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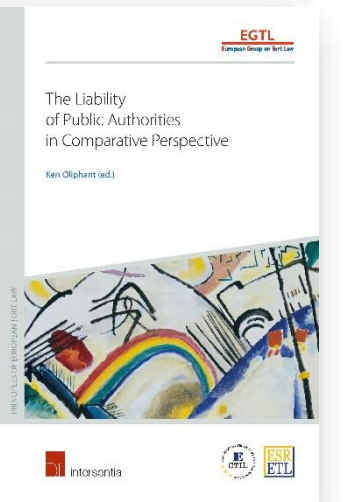
The Liability of Public Authorities in Comparative Perspective

Ken Oliphant (ed.)



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THE LIABILITY OF PUBLIC AUTHORITIES IN ENGLAND AND WALES

Ken Oliphant

I. INTRODUCTION

A. OVERVIEW

01 In most respects, but not without exception, the State and its emanations are subject to the 'rule of law' which, as interpreted by the 19th-century constitutional historian AV Dicey, entails their equal subjection – in common with persons generally – to the ordinary law administered by the ordinary courts.[1] The principle applies to every public body and every public official. Generally speaking, public bodies and public officials are therefore subject to the same tortious liabilities as private persons. They are not liable *without more* for causing damage in breach of their duties or in wrongful exercise of their powers. The circumstances must be such as to make out the elements of a recognised 'tort'[2] or to trigger the obligation to provide just satisfaction for violation of the Human Rights Act 1998 (HRA).[3] As regards liability in tort, the principles applied have for the most part been developed through judicial decision, though statute has also played a role – for example, in establishing additional liabilities and removing certain common law restrictions on liability. Fault is almost always required. In terms of practical significance, the three most important bases of claim against a public authority in tort are *negligence*, *breach of statutory duty* and *misfeasance in public office*.

02 Dicey's idea of equality before the law – though it holds good to a considerable extent – is subject to a number of exceptions: (a) there is one tort, *misfeasance in public office*, that applies only to public officials; (b) particular public officials (eg judges) benefit from a general immunity from tortious liability; (c) various conceptual devices restrict the tortious liability of other emanations of the State (*justiciability*, *discretion*, *the policy sphere*); (d) the courts tend to be more willing to negate a duty of care for reasons of public policy where a public defendant is involved; (e) punitive (or exemplary) damages may be awarded for 'oppressive, arbitrary or unconstitutional action by the servants of the government' in circumstances where no such award would be possible against a private person; and (f) the liability to compensate under the HRA is

1 *AV Dicey,* An Introduction to the Study of the Law of the Constitution (1885) Lectures V and VI. For nuanced discussion, see *P Cane*, Damages in Public Law (1999) Otago L Rev 489, 490 f and 507 f; *C Harlow*, State Liability: Tort Law and Beyond (2004) 6 f and 22 ff; *T Cornford*, Towards a Public Law of Tort (2008) chs 1 and 2.

2 *X (Minors) v Bedfordshire County Council* [1995] 2 Appeal Cases, Third Series (AC) 633, 730 per Lord Browne-Wilkinson ('A claim for damages must be based on a private law cause of action').

3 It is generally accepted that this liability is not tortious but *sui generis*: see eg *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 Weekly Law Reports (WLR) 673 at [19] per Lord Bingham ('the 1998 Act is not a tort statute'). As to the distinctive features of HRA damages, see nos 7 and 40 below.

exclusive to public authorities. These points of distinction are elaborated further in the analysis below.

B. HISTORICAL EVOLUTION[4]

03 It was established in 1866 in *Mersey Docks and Harbour Board Trustees v Gibbs*[5] that public bodies have no blanket immunity from liability in tort, opening up the possibility of damages actions being brought against local government, the utilities, regulators, and the emergency services. The immunity of the Crown survived into the 20th century but was largely swept away by the Crown Proceedings Act 1947,[6] which allowed claims to be brought against central government, especially government departments. In the years since, litigation against public bodies has increased significantly – no doubt a reflection of the perceived depth of their metaphorical pockets, as well as the multifarious ways in which the exercise of their powers and performance of their duties can impact upon the lives of ordinary citizens.[7] But at the same time judicial attitudes towards the expansion of public authority liability have altered and a restrictive mindset has come in from the late 1980s onwards, with an emphasis upon the need to keep the liability within proper bounds lest it unduly depletes public funds, has a detrimental impact upon the performance of public functions, or induces judges to interfere inappropriately in matters of government.[8]

