The same basic argument may be made in relation to the police. The cases in which the police have been held to owe a duty to protect particular individuals have been those in which they have made specific undertakings and induced reliance.[65] If these elements are required for the police to come under a duty, it leads again to an unsatisfactory distinction between cases in which the elements in question are present and other cases in which the police are aware that some particular individual is in danger and requires their assistance but have done nothing to induce reliance.

Use of the concept of assumption of responsibility may produce satisfactory results where there is no reason to think of an authority as being under an obligation to any individual in circumstances wider than those in which such an assumption has been made. For example, in *T v Surrey County Council*[66] the defendant authority kept the name of a particular child minder on the register of child minders it was obliged by law to maintain. T's mother left T in the care of the child minder after having sought and received assurances from an employee of the authority that the child minder was to be trusted. In fact, on a previous occasion, the child minder had caused injury to a child by violent shaking and did the same to T. The court held that although the purpose of the governing legislation was to ensure that only persons who were fit to act as child minders should be registered, it did not give rise to duties to any individuals who might rely on the register. The

63 Note 36 above.

64 This point is made in Hickman, "Taking the Tortious Liability of Public Bodies into the Human Rights Era: A Theoretical and Conceptual Analysis" unpublished PhD thesis, Cambridge University, pp.87–89.

65 As for example in *Welsh v Chief Constable of Merseyside Police* [1993] 1 All ER 692; *Swinney v Chief Constable of Northumberland Police* [1997] QB 464.

66 [1994] 4 All ER 448.

specific assurances made by the authority to T's mother were, however, capable of giving rise to a duty of care. The distinction made in this case is not as obviously indefensible as the distinction made in the cases considered above. This is because the difference between giving an assurance to a specific individual and making a list of names available to the general public is greater than that between two situations in both of which the authority is aware, or ought to be aware, of the identity of the particular individuals who its acts or omissions affect. Nonetheless, a better method for determining whether individuals are entitled to rely on representations made by public authorities is by use of the concept of legitimate expectations. This is because it encompasses cases like *Maguire*,[67] in which an authority has promulgated policies which a limited class of persons relies upon, as well as cases in which assurances have been given to specific individuals.

The principal argument of this book is that there ought to be liability where harm results from public law wrongs and that this can be achieved (in relation to principle I) by adopting what I have called the public approach to the law of negligence. The considerations adduced in the preceding few paragraphs tend to support this argument but, taken on their own, they also a support a different and more limited argument which runs as follows. As cases like *Neil Martin* or *Kent v Griffiths* suggest, attempts in relation to public authorities to extend negligence beyond what strict orthodoxy requires are often inspired – tacitly or otherwise – by the principle expressed in Lord Bingham's dictum that "wrongs should be remedied." They are inspired, that is, by the recognition that there should be compensation for an individual who suffers loss as a result of some gross failure of a public authority to fulfil its duties towards her. But if this is one's true motivation, one ought, in strict consistency to adopt the public approach and recognize as a general principle that there can be a remedy in damages for public law wrongs. Conversely, if one is not prepared to go this far, one should resist the temptation to remedy what are really public law wrongs and eschew all attempts to find a duty of care in relation to the exercise of statutory powers if it might lead to the sort of inconsistencies identified above. This would mean, in effect rigorous adherence to the orthodoxy that preceded *Anns v Merton Borough Council* and acceptance that, in relation to many wrongs committed by public authorities, our judicial system can offer no remedy. The conclusion of this subsidiary argument is thus that either the courts should follow the public approach or the private approach (as I defined these above) but not something in between. If adopting the latter course meant that the common law failed to satisfy the requirements of the European Convention, the solution would be to make use of the provisions for giving just satisfaction in the Human Rights Act. The overall conclusion of this chapter remains, however, that the public approach affords the best solution to the problem of administrative liability.

67 Note 4 above.

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Chapter 13
Outstanding Issues

Contrary views of administrative liability

Policy arguments

My views about the policy arguments often made against the extension of liability in relation to public authorities can be deduced, in so far as I have not made them explicit, from the previous chapters. Since, however, so much debate centres around the question of whether the dangers that increased litigation pose to public funds mean that any expansion in court-based liability should be discouraged; and since the judges and commentators who are impressed by these dangers tend to advocate non-curial alternatives, I address these arguments here.

My basic position is that there should be liability in the circumstances in which I have suggested and that policy arguments – which are all concerned in one way or another with the possibility that public authorities will be inhibited in the performance of their functions – can be adequately dealt with within the framework I propose. As I argued above, it may sometimes be right to limit liability on the basis that to grant a remedy, or impose a duty of care, would tend to stultify an authority's performance of its functions, but there should be clear evidence of this. Such decisions should not be based on the instinctual or speculative grounds which, as many commentators have complained, seem to inform some of the courts' more restrictive decisions.[1]

Some commentators and judges take the view that in order to deal with the problem of excessive liability, the incidence of the duty of care should be limited by the use of the traditional restrictions developed in the context of disputes between private parties. On this view, it is permissible, for example, to apply

1 See in this respect Surma, "A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence" at p.389, Markesinis and Stewart, "Tortious Liability for Negligent Misdiagnosis of Learning Disabilities: a Comparative Study of English and American Law" at pp.243–256 and p.266, and Markesinis, "Unity or Division: the Search for Similarities in Contemporary European Law" at p.458, all in Andenas, Fairgrieve and Bell eds., *Tort Liability of Public Authorities in Comparative Perspective* (2002); Todd, "Liability in Tort of Public Bodies in Tort" in Mullany and Linden eds., *Torts Tomorrow: A Tribute to John Fleming* (The Law Book Company, 1998) at p.55; Markesinis, Auby, Coester-Waltjens and Deakin *Tortious Liability of Statutory Bodies* (Hart, 1999). For an exhaustive review of the various policy arguments used by the English courts in negligence cases see Booth and Squire *The Negligence Liability of Public Authorities* (Oxford University Press, 2006).

the presumption against liability in negligence for omissions simply as a way of reducing the burden on public authorities.[2] It cannot be right or necessary to do this, however. If there is a particular policy reason for limiting liability then, for the sake of transparency, this should be the reason given. To invoke restrictions that, like the presumption against liability for omissions, have developed for reasons unconnected with the problems of public authorities is to adopt an approach that excludes liability where there is no good reason for doing so, and is hence indiscriminate and disproportionate.

Of course, underlying some calls for the blanket exclusion of liability in relation to public authorities is a deeper fear than the fear that liability will interfere with the effective operation of public authorities in particular cases. This is that we are faced with a general crisis of liability in which public authorities are likely to be amongst the primary victims. Prominent amongst the advocates of this view is Carol Harlow. According to Harlow, the welfare state has retreated but in its place has arisen a consumer-oriented, risk-averse society in which "state services were seen as capable of wrapping every citizen in a personal security blanket."[3] A consequence of this development is the existence of "the compensation culture"[4] and "litigation fever"[5] The solution is that tort law should "retract … towards a residual position."[6]

Much of Harlow's polemic is directed against changes brought about by the law of the European Convention on Human Rights and the European Union and it is undeniable that these have made possible claims in damages which were not possible before. But although she gives various examples of situations in which public authorities are faced with a difficult task[7] and of cases in which they must deal with large compensation claims,[8] she offers no real evidence that the changes in the law she discusses are leading to the kind of generalized crisis she suggests. One is therefore inclined to treat her warnings with a degree of scepticism.

Harlow's claims about the existence of a "compensation culture" are in contrast with the more nuanced conclusions of a scholar who has undertaken an empirical investigation of the supposed phenomenon.[9] As its title makes clear,

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2 This is the kernel of Lord Hoffmann's argument in *Stovin v Wise* [1996] AC 923. A good example of a similar viewpoint is to be found in Sopinka, "The Liability of Public Authorities: Drawing the Line" (1993) 1 Tort Law Rev 123 at 148–9.

3 Harlow *State Liability: Tort Law and Beyond* (2004) p.5.

4 Ibid. p.6.

5 Ibid. p.91.

6 Ibid. p.132.

7 For example, she discusses at pp.81–84 the difficulties faced by the public authorities whose task is to deal with child abuse and children with special educational needs.

8 As in her discussion of the litigation arising from the Alder Hey organ retention scandal at p.121–122.

9 (2007) 70 MLR 349. See also Lewis, Morris and Oliphant, "Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom" (2006) 14 Torts Law Journal 158.

Annette Morris's article "Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury" is concerned with claims for personal injury rather than with tort claims generally. It is also concerned with all personal injury litigation and not just litigation against public authorities, but it includes statistics specifically concerning the latter. Its most important empirical finding is that although the number of personal injury claims has increased significantly since the 1970s, "[t]he number of claims has … remained relatively stable since 2000, if not since 1997/8 … Contrary to popular belief, therefore, claims have been stabilising and not spiralling in recent years."[10] The statistics cited show this to be as true of claims against public authorities as it is of claims against private defendants.[11]

Other remedies

Harlow and others like her who worry that remedies in tort, available as of right, will overwhelm public authorities, typically suggest other remedies. Such remedies may be discretionary ones administered by the courts, or they may be provided outside the court system. The most obvious way to create a remedy of the former sort would be to confer upon the Administrative Court a discretionary power to order the payment of compensation along with the remedies it may currently grant in judicial review.

A solution of this type has been advocated in a well known article by Michael Fordham.[12] From the point of view of my argument in the present work, the idea

10 Page 357.

11 It does not of course follow from the fact that litigation is not spiralling in the field of personal injuries that it might not be in relation to other kinds of harm. But as I say in the text, Harlow offers no real evidence of such spiralling. Useful empirical evidence from Germany is supplied by Markesinis and Fedtke in "Damages for the Negligence of Statutory Bodies: the Empirical and Comparative Dimension to an Unending Debate" [2007] PL 299. The authors find that despite a more liberal approach to administrative liability the German courts have not been flooded with claims.

12 Fordham, "Reparation for Maladministration: Public Law's Final Frontier" [2003] JR 104. In *State Liability* (at p.115) Harlow also endorses the idea of giving the Administrative Court a discretionary power to grant damages as part of judicial review. However, this is specifically in the context of the Human Rights Act and reflects her view that the discretionary nature of the monetary remedy under the Act should be emphasized. (In her terminology, the money paid should be thought of as "compensation" and not, as the Act calls it, "damages.") A much earlier proposal in favour of a statutory power to order compensation in public law cases was made by the JUSTICE-All Souls Committee in its review of administrative law: see *Administrative Justice: Some Necessary Reforms* Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the UK (1988) Ch.11, para 11.83. The power proposed by the Committee did not have the highly discretionary character of the power proposed by Fordham and by Harlow: it is better described in fact as a duty to order compensation where loss is caused by unlawful

is unexceptionable so long as one does not suppose that by itself it constitutes an answer to the problems of administrative liability. It may seem to do so if one assumes that the problem of administrative liability resides solely in the fact that in certain kinds of judicial review cases – again, the licensing case is the obvious example – the court lacks the power to grant a monetary remedy. We have seen, however, that the problem extends much further than cases of this sort to encompass cases in which there would not usually be judicial review because the unlawful acts giving rise to harm are committed in the performance of practical powers, or only become the subject of contention once they have caused harm. Thus the power to grant a discretionary remedy in judicial review would be welcome but would not lead to a solution to the problem of administrative liability (even when conceived solely in terms of principle I) unless accompanied by a reformulation of the general principles governing the area of the sort I attempted in the preceding chapters.

Nor should it be thought that decisions whether to grant the monetary remedy in judicial review should be made in an ad hoc or casuistic manner. If there were such a remedy, it should be governed by the standards that, I have argued, flow from principle I i.e. it should be granted wherever breach of a public law duty owed to an individual causes harm to an individual of a sort that the courts have decided (on the basis of a carefully developed case law) can be made the object of compensation. This should be calculated on the basis of the traditional principle that the claimant must be put in the position she would have been in if the wrong had not occurred.

Unfortunately, the idea of a discretionary power to grant compensation in judicial review seems to appeal to Fordham precisely because he conceives of it in the terms I have just rejected. He seems to imagine the remedy being provided on the basis of a fairly unstructured discretion in a few small-scale cases in which it could be offered to persons who had suffered loss without threatening inconvenience to public authorities. His paradigm case is that of the taxi driver who has been wrongfully deprived of a licence. To characterize the remedy in this way overlooks the fact that if it were provided in relation to relatively small claims, there would be no reason of principle to deny it in much larger ones.

Fordham's argument also involves a curious leap of logic. He begins by pointing out the obvious unfairness involved where compensation is denied to someone like the taxi driver wrongly deprived of his licence. He then considers the

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administrative action with a corresponding right in the victims. The Committee's decision to recommend a new administrative law remedy without making suggestions for reform of the law of negligence makes more sense than the equivalent suggestion does in the current climate because at the time of its report the courts had not retreated as thoroughly from *Anns* as they were later to do. Another proposal for a statutory power to grant compensation for public law wrongs is to be found in Amos, "Extending the liability of the State in damages" (2001) 21 Legal Studies 1.

argument that there should be liability for loss caused by public law unlawfulness – roughly, principle I. This make sense because principle I is the principle that the taxi case obviously contravenes. However, Fordham rejects this principle because he says that it would lead to "bingo damages" of the sort that occur in medical negligence cases. Just because it would avoid this consequence, he asserts, a better rationale for liability would be the principle that no individual should be made to bear the exceptional losses imposed by a public authority in pursuit of the public interest – i.e. principle II. This, he concluded, is therefore the proper basis on which to exercise a discretionary power to grant compensation.