04 The law's evolution in this area has not so far been significantly influenced by EU law, contrary to the past expectations of some commentators.[9] Of course, the EU law of Member State liability is necessarily part of national law as well, but there has been considerable resistance to its full integration within English

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4 See further *H Street*, Governmental Liability: A Comparative Study (1953) ch 1; *C Booth/D Squires*, The Negligence Liability of Public Authorities (2006) para 1.29 ff; *M Lunney/K Oliphant*, Tort Law: Text and Materials (5th edn 2013) 491 ff.

5 (1866) Law Reports, 1st series (LR) 1 House of Lords (HL) 93.

6 See generally *H Street*, Crown Proceedings Act, 1947 (1948) 11 Modern Law Review (MLR) 129. In fact, even before the Act it was the Treasury's practice to make an ex gratia payment of compensation in cases where, but for Crown immunity, the Crown would have been vicariously liable for damage caused by a Crown servant: *In re M* [1994] 2 AC 377, 410 per Lord Woolf.

7 *PS Atiyah*, The Damages Lottery (1997) 78–93 ('huge growth'); *C Harlow*, Damages and Human Rights [2004] New Zealand Law Review (NZ L Rev) 429, 430 ('litigation against the state has become a growth area'); *ead* (fn 1) 21 ('in the modern regulatory state, the state intervenes at some point in almost every human activity…, almost every human activity is contingently capable of regulation').

8 See *Booth/Squires* (fn 4) para 1.33 f and 1.37 ff. As to the policy arguments, see further no 11 ff below.

9 See eg *PP Craig*, The Domestic Liability of Public Authorities in Damages: Lessons from the EC?, in: J Beatson/T Tridimas (eds), New Directions in European Public Law (1998).

tort law; the liability is considered distinct and *sui generis*.[10] Further, when the Law Commission of England and Wales recommended in 2008 a radical structuring of public authority liability on the basis of principles explicitly drawn from the CJEU's jurisprudence on Member State liability,[11] this was opposed by most commentators and rejected by Government (see further no 53 below). The European Convention on Human Rights (ECHR) has arguably played a bigger role in domestic law, especially since the incorporation of specified Convention rights into English law through the HRA, though the courts have tended to channel claims through the Act's own remedial mechanism rather than developing pre-existing principles of liability law.[12]

C. DEFINING THE PUBLIC SPHERE

05 The distinction between public and private spheres, notwithstanding its crucial importance in administrative law, is not of first-rate significance in English tort law – precisely because the general principle of equality before the law is deemed to entail subjecting public authorities to the same liabilities as private persons.[13] However, the courts have had to address the meaning of 'public office'[14] in determining the scope of the tort of misfeasance in public office, while the HRA defines the 'public authorities'[15] who are subject to its

10 See further *KM Stanton*, New forms of the tort of breach of statutory duty (2004) 120 Law Quarterly Review (LQR) 324; *P Giliker*, English tort law and the challenge of *Francovich* liability: 20 years on (2012) 128 LQR 541; *ead*, The Europeanisation of English Tort Law (2014) ch 4. A further indication that EU law is peripheral in this area is that the leading practitioners' text, *Booth/Squires* (fn 4), does not discuss it at all, even in its chapter on 'alternative remedies' (ch 6) – indeed, it includes not a single CJEU decision in its table of cases.

11 *Law Commission*, Administrative Redress: Public Bodies and the Citizen, Consultation Paper No 187 (2008), referring in particular to C-6/90, *Francovich v Italy* [1991] European Court Reports (ECR) I-5357.

12 See generally *Booth/Squires* (fn 4) ch 7; *D Nolan*, Negligence and Human Rights Law: The Case for Separate Development (2013) 76 MLR 286; *Giliker*, Europeanisation (fn 10) ch 5. See further no 40 below. It must be noted that, at the time of writing, it was declared Government policy to repeal the HRA, though no concrete proposals had been published.