As we saw in Part 1, principle II is a different principle from principle I. How one interprets the relationship between the two depends on how broadly or narrowly one interprets principle II. One might interpret it as applying only where an authority commits an act which is unlawful because it breaches the principle of substantive equality or would be unlawful on that ground if compensation were not paid. Interpreted in this narrower sense, principle II overlaps with principle I but is distinct from it. If Fordham understands principle II in this sense, his argument has the following odd characteristic: it a) identifies a problem X; b) identifies the solution to X; but c) because the solution seems to the author to have a characteristic not to his liking, identifies a second problem Y and proposes a solution to that while purporting at the same time still to be offering a solution to the original problem X. On the other hand, principle II may be interpreted in a broader sense as, in effect, the master principle of administrative liability. Where it is understood in this broader sense, it includes principle I, since being made subject to loss as a result of unlawful administrative action is thought of as a special case of being made to bear the burden of actions taken in the public interest. On this interpretation, however, the principle Fordham espouses entails the one that he rejects for its supposed damaging consequences. [13]

Another form of legally enforceable solution has been championed by David Cohen in work subsequent to "Entitlement and the Body Politic."[14] This is that the state should create different compensation schemes in relation to different parts of government (Cohen refers to such schemes as "program-specific adjustment

13 Harlow may be guilty of a non sequitur similar to Fordham's in her advocacy of a principle of compensation confined to situations of "abnormal loss" in preference to compensation designed to put the claimant back in the position she would have been in if there had been no unlawfulness or maladministration. "Abnormal loss" is an expression associated with principle II (Harlow uses it in this way in her earlier work *Compensation and Government Torts* (1982) at p.113) but Harlow seems to prefer a practice of awarding compensation for abnormal loss principally because it reduces the amount of compensation that the state is likely to have to pay out. However, even to put the matter in this way makes Harlow's reasoning seem clearer than it is because in *State Liability* no principled justification for awarding compensation for abnormal loss is offered at all.

14 For example in "Adjustment to the Consequences of State Action: Suing the State" (1990) 40 UTLJ 630.

policies").[15] The argument for this is that the state is best placed to weigh up the various factors relevant to determining whether there should be compensation for loss caused by errors in the performance of any given governmental function.[16] The schemes envisaged here seem to involve entitlements rather than the ex gratia payments that many governmental schemes provide.

As with the proposal for a discretionary power in the Administrative Court to award compensation, the idea of such schemes in general is in itself unexceptionable. The merits of individual schemes would, naturally, have to be judged case by case. Where a scheme was created in relation to a function which had the inevitable side effect of imposing certain burdens on blameless individuals – i.e. where principle II was the appropriate standard – then the success of the scheme would have to be judged by the degree of its fidelity to principle II. A scheme which provided claimants with a sum that did not adequately represent the difference between the exceptional burden they were required to bear and the burden that any member of the public might reasonably be expected to bear would, judged by this standard, be deficient.[17] On the other hand, given the limitations (discussed in Chapter 9) on the courts' ability to impose liability on the basis of principle II, any scheme which goes some way towards doing so may be an improvement on the pre-existing position.

Where a scheme provided compensation for loss caused by unlawful administrative action, then the arguments I made in relation to principle I would provide no basis for criticizing it. The form of liability I have proposed would be available wherever Parliament had remained silent as to what should happen when an authority misused its powers; but it could always be abrogated where Parliament made specific provision for such cases. At the same time, the possibility that Parliament might create some compensatory scheme is not a reason not to develop the law along the lines I have suggested. The availability via the courts of compensation in accordance with principle I should be the default position. As well as being right as a matter of principle it might also provide government with the stimulus it needs in order to think about what sort of compensation would be appropriate in relation to the misuse of particular powers; and in proposing its own schemes, the government might then find itself obliged to explain why it was removing a remedy that citizens had previously been entitled to claim.

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15 Harlow seems to lean towards this type of solution in her most recent work: see *State Liability* especially at p.122 and 133.

16 Cohen spells out a long list of factors. These mainly concern the economic and deterrent effects of state liability but he also mentions considerations of equal treatment and justice: ibid. p.660.

17 See the discussion of the scheme under the Vaccination Damages Payments Act 1979 at the end of Chapter 5. See also Dworkin, "Compensation and Payments for Vaccine Damage" [1979] JSWL 330; Harlow and Rawlings *Law and Administration* (1984) pp.398–406.

As well as these legally enforceable alternatives to the kind of common law solution I have proposed, there are also, of course, voluntary alternatives such as ex gratia governmental schemes and recommendations by ombudsmen. Ex gratia schemes must be judged case by case. An ex gratia scheme might be good and fair or it might be a shabby compromise adopted in order to forestall the claims of the recipients of payments made under it to the larger compensation that they ought, in justice, to be provided with. Either way, they cannot provide a general solution to the problem of administrative liability.[18]

As for the ombudsman, it is an admirable institution and has many advantages over the court as a way of discovering what has gone wrong in administration and of providing remedies.[19] But it can never altogether substitute for a legal entitlement to seek compensation just because its recommendations are not legally binding.[20] This is so, even if the ombudsman is usually obeyed. The ombudsman may in practice be the aggrieved citizen's first port of call, but the court should remain in the background as the ultimate guarantor of the citizen's entitlements.[21]

Other rationales

While the views discussed above differ from my own, they do not differ fundamentally on the questions of what kind of rationale might justify liability or of what kind of reasons there might be for restricting it. There are, however, other kinds of argument both for imposing liability and for excluding it and these deserve brief consideration.

Chief among them are arguments based on the assumption that deterrence is the central function of the law of tort. A subclass of such arguments is based on the premise that the function of tort law is to induce the persons subject to it to engage in economically efficient behaviour.[22] These economic conceptions of tort can be dismissed quickly as having little relevance to the problem of administrative liability. Whatever the merits or demerits of these conceptions when applied to

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18 For criticism of recent ex gratia schemes, see two recent reports of the Parliamentary Commissioner for Administration, *Put together in haste: "Cod Wars" trawlermens' compensation scheme* HC 313 (2007), and *"A debt of honour": The ex gratia scheme for British groups interned by the Japanese during the Second World War* HC 324 (2005) (both available on the PCA's website <http://www.ombudsman.org.uk/index.html>.