13 See further *C Harlow*, 'Public' and 'Private' Law: Definition without Distinction (1980) 43 MLR 241. Cf *G Samuel*, Public and Private Law: A Private Lawyer's Response (1983) 46 MLR 558.

14 Any act or omission done or made by a public official in purported performance of the functions of his office can found an action for misfeasance: *Northern Territory of Australia v Mengel* (1995) 185 Commonwealth Law Reports (CLR) 307, 355 per Brennan J.

15 The term includes a court or tribunal, and any person certain of whose functions are functions of a public nature: sec 6(3) HRA. In relation to a particular act, a person is not a public authority on grounds of its functions of a public nature if the nature of the act is private: sec 6(5) HRA. It is therefore clear that a person (a 'hybrid' rather than 'core' public authority) may act as a public authority while exercising public functions and as a private person while engaging in acts of a private nature. In this context, 'public' has been interpreted to mean 'governmental', and held not to extend to the operation of care homes by a private company to which a local council has delegated its statutory responsibilities as regards the provision of care and accommodation: *L v Birmingham City Council* [2007] United Kingdom

duties. Additionally, even in claims in negligence, the concepts of *justiciability*, *discretion* and *the policy sphere* are typically applied only to public authorities (or, conceivably, private persons) when they exercise specifically public functions, and not in performing acts of a private nature such as driving or maintaining motor vehicles, and providing medical care. There is thus some underlying, implied conception of where the line between public and private should be drawn, but it is not very precise and to a large extent consists in a sliding scale rather than an unwavering boundary.[16]

D. COURTS AND PROCEDURES

06 Damages claims against public authorities are brought in the ordinary courts under the ordinary rules of civil procedure. There is a limited and rarely used[17] power to order the payment of compensation under administrative law proceedings for *judicial review*,[18] which are subject to different procedural rules (Civil Procedure Rules (CPR) Part 54) and heard by specialised judges (though still within the ordinary civil courts). Although CPR Part 54, in the interests of efficient government, imposes a number of procedural restrictions on applications for judicial review (eg a very short limitation period of three months[19]), the courts have allowed litigants to side-step these restrictions by bringing ordinary civil claims against a public body in cases where they seek to vindicate *private rights*, amongst which is included the right to recover damages for harm caused in breach of a duty of care.[20] In such a claim, the ordinary rules of evidence (including proof on the balance of probabilities), time limits[21] and procedures apply.

House of Lords (UKHL) 27, [2008] 1 AC 95 (where the House of Lords accepted that the definition should reflect the approach of the European Court of Human Rights (ECtHR) to the identification of those bodies which engage the responsibility of the State under the Convention). See further *A Williams*, Public Authorities, in: D Hoffman (ed), The Impact of the UK Human Rights Act on Private Law (2011).

16 See further *Law Commission*, Remedies against Public Bodies: A Scoping Report (2006) paras 5.9–5.15 ('What is distinctive about the state as a party').

17 See no 8 below.

18 Senior Courts Act 1981, sec 31(4). The Law Commission proposed that damages should be available generally in judicial review, subject to the same (proposed) restrictions as in tort (*Law Commission*, fn 11, para 2.10), but it later retracted its package of proposals in *Law Commission*, Administrative Redress: Public Bodies and the Citizen, Law Com No 322 (2010): see no 50 ff below.

19 Rule 54.5 CPR.

20 See *Davy v Spelthorne Borough Council* [1984] AC 262.

21 Different time limits previously applied to actions against public authorities but these were repealed by the (now also repealed) Law Reform (Limitation of Actions etc) Act 1954. It may be noted that the statutes of limitation only have the effect of extinguishing the claimant's remedy, not the underlying right of action.