19 Harlow gives a succinct list of these in *State Liability* at p.122.

20 In *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin), [2007] All ER (D) 261 the Administrative Court held that findings of maladministration by the Parliamentary Ombudsman were binding on the Secretary of State as long as they could not be shown objectively to be flawed or irrational. By contrast, the Ombudsman's recommendations were not binding.

21 See also the arguments advanced by Craig and Fairgrieve in "Barrett, Negligence and Discretionary Power" [1999] PL 626 at 636.

22 See e.g. Cohen "Regulating Regulators: The Legal Environment of the State" (1990) 40 UTLJ 213.

private parties, it cannot be the role of the courts to regulate public authorities so that they engage in behaviour which the courts consider to be conducive to the general economic welfare.[23] It is for Parliament and for public authorities themselves to determine how they should serve the public interest. The role of the courts is confined to ensuring that this is done in accordance with principles of legality and the nature and limits of this role are defined by public law.

The broader view that the, or a, purpose of tort actions against public authorities must be to influence the behaviour of public officials is more plausible than its economic variant. On this broader view, tort actions encourage officials to conform to standards of lawfulness. This is how Dicey seems to have conceived of the role of tort.[24] Considerations of this sort are of little assistance, however, in telling us whether or when there ought to be liability because we know so little about the effect that the imposition of liability has on the behaviour of public officials. If one examines the literature, one finds, on the one hand, the American scholar Schuck arguing that tort law should be used as a tool to ensure lawful behaviour on the part of officials[25] while on the other, the Canadian Cohen argues at length that, because of their budgetary structure, public authorities are unlikely to respond rationally to having to pay awards of damages.[26] Similarly, English case law and commentary is replete with assertions that the imposition of liability will induce defensive behaviour[27] or lead to money being wasted on the payment of damages and higher insurance premiums which would be better spent on improving the services impugned;[28] but in every case, one might, with equal plausibility argue that having to pay damages or higher insurance premiums is an incentive to better practice which will lead to avoidance of the harms which it is the task of officials to prevent and hence provide a net social benefit.[29]

Even if we had accurate information about the effects on officials' behaviour of liability, it seems unlikely that this would be uniform across all public authorities.

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23 This point is made by Schuck in *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983) and perhaps carries special weight because Schuck is a disciple of Calabresi, one of the founding father of the economic approach to tort law. The question of the appropriateness of economic reasoning in relation to actions against public authorities has been considered more recently in the context of American constitutional torts in Levinson, "Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs"(2000) 67 U Chi L Rev 345 and in Dauenhauer and Wells, "Corrective Justice and Constitutional Torts" (2001) 35 Ga L Rev 903.

24 Emphasized in Lawson, "Dicey Revisited" (1959) 7 Pol Studies at 109 and 207.

25 In *Suing Government* n.23 above. Admittedly, Schuck is interested in the use of tort remedies generally and not just damages.

26 "Regulating Regulators" n.22 above.

27 As for example in the dicta of Lord Hoffmann in *Stovin v Wise* [1996] AC 923 at p.958 b-f.

28 See Weir, "Governmental Liability" [1989] PL 40; Lord Hoffmann in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057 at [33].

29 As Lord Nicholls did in *Stovin*.

It could hardly, therefore, provide an answer to general questions about the correct approach to administrative liability.[30] There is, moreover, something odd about the idea that the question of whether remedies should be made available to victims of official wrongdoing should be made to turn on the likely effect of granting such remedies on the behaviour of officials. This way of thinking makes sense where the state attempts to orient citizens' behaviour towards desirable conduct or away from undesirable conduct. It makes sense, for example, to put up speed cameras if one thinks that doing so will discourage people from driving too fast but to remove them if it turns out that maintaining them is expensive and that they have no influence on people's behaviour. But, on the view advanced here, formulating rules of administrative liability is a matter of deciding how the state must behave towards its citizens if it is to treat them fairly. It is no answer to say that if public authorities are obliged to compensate citizens who have been treated unfairly, their officials will react irrationally and do their jobs less well as a result. Where this is the effect of liability, a way must be found of training officials or structuring the authority so that the effect is avoided.

The solution I have proposed allows for liability to be excluded where to impose it would stultify an authority's performance of its functions. It is not my intention, however, that this should make it permissible to rule out liability simply because it would make officials lives more difficult or because they might react irrationally. The cases I have in mind are those in which the imposition of liability might genuinely make an authority's position impossible, as, for example, where regulators are made liable for the losses suffered by companies and investors as a result of some financial catastrophe. Even in cases of this sort, an authority might be able to shoulder very large losses if it had central government standing behind it.

For a public authority to have to pay compensation should not, in any case, be regarded as something exceptional or calamitous. Bureaucratic organizations inevitably make mistakes and the victims of these mistakes should be compensated. The possibility of having to compensate citizens should be foreseen and built into the cost of any governmental programme. It should not be treated as something unheard of and to be avoided at all costs.

A rival to the view of tort law as deterrence is the view of tort law as simply an inefficient and wasteful way of compensating people for their misfortunes.

30 This might, of course, be taken as a reason for trying to avoid general questions about administrative liability and adopting a piecemeal approach based on the information available in relation to particular sectors of governmental activity. This no doubt is the approach that government ought to take in devising schemes of compensation. But the courts are inevitably faced with a general question: what should be the default position in relation to claims for compensation in respect of harms caused by breaches of public law? The view advanced here is that the default position should favour liability; but the present default position, based on vague fears as to the general consequences of such liability, is that there should be none.

Someone who – like Atiyah[31] – takes the latter view is bound to deprecate any attempt to extend the reach of tort by making it apply to more of the actions of public authorities than it already does. I do not attempt here to evaluate the Atiyah view but merely note that the arguments over whether tort law should be abandoned in favour of other systems of compensation have reached no clear conclusion. I do, however, have two related observations to make. The first is that, however inefficient it might be as a way of compensating people, a finding by a court that a public authority has breached its duty to a citizen and that the citizen is entitled to a remedy has tremendous symbolic, as well as practical, importance. The requirement that the authority compensate the citizen in full is also of symbolic, as well as practical, significance. The second observation concerns the uses to which arguments like Atiyah's are sometimes put. If one is persuaded by arguments of this sort, it makes perfect sense to say that tort law should be abolished and replaced by statutory systems of compensation. What does not make sense is to take the stance adopted by some scholars – Harlow again is an example[32] – and eulogize, on the one hand, the traditional practice of applying the private law of tort to public authorities while on the other opposing any extension of tort law on grounds of the kind advanced by Atiyah.