E. REMEDIES

07 The full range of remedies available against private persons is also applicable in actions against public authorities. By way of exception, injunctions are not available against the Crown[22] except insofar as Member State liability under EU law is concerned.[23] Furthermore, where the claim is founded on the HRA, the award of damages is discretionary and governed by principles distinct from those applying to ordinary tort claims.[24] Otherwise, however, entitlement to damages and entitlement to an injunction are assessed according to ordinary general principles. Broadly the same requirements apply to both remedies, except that injunctions are discretionary remedies and (for example) are not available where damages alone would be sufficient.[25] Damages are usually compensatory, but exemplary (or 'punitive') damages may sometimes be awarded. In fact, one of the two bases on which such awards can be made at common law applies exclusively to public authorities: 'oppressive, arbitrary or unconstitutional action by the servants of the government'.[26] In principle, the other common law basis for such awards – where the defendant's conduct was calculated to make a profit exceeding the compensation payable – also applies to the liability of public authorities, but claims of this nature seem unlikely to arise in practice. Where one or other of the tests is satisfied, exemplary damages may be awarded even though the defendant's liability is vicarious.[27] Aggravated, nominal and contemptuous damages are available against public authorities as they are against private persons.

08 In an application for judicial review, the following remedies may be awarded at the court's discretion: a mandatory, prohibiting or quashing order; a declaration or injunction (including an injunction restraining a person from acting in an office in which he or she is not entitled to act); and damages,

22 Crown Proceedings Act 1947, sec 21. The immunity does not apply to ministers and other officers of the Crown unless the effect of the injunction would be to give relief which could not have been obtained in proceedings against the Crown directly: sec 21(2). The Act does not apply to applications for judicial review: see *M v Home Office* [1994] 1 AC 377.

23 See *R v Secretary of State for Transport, ex parte Factortame Ltd* [1991] 1 AC 603.

24 Sec 8 HRA; *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at [19] per Lord Bingham. See further no 40 below.

25 See further *K Oliphant*, Injunctions, in: id (ed), The Law of Tort (3rd edn 2015).

26 *Rookes v Barnard* [1964] AC 1129, 1226 per Lord Devlin. In practice, such awards are made most frequently against the police: see generally *Thompson v Commissioner of Police of the Metropolis* [1998] Queen's Bench (QB) 498. Lord Devlin's category does not extend to the commercial activities of nationalised enterprises (*AB v South West Services Ltd* [1993] QB 507) or to the oppressive and arbitrary acts of private corporations or individuals, no matter how powerful (*Rookes*, 1226 per Lord Devlin). For further discussion, see *V Wilcox*, Punitive Damages in England, in: H Koziol/V Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009).

27 *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065.

restitution or the recovery of a sum due.[28] A claim that is *only* for damages, restitution or the recovery of a sum due may not be brought as an application for judicial review, however.[29] If the court quashes the decision to which the application relates, it may in addition remit the matter to the court, tribunal or authority that made it, with a direction to reconsider the matter and reach a decision in accordance with the findings of the court, or substitute its own decision.[30] Damages are available in judicial review proceedings only where they would be recoverable in an ordinary civil claim[31] and in practice are awarded only 'in exceptional circumstances'.[32]

09 A finding of public law unlawfulness does not establish the breach of duty necessary to bring a civil action for damages. However, the quashing of a decision in an application for judicial review may 'facilitate' the damages claim,[33] and a finding of 'irrationality' may be regarded as conclusive of the public authority's negligence (see no 15 below). Conversely, rejection of the application for judicial review may prevent a civil claim for damages in accordance with the normal rules on *res judicata*.

F. POLICY CONSIDERATIONS[34]

10 Policy considerations either for or (more usually) against liability are expressly considered in the tort of negligence in deciding whether or not there is a duty of care, and they may well exert a covert influence in claims brought on other bases. A variety of public policy considerations have, in one case or another, been held to negate the duty of care that a public body or public official would otherwise owe. Amongst the most significant are the following: the need to preserve public funds;[35] the risk of detrimentally defensive action by public officials ('overkill');[36] and the conflict between the authority's duty to the public and the (proposed) private duty (eg health and social care professionals owe no duty of care to the parents of a child they take into protective care on suspicion

28 Senior Courts Act 1981, sec 31.

29 CPR rule 54.3(2).

30 Senior Courts Act 1981, sec 31(5). The Court can substitute its own decision only where there was an error of law by a court or tribunal: sec 31(5A).

31 *In re M* [1994] 2 AC 377, 418 per Lord Woolf.

32 *Law Commission* (fn 11) para 4.14.

33 *Law Commission* (fn 11) para 4.17, citing *Re McC (A Minor)* [1985] AC 528 and *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19.

34 See generally *Booth/Squires* (fn 4) ch 4.

35 See eg *Stovin v Wise* [1996] AC 923, 952 per Lord Hoffmann; *Booth/Squires* (fn 4) para 4.17 ff.

36 See eg *Rowling v Takaro Properties Ltd* [1988] AC 473, 502 per Lord Keith (Privy Council); *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63 per Lord Keith; *Booth/Squires* (fn 4) para 4.26 ff.

of having been abused: a duty to the parents might conflict with the overriding duty owed to the child[37]). The concern to respect the constitutional separation of powers is evident in various concepts employed to limit the scope for judicial consideration of the reasonableness of administrative decisions, most notably justiciability, discretion and the policy/operations dichotomy (see further no 21 ff below).

II. LIABILITY FOR UNLAWFUL CONDUCT OR FAULT

A. BASIC PRINCIPLES

11 As previously mentioned, public authorities are subject to broadly the same tortious liabilities as private persons. The principal torts that may be committed by public bodies are *negligence*, *breach of statutory duty* and *misfeasance in public office*.[38] The latter is exceptional in being a liability that may only be incurred by a public authority, and not by a private person.

12 Liability normally depends on fault (negligence or intentional wrongdoing) rather than the unlawfulness in a public law sense of what was done. Even liability for breach of statutory duty can be conceived as fault-based, though that depends on the standard laid down by the statute. Generally, no distinction is drawn between legal and natural persons, with the consequence that (for example) public officers, agents and employees are subject to liability on the same conditions as the bodies for which they work, while the latter may incur a 'direct' liability for their own conduct that is distinct from their vicarious liability for others.[39]

13 There is no general principle by which the State as such (ie the Crown) assumes liability for torts committed by public bodies or the latter's officers, agents or employees. But by statute the Crown is subject to certain liabilities in tort to which it would be subject if it were a private person of full age and capacity, including liability in respect of torts committed by its servants or agents.[40]

37 *D v East Berkshire NHS Trust* [2005] UKHL 23, [2005] 2 AC 373.

38 These are the three torts highlighted as particularly relevant in this context in *Law Commission* (fn 11) para 3.106 ff.

39 See generally *Booth/Squires* (fn 4) para 5.56 ff.

40 Crown Proceedings Act 1947, sec 2.

B. DEFINITIONS

1) General

14 In English law, it is the generally the negligence of the public authority that is crucial, not the simple unlawfulness of its action. According to a frequently cited dictum, '[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'[41] No distinction is made between different grades of negligence – in conformity with general tort law.

15 Although the English law of public authority liability focuses on the authority's fault, rather than the unlawfulness of its actions, the relationship of the public law conception of unlawfulness and private law fault still warrants consideration. In public law, a public authority's conduct is unlawful if it is illegal, irrational or procedurally improper.[42] It must be immediately noted that neither illegality nor procedural impropriety entails negligence – because (for example) the authority may have reasonably misconstrued its powers or the procedure to be followed.[43] However, the same does not seem to be true as regards the other form of public law unlawfulness, namely, irrationality. A public authority acts irrationally in the necessary sense if its conduct is so unreasonable that no reasonable public authority could have acted in the same way. This test is sometimes known as the test of '*Wednesbury* unreasonableness' after the leading case.[44] It seems to be a necessary inference that conduct that is *Wednesbury* unreasonable must also be negligent; however, such conduct will not necessarily give rise to liability in the tort of negligence, because that requires that the defendant owe the claimant a duty of care in respect of the type of harm suffered, and no duty will be owed unless such harm was reasonably foreseeable, a proximate relationship existed between the parties, and it would be fair, just and reasonable to recognise a duty of care.[45]

41 *Blyth v Birmingham Waterworks Co* (1856) 11 Exchequer Reports (Ex) 781, 784 per Baron Alderson.
42 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
43 See especially *Rowling v Takaro Properties Ltd* [1988] AC 473.
44 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 King's Bench (KB) 223.
45 *Caparo v Dickman plc* [1990] 2 AC 605.