The last point I wish to make in this section concerns the insistence of some commentators that to make authorities liable for failing to provide benefits is to enter the field of distributive justice.[33] This claim is not true of the form of liability I propose here and nor is it true of any proposal that there should be liability for harm caused by public law unlawfulness. Distributive justice is justice with respect to the general distribution of goods in society and is pre-eminently a political matter. The claim that some form of administrative liability involves the courts in making decisions on grounds of distributive justice is closely related to the claim that imposing liability on public authorities threatens the separation of powers and, when applied to the proposal made here, is false for the same reason. Subjecting public authorities to public law norms does not involve telling them how, from the point of distributive justice, they ought to parcel out the goods that they exist to provide.[34] The norms of public law are carefully designed in order to avoid this result. They exist to guarantee the regularity, predictability and fidelity to purpose of administrative action, the purposes in question being chosen, by and large, by the legislature. Where there is liability for breach of public law norms it no more involves making decisions on grounds of distributive justice than does public law itself. The imposition of liability may sometimes involve a finding that a particular citizen ought to have been provided with a particular benefit. But this

31 See Atiyah, *The Damages Lottery* (Hart, 1997); Cane ed., *Atiyah's Accidents Compensation and the Law* (7th ed., Cambridge University Press, 2006).

32 See *State Liablity*.

33 See e.g. Harlow *State Liability* pp.85–86, 91.

34 Cf. Oliver "Public Law Procedures and Remedies – Do We Need Them?" [2002] PL 91 at 97.

will be because the only way in which the authority concerned could reasonably be taken to have fulfilled its assigned purpose would be by conferring the benefit in question; or because some promise or representation was made to the citizen. No deeper judgment about who ought to have which benefits will be involved. On the view I have advanced, citizens are entitled to be treated by the state in accordance with certain norms of administrative morality. Where they suffer harm as a result of not being so treated, the payment of compensation is intended to put them in the position they would have been in if their entitlement had been respected in the first place. The form of justice involved is, thus, as argued in Chapter 3, a kind of corrective or restorative justice.

European influences

Liability under principle I and state liability in European Community law

Until this point, I have considered liability under principle I largely without reference to the monetary remedies imported into our law from the European Union and the European Convention on Human Rights. Both the latter involve liability for public law unlawfulness and this naturally gives rise to the question of how the solution I have proposed relates to them. The ideal state of affairs would be one in which public authority liability was governed by principles that were roughly consistent across all three parts of the law – the part governed by EC law, the part not governed by EC law but in which rights under the Human Rights Act can be invoked, and the remaining part, in relation to which my proposals have been made – allowing for such differences as are appropriate given the different purposes of the different parts. To see how far this is possible, it is necessary to say something about the current state of *Francovich* or EC state liability and the law concerning the award of damages under the Human Rights Act.

To begin with EC law, there is clearly a degree of consistency or structural similarity between the form of liability I have proposed under principle I and *Francovich* liaibility, but there are also significant differences. EC state liability arises where member state institutions have caused loss to individuals by failing to implement or in some other way contravening Community law. They may do this either by legislation or by administrative action.[35] The conditions of liability were laid down by the European Court of Justice in *Brasserie du Pecheur SA v Germany*.[36] They were that "the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be

35 As for example in *R v Minister of Agriculture ex p Hedley Lomas* [1996] 2 CMLR 391. See also, in the context of the liability of Community institutions, *Laboratoires Pharmaceutiques Bergaderm SA v Commission* Case C-352/98 P [2000] EC I-5291 at para 46.

36 Cases C-46 and 48/93 [1996] ECR I-1029 para 51.

a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties." As to what constitutes sufficiently serious breach, the court stated that the decisive test was whether the "institution concerned manifestly and gravely disregarded the limits of its discretion."[37] It then went on:

> The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

The court has observed on subsequent occasions that "where … the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."[38]

This form of liability has sometimes been compared to breach of statutory duty in English law.[39] It differs, however, in that the respondent state institution may have considerable discretion as to how it satisfies the requirements of Community law and yet still owe a duty to individuals and still be found in breach and hence liable. In this respect, then, it resembles principle I liability. On the other hand, the extent of the discretion that an authority may possess and still be found liable is unclear. This is partly because the ECJ's list of factors determining the seriousness of breach includes the degree of discretion left to the national authorities so that an unlawful act causing loss may not give rise to liability if it was done in the exercise of a wide discretion. It is partly also because the exact circumstances in which damages are to be awarded is left to the national authorities This means that how discretionary a particular power can be while still giving rise to liability depends to some extent on the law of the individual member state.

In the law that governs the liability of EC institutions there is no doubt that an institution can be liable not merely for the straightforward breach of a provision of the Treaty or legislation but for exercising its discretion in a way which breaches one of the general principles of EC law such as the principle of proportionality, legitimate expectations or non-discrimination. An illustration of this is the well-

37 Para 55.

38 See *Hedley Lomas* n.35 above at para 28. See also *Bergaderm* at para 44.

39 For discussion, see Hoskins, "Rebirth of an Innominate Tort" and Craig, "The Domestic Liability of Public Authorities in Damages: Lessons from the European Community" both in Beatson and Tridimas eds. *New Directions in European Public Law* (Hart, 1998); see also Convery, "State Liability in the UK after *Brasserie du Pecheur*" (1997) 34 CML Rev 603.

known *Mulder* case.[40] There liability arose from regulations made by the Council to govern the production of milk. In 1977, in order to decrease milk production, the Council adopted a regulation in accordance with which diary farmers would receive a premium if they undertook not to produce any milk for a period of five years. Several thousand dairy farmers took advantage of this scheme. Then, in 1984, the Council adopted another regulation which laid down a new system of milk quotas for those farmers who wanted to produce milk. The regulation provided that each year any given farmer would only be allowed to produce a certain limited quantity of milk and this quantity was to be determined by reference to the amount they had produced in previous years. The relevant years for this purpose were either 1981, 1982 or 1983. This meant that the farmers who had taken advantage of the 1977 scheme were precluded from producing milk since they had produced none in the relevant years. This led to challenges to the validity of the regulations and eventually to claims for damages. The ground of the claims, which were in part successful, were that the legitimate expectations of the affected farmers had been breached. The Council had said nothing to indicate that by taking advantage of the 1977 scheme they would later forfeit the right to produce milk and it was therefore reasonable for them to assume that they would be able to resume production.

The EC law of state liability is supposed to reflect the law that governs the liability of EC institutions. In principle, therefore, one might expect it to be possible for state institutions to be held liable in cases in which they possessed a wide discretion but exercised it wrongly by breaching a general principle. At present, however, there seem to be no cases of this type. In most, the breach involves unequivocal contravention of provisions of the Treaty or legislation; and where the breach has occurred in an area in which there might have been broad discretion, the breach is rendered obvious by the fact a Community institution has pointed out the unlawfulness of the conduct in question.