2) Specific Torts

a) Negligence[46]

16 For most practical purposes, public authority liability in English law refers to liability in the tort of negligence. A number of specific points must be noted: (a) The ordinary requirements of a duty of care, breach of duty, and resulting harm all apply. (b) A duty of care will not be found to exist simply because the defendant has been entrusted with a public function and public funds with the intention of benefiting a class of which the claimant is a member. The bases on which a duty of care can be imposed on a public body or public official are the same as those applicable to private persons. (c) Conversely, a variety of public policy considerations may negate the duty of care that a public body or public official would otherwise owe (see no 10 above). Such policy considerations may also negate any duty of care where the defendant is a private person, but they seem to be given greater weight in claims against the State. (d) Over time, the courts have also invoked various other concepts (eg the *non-justiciability* of certain decisions, including *policy* decisions and those involving the exercise of *discretion*) to preclude liability for negligence in the performance of public functions. How these concepts fit with the ordinary requirements of the tort is not entirely clear and has been much debated.[47] (e) For the above reasons, and others that cannot be addressed here, public authority (negligence) liability in English law is very limited in scope compared with other European systems, and several liabilities the latter would consider typical cannot arise (eg negligent refusal of a licence or permit[48]).

b) Breach of Statutory Duty[49]

17 Perhaps the next most important head of liability that a public authority may incur is for breach of statutory duty. In English law, this is considered to be a distinct tort in its own right, independent of liability in negligence.[50] English law does not therefore accept the 'statutory negligence' approach – under which breach of the statute itself automatically constitutes negligence – that has prevailed in some other common law jurisdictions[51] and indeed in parts of the civil law world.

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46 See generally Booth/Squires (fn 4) *passim*.

47 See especially *SH Bailey/MJ Bowman*, The Policy/Operational Dichotomy – A Cuckoo in the Nest [1986] Cambridge Law Journal (CLJ) 430; *SH Bailey/MJ Bowman*, Public Authority Negligence Revisited [2000] CLJ 85. See further no 21 ff below.

48 See *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853.

49 See generally Booth/Squires (fn 4) para 6.31 ff.

50 *London Passenger Transport Board v Upson* [1949] AC 155.

51 Cf *The Queen in the Right of Canada v Saskatchewan Wheat Pool* [1983] 1 Supreme Court Reports (SCR) 205 (Canada).

18 It is not every breach of statutory duty causing damage that attracts tortious liability. One has to refer to the purpose of the rule in question. It must be shown that Parliament intended not only (a) to protect the class of which the claimant is a member from the misfortune in question, but also (b) to provide a remedy in damages if damage should result from the breach.[52] In fact, Parliament rarely gives consideration to the question of private law remedies for the breach of statutory duties, and this requirement provides fertile ground for dispute. It would be fair to say that the courts have been reluctant to find any intent to impose liability in damages where the defendant is a public authority and that the tort consequently plays a limited role here in practice.[53]

c) Misfeasance in Public Office[54]

19 Misfeasance in public office, the only tort directed exclusively at public authorities, is committed where a public official deliberately injures the claimant or deliberately acts in excess of authority.[55] In principle, the liability applies to any such act or omission done or made by a public official in purported performance of the functions of the office.[56] In practice, the significance of this liability too has been limited, largely because of the difficulty of proving intentional wrongdoing.

20 Misfeasance in public office is a direct liability of the officer alone, not of the public body for which the officer works or the State. Although conscious misfeasance is the basis of the tort, vicarious liability can nevertheless arise in this context in an appropriate case.[57]

C. DISCRETION AND JUSTICIABILITY[58]

21 Over time English law has developed a number of mechanisms to make allowance for the element of discretion inherent in many decisions taken by or on behalf of the State, and the inherent unsuitability (or limited suitability) of many such decisions for judicial determination. The most important concepts employed in the case law are: (1) *vires*; (2) discretion; (3) a distinction between 'policy' and 'operational' spheres; (4) justiciability; and (5) irrationality.

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52 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731 per Lord Browne-Wilkinson.

53 *Law Commission* (fn 11) para 4.75 ff.

54 See generally Booth/Squires (fn 4) para 6.02 ff; M Aronson, Misfeasance in Public Office: A Very Peculiar Tort (2011) 35 Melbourne University L Rev 1; J Murphy, Misfeasance in a Public Office: A Tort Law Misfit? (2012) 32 Oxford Journal of Legal Studies (OJLS) 51.

55 *Three Rivers District Council v Bank of England (No 3)* [2003] AC 1.

56 *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, 355 per Brennan J.

57 *Racz v Home Office* [1994] 2 AC 45. Cf the approach to vicarious liability and exemplary damages: see no 7 ff above.

58 See generally *Booth/Squires* (fn 4) ch 2; *Lunney/Oliphant,* Tort Law: Text and Materials (fn 4).

1) Vires

22 In *Home Office v Dorset Yacht Co Ltd*,[59] perhaps the first modern attempt to grapple with the negligence liability of public authorities,[60] it was suggested that liability should turn on an application of the public law test of whether or not the defendant's conduct was *ultra vires*. Lord Diplock stated:[61]

> 'The public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred on them by Parliament…'

23 Though later cases adopted the language of *vires*, the difficulties inherent in this approach soon came to be recognised.[62] The mere fact that a public authority has been found to have acted *ultra vires* does not mean that consequential injury should be actionable. *Ultra vires* conduct is not necessarily negligent conduct (eg in the case of a non-culpable misconstruction of a statute); nor does it establish the elements of foreseeability, proximity and fairness, justice and reasonableness which are necessary to give rise to a duty of care. Indeed, where *ultra vires* merely denotes a procedural error or the misconstruction of a power, the subject-matter of the case before the court may remain entirely unsuitable for judicial resolution.

2) Discretion

24 Another approach has been to ask whether the conduct in question fell within the ambit of a discretion that the defendant was exercising. In the *Dorset Yacht* case, Lord Reid elaborated:[63]

> 'Where Parliament confers a discretion … there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament

59 [1970] AC 1004.

60 As suggested by *Booth/Squires* (fn 4) para 1.02.

61 [1970] AC 1004, 1067.

62 See eg *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 736 per Lord Browne-Wilkinson ('I do not believe that it is either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence'). In fact, doubts have even been expressed about the utility of the concept of *ultra vires* in public law: see eg *P Craig*, Ultra Vires and the Foundations of Judicial Review [1998] CLJ 63.

63 [1970] AC 1004, 1031.

> has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power.'

25 On the facts of the case, the Law Lords held that the carelessness of officers at a young offender institution in leaving a group of boys unsupervised while engaged in extramural activities was indeed in excess of any discretion that had been conferred upon them. Lord Pearson distinguished a situation where 'the defendants had, in the exercise of their discretion, released some of these boys, taking them on shore and putting them on trains or buses with tickets to their homes'.[64] This would have been a valid exercise of discretion for which no liability could arise.

26 Though not all are convinced by the utility or aptness of the concept,[65] later cases have accepted no liability can arise for conduct within the ambit of a statutory (or prerogative) discretion.[66] Yet, discretion should not be looked at in 'all-or-nothing' terms; rather we should think of a sliding scale along which the nature and degree of the discretion conferred can vary significantly. The mere existence of some small element of discretion is insufficient to preclude the imposition of a duty of care:[67]

> 'Acts may be done pursuant and subsequent to the exercise of a discretion where a duty of care may exist – as has often been said even knocking a nail into a piece of wood involves the exercise of some choice or discretion and yet there may be a duty of care in the way it is done. Whether there is an element of discretion to do the act is thus not a complete test leading to the result that, if there is, a claim against an authority for what it actually does or fails to do must necessarily be ruled out.'

3) Policy and Operational Spheres

27 As the existence of an element of discretion in the task being performed thus does not exclude the possibility of a duty of care, it is necessary to explore more closely the *nature* of the discretion conferred. In a well-known passage of

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64 [1970] AC 1004, 1053.

65 See eg *D v Commissioner of Police of the Metropolis* [2015] England & Wales Court of Appeal (Civil Division) (EWCA Civ) 646, [2016] QB 161 at [68] per Laws LJ: 'Such a margin of discretion is, however, quite