In seeking to compare EC state liability and liability under principle I, a further complication is the requirement of serious breach. In spelling out in Chapter 3 what I thought liability under principle I required, I argued that it should be possible to withhold a remedy where to grant it would tend to stultify the performance of the defendant authority's functions. In Chapter 11, I argued that if negligence was made the vehicle for principle I liability then the discretion as to whether to find a duty of care could fulfil the same role as remedial discretion without there being untoward consequences. The requirement in EC state liability that in order for there to be liability breach must be serious performs a function roughly equivalent to the requirement of remedial discretion under principle I. There are, however, significant differences. The references in the ECJ's list of criteria to the questions of whether an infringement was voluntary or involuntary and whether any error of law was excusable or inexcusable suggest the possibility of a requirement of fault in addition to simple unlawfulness. By contrast, in the form of liability I have proposed unlawfulness constitutes fault. On the other hand, there is no suggestion

40 *Mulder v Council and Commission* Cases C-104/89 and 37/90, [1992] ECR I-3061.

in EC law that the state can avoid providing a remedy where to do so would be too onerous.

These differences reflect the difference in function between EC state liability and liability under principle I. The former is concerned above all with ensuring the uniform application of EC law throughout the Community. There is therefore no room for significant variation in the law's interpretation, but the ECJ softens the rule's harshness by excusing the state from liability where its mistake arises from an understandable misconstruction.[41] As I suggested in Chapter 8, the equivalent outcome under principle I should be achieved by recognizing that public authorities have greater freedom to interpret the requirements of legislation than English law has traditionally allowed them. The same need for uniformity also explains why, in the case of EC law, there is no provision for excluding liability on the ground that it would impose too great a burden on the state.

EC state liability is thus, in one way, stricter because it makes no explicit allowance for the effect on the authorities of having to pay damages; but in another way, the remedy it provides may be less generous because it is not clear that it extends to cases in which an authority's fault consists simply in its contravention of some general principle. So far as this last point is concerned, however, there is nothing in the EC jurisprudence to prevent a state being more generous than EC law demands, and a possible consequence of principle I is liability where breach of general principles causes loss even if the ECJ does not require it. Thus if our domestic authorities were to breach general principles of EC law when issuing milk quotas in the way the Council did in *Mulder*[42] – whether by means of delegated legislation[43] or administrative act – then there could be liability. To impose liability in these circumstances would only be the equivalent of imposing liability for the unlawful use of power involved in the licensing example I have referred to so often in this book. To take another example, suppose (perhaps more plausibly) that facts recurred like those in *Bourgoin SA v Minister of Agriculture*.[44] There the minister revoked the license that French turkey producers needed to import their turkeys into the UK. Doing this constituted a quantitative restriction on imports contrary to then Article 30 (now 28) of the EC Treaty but the minister was entitled to do it if he could show that the restriction was justified on one of the grounds set out in Article 36 (now 30) which included the protection of animal health. Demonstrating that such a restriction is justified involves satisfying a test of proportionality. In the event, the French turkey producers complained to the Commission which successfully brought

41 As in *R v HM Treasury, ex p British Telecommunications plc* Case C-329/93 [1996] ECR I-1631.

42 Cf. *R v Dairy Produce Quota Tribunal ex p Caswell* [1990] 2 AC 738 where the tribunal had deprived the applicants of some of the quota to which they were entitled by misconstruing the relevant regulations.

43 It would not be possible for the courts to impose liability in relation to primary legislation if EC law did not require them to do so.

44 [1986] QB 716.

enforcement proceedings against the UK government. The UK government was obliged to restore the license but the French producers then sought damages in the English courts in respect of the losses they had suffered between the time of the license's revocation and its restoration. On appeal against the High Court's decision to strike the proceedings out as disclosing no cause of action, the Court of Appeal held that the plaintiffs could only succeed by showing misfeasance in a public office. An action in breach of statutory duty could not succeed because, although, from the point of EC law, Article 30 confers rights upon individuals, the exact content of the rights depends upon the exercise of discretion by the authorities. In other words, the rights were only public law rights and the remedy for their breach lay in judicial review. Under principle I, there should and could be liability in a case such as this. If, as I proposed in Chapters 11 and 12, negligence were used as the vehicle for imposing such liability, then the minister would owe a duty of care to importers not to restrict imports without justification and breach would consist in imposing a restriction which did not satisfy the test of proportionality. A further consequence of awarding damages on the basis of principle I for breach of EC norms would be that a duty could be excluded where to impose it would stultify the performance of the authority's functions – but this could only occur if, and to the extent this would not rule out liability where the ECJ's guidelines demanded it.

Liability under principle I and damages under the Human Rights Act

S.8 of the Human Rights Act confers on courts that have the power to award damages or to order the payment of compensation in civil proceedings (subs. (2)) the power to award damages for a breach by a public authority of convention rights where they consider it just and appropriate (subs. (1)). Subsections (3) and (4) state that:

> (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.

Looked at in isolation from the case law, these provisions suggest a type of action in damages that, like EC state liability, shares certain structural features with the form of liability I have argued should follow from principle I. As under principle I, there is the possibility of reparation for harm caused by public law unlawfulness, the reparation to be provided on the *restitutio in integrum* basis favoured by the European Court of Human Rights. And, as under principle I, the availability of reparation may be restricted by reference to the likely consequences of granting it.[45] Prior to the Act's coming into force, one might therefore have expected it to provide a stimulus towards the development of principle I-type liability.

For this to have happened, however, the question of damages (and the Human Rights Act as a whole) would have to have been approached in a spirit very different to the one that has in fact prevailed. The Act can be treated as an opportunity to develop a principled body of law relating to human rights; or as simply imposing a duty to do the minimum necessary to ensure that English law is not out of step with Strasbourg. In the case of damages, the House of Lords has adopted the latter attitude in its judgment in the *Greenfield* case.[46] Lord Bingham, with whom other judges agreed, 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 practise 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.

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45 It may not be correct, however, to interpret the requirement to have regard to consequences as having anything to do with the effect of paying damages on the interests of the general public. The Court of Appeal embraced this interpretation in joined appeals *Anufrijeva v Southwark LBC; R (N) v Home Secretary; R (M) v Home Secretary* [2003] EWCA Civ 1406; [2004] QB 1124 at [56]. As Richard Clayton has pointed out however "the idea that the court should expressly balance an individual's rights with the general interest of the community before awarding HRA damages has no basis in the ECtHR case law": see Clayton, "Damage Limitation; the Courts and Human Rights Act Damages" [2005] PL 429 at 435. In the light of this s.8(3)(b) is perhaps better interpreted as being solely concerned with the question whether other remedies granted to the claimant are already sufficient to constitute just satisfaction.

46 *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673.

Lord Bingham's interpretation of s.8 is highly disputable. His lordship argues that damages should seldom be awarded because to do so is not usually necessary to ensure the compliance of states with Convention standards. But this seems to overlook the role of the Convention in protecting the rights of the particular people whose rights have been infringed.[47] It is, moreover, hard to see how the courts can take as their sole or principal guide the principles applied by the ECtHR when it is generally agreed that its case law on just satisfaction does not contain any clear principles.[48] As the Law Commission pointed out,[49] there are many reasons, all related to its position as an international court, why formulating clear principles may be difficult for the ECtHR. These reasons do not apply in the domestic context, however. Our own courts can surely do better than to mimic Strasbourg's ad hoc and casuistic decisions in relation to just satisfaction. Our courts should create a body of case law laying down clear principles as to what sorts of infringements are to sound in damages. Recognition of principle I requires this in relation to violations of convention rights as it does in relation to ordinary public law wrongs.

However the free-standing action under s.8 of the HRA is developed, cases in which principle I is applied in relation to ordinary public law and cases in which s.8 is invoked will certainly overlap. This can be seen in those cases in which claimants have sought damage for breach of convention rights because public authorities have failed, in the performance of their welfare functions, to deliver benefits.[50] Such cases may often give rise to principle I liability in relation to the

47 It seems, in fact, to be a version of the argument sometimes employed in relation to breach of statutory duty whereby welfare functions which are quite patently concerned with the interests of individuals as well as those of the general public are said to give rise to duties to the general public alone.

48 See Wright *Tort Law and Human Rights* (Hart, 2001) pp.39–42; The Law Commission *Damages Under the Human Rights Act 1998* (Law Com No. 266) (2000) paras 3.4–3.15; Mowbray, "The European Court of Human Right's Approach to Just Satisfaction" [1997] PL 647. Clayton n.45 above at p.431 produces a comprehensive list of authorities all of whom make the same observation.

49 In *Damages under the Human Rights Act* n.48 above at paras 3.4–3.12. Amongst the reasons given are the diversity of the legal traditions of the countries to which the Convention applies and from which its judges are drawn and the Court's difficulty in acquiring the evidence necessary to make reasoned judgments as to correct levels of damages to award.

50 See especially *R (Bernard) v Enfield Borough Council* [2002] EWHC 2282; [2003] HRLR 4 in which Sullivan J held that the council's unexplained failure over a prolonged period to provide suitably adapted accommodation for a disabled woman and her family as required by s.21 of the National Assistance Act 1948 was a breach of Article 8 of the Convention and awarded damages on that basis. See also the statements of principle by the Court of Appeal in joined appeals *Anufrijeva v Southwark LBC; R (N) v Home Secretary; R (M) v Home Secretary* n.45 above. While ruling against the award of damages in any of the appealed cases, the court accepted that a failure on the part of the state to perform positive obligations towards the claimant could amount to breach of Articles 3 or 8 and that

ordinary public law wrongs that they involve. There would also be the possibility of overlap in cases in which harm was caused by procedurally improper acts on the part of authorities. Here claims for damages for breach of Article 6 of the Convention[51] and for procedural failings in the protection of rights under other Convention articles[52] could be added to claims based on the ordinary common law principles of procedural fairness.

The procedural divide between public and private law

Any proposal to create a distinctively public form of liability is bound to raise questions about the jurisdictional divide between public and private law. In our law this is a shallow divide and of recent invention. Only with the advent of the new procedural regime in 1977 was the existence of something called "judicial review" recognized in legislation and no attempt was made to give the expression a substantive, as opposed to a procedural meaning, until the enactment of Part 54 of the Civil Procedure Rules in 2000.[53] The idea, originating in the House of Lords' judgment in *O'Reilly v Mackman*,[54] that the judicial review procedure should be the exclusive vehicle for challenges to the legality of administrative action has been the subject of a great deal of justified criticism.[55] Even given the acceptance that litigants with private rights[56] or interests similar to private rights[57] should not be

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where such breach occurred it might be necessary to award damages in order to afford just satisfaction.

51 In the jurisprudence of the ECtHR there are, however, no clear or consistent principles as to the kind or degree of harm which should lead to an award of compensation for breaches of Article 6: see the account in The Law Commission *Damages Under the Human Rights Act 1998* n.48 above paras 6.84–6.124.

52 See *Bernard* and *Anufrijeva* supra. See also *R(KB) v Mental Health Tribunal* [2003] EWHC 193; [2004] QB 936 where Stanley Burnton J awarded damages in a number of cases for inordinate delay in processing the claims of mental patients to hearings before mental health tribunals in breach of Article 5(4) of the Convention. The judge showed himself ready to award damages not just for loss of liberty resulting from the loss of the opportunity to secure release at an earlier date but for frustration and distress resulting from delay in a case in which the claimant would have had no real hope of release if a hearing had been held at an earlier date (see [41]–[42], [71]–[73], [128]–[129]).

53 CPR 54.1 (a) defines a claim for judicial review as "a claim to review the lawfulness of – i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function."

54 [1983] 2 AC 237.

55 For of a summary of and extensive list of references to these see Allison, *A Continental Distinction in the Common Law* (2000, revised edition) pp.95–100.

56 As in *Wandsworth LBC v Winder* [1985] AC 461; *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988.

57 As in *Roy v Kensington and Chelsea FPC* [1992] 1 AC 624 ; *Mercury Communications v Director General of Telecommunications* [1996] 1 WLR 48; *Dennis Rye Pension Fund*

compelled to use the procedure, there are reasons to doubt its fitness as the primary means of challenge to public authorities. Thus there are grounds for arguing that the permission stage is unnecessary and leads to arbitrary decisions;[58] that there is no need for the blanket application of a short time limit and that the aims that the time limit is supposed to serve can be met equally well by the use of special time limits in particular areas (such as planning and compulsory purchase) and the discretion to give summary judgements on grounds of delay.[59] The traditional reliance on affidavit evidence and the tendency to exclude disclosure and cross-examination can also be criticized: it is not obvious that officials can always be trusted to reveal all that needs to be known about the decision-making process.[60] At a deeper level, John Allison has argued that English law lacks a number of features which are essential if there is to be a distinct and adequate public law. The most important of these are a well-developed concept of the state, clear criteria for assigning cases to either the public or the private side of the divide, administrative expertise on the part of the relevant judges and inquisitorial procedure.[61]

The position is complicated by the arrival of the Human Rights Act. At present, judicial review is assumed to be the natural means of challenging public authorities on human rights grounds but this assumption is questionable. In recent history, judicial review has been the means whereby citizens with an interest could challenge governmental action on the grounds that it contravened what were, in effect, norms of good administration. By contrast, challenges under the Human Rights Act are concerned with the vindication of rights. The ordinary private law action seems to be, procedurally speaking, an equally appropriate candidate for this

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Trustees v Sheffield City Council [1997] 4 All ER 747.

58 See for evidence in this respect Bridges, Meszaros and Sunkin, *Judicial Review in Perspective* 2nd ed. (Cavendish, 1995) Chapters 7 and 8; Sunkin and Le Sueur, "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102.

59 See Oliver, "Public Law Procedures and Remedies – Do We Need Them?" [2002] PL 91. See also the remarks of Lord Woolf MR in *Clark* n.56 above at [34]–[39] and Wade and Forsyth *Administrative Law* (9th ed., Oxford University Press, 2004) pp. 664–665.

60 For a recent account and mild critique see Sanders, "Disclosure of Documents in Claims for Judicial Review" [2006] JR 194. For earlier criticism see Allen and Shaw "Discovery in JR" [1998] JR 12; Law Commission Administrative Law: Judicial Review and Statutory Appeals (Law Com No. 226, HC 669, 1994) para 7.12; *Administrative Justice: Some Necessary Reforms* Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the United Kingdom (1988), para 6.32, p.157 and recommendation No. 6 at the end of Chapter 6.

61 Allison n.55 above. Other criticisms of the limits which English legal procedure imposes on the courts' ability to gain a properly informed view of the issues in public law litigation are to be found in Griffith "Judicial Decision – Making in Public Law" [1985] PL 564; Lord Woolf "Public Law – Private Law: Why the Divide? A Personal View" [1986] PL 220, 235–6; Lord Woolf, *Protection of the Public – A New Challenge* (1990) pp.109–13; Harlow and Rawlings, *Pressure Through Law* (1992) especially at pp.310–14; Allison, "The Procedural Reason for Judicial Restraint" [1994] PL 452.

role. Moreover, judging human rights claims may require evidence as to the social effects of the governmental policies challenged. Neither judicial review procedure nor that of the ordinary action has traditionally been hospitable to evidence of this sort. This may be changing as a result of the rise of third party intervention,[62] but the admission of extensive materials concerning social impact does not sit easily with the old idea of judicial review as involving little in the way of evidence.[63] A further complicating factor is the possibility of convention rights being invoked in litigation between private parties.

The criticisms of the current procedural divide point in two directions. One way to answer them would be to entrench the divide more deeply and create a system of administrative courts on the French model, staffed with judges trained in administrative matters and with powers to demand, of their own volition, evidence which threw light on both the internal workings of public authorities and the policy background to their decisions. The other deficiencies highlighted by Allison would have also to be addressed.[64] A solution of this sort, which attracted some writers in the middle years of the last century,[65] now seems less likely than ever. The alternative would be to abolish the distinction or at least to undermine it, by ceasing to insist that the judicial review procedure should be the primary mechanism for making public law claims. Use of ordinary procedure for challenging public authorities need not mean abandoning what real advantages there are in the judicial review procedure. As noted above, ordinary procedure provides ways of dealing with tardy and unmeritorious claims and third party intervention is possible in private as well as in public claims.[66] The Administrative Court has the advantage of a group of judges with specialized knowledge. But

62 Permitted in judicial review by CPR 54.17. See for commentary Hannett, "Third Party Interventions: In the Public Interest?" (2003) PL 128; Ashi and O'Cinneide, "Third-party interventions: the public interest reaffirmed" (2004) PL 69; Havers and Mellor, "Third Party Interventions by the Government" [2004] JR 130.

63 For an argument along these lines see Leigh and Lustgarten, "Making Rights Real: The Courts, Remedies and the Human Rights Act" [1999] CLJ 509.

64 Judged by Allison's standards, the reform I have proposed in this book is a piecemeal, pragmatic one. Nonetheless, it is significant that in order to propound it, I have had to use the concept of the state, to give it a meaning (albeit a rather loose and provisional one) and to attempt to spell out more clearly than the cases do what follows from identifying a body or function as public.

65 See Mitchell, "The Causes and Effects of the Absence of a System of Public Law in the United Kingdom" [1965] PL 95. See also the readings referred to in Chapter 1 n.13.

66 It is not provided for explicitly in the rules of court but these could be amended to make it so and, in any case, the courts have an inherent jurisdiction to allow parties to intervene: see per Sedley LJ in *Roe v Sheffield City Council* [2003] EWCA Civ 1, [2003] 2 WLR 848 at [85].

there is no reason why judges from the same group should not be assigned to claims against public authorities brought via civil proceedings.[67]

The form of liability proposed in this book could be seen as supporting either of these alternatives. On the one hand, to make available a monetary remedy for harms caused by public law unlawfulness removes one of the principal obstacles to the creation of a truly distinct public law jurisdiction. On the other, the hybrid nature of the remedy seems to point away from the separation of public and private. At a practical level, the proposal does not necessitate change of either sort. A claim in negligence can either be pursued in the civil courts in the normal way, or, if the claimant also seeks one of the remedies in judicial review, can be appended to the judicial review claim.[68] Under the public approach to negligence, cases could be apportioned between the civil courts and the Administrative Court in the same way as they are today. The difference would be that cases involving the practical powers of public authorities such as *Gorringe* might involve collateral challenge to the lawfulness of administrative action of a kind that is ruled out by the current approach to negligence.

Despite the criticisms that have been made of the judicial review procedure, it has at least a symbolic importance in emphasizing that a distinct body of principles does and should apply to public authorities. For this reason, I have not endorsed one argument that might be made in questioning the need for a distinct public law jurisdiction, namely that the prevalence of privatization, contracting out and so forth cast doubt on the distinctness of public law. On the contrary, in a system in which public law has historically been underdeveloped, these phenomena make it more important than ever to safeguard the role of public law principles and to ensure that the new arrangements operate in the public interest. The existence of the separate jurisdiction reminds us of this. If, however, the place of public law principles in English law was made more secure, the symbolic need for a distinct public law jurisdiction would be reduced. The establishment of a specifically public law form of tort would be a significant step towards accomplishing that task. Once it was taken, the procedural divide in English law could be allowed, perhaps, to fade away.

67 Another possibility would be to maintain the presumption in favour of bringing claims against public authorities before the Administrative Court while doing away with the procedural differences between that Court and the main part of the Queen's Bench Division.

68 As provided for by the Supreme Court Act 1981 s.31(4).

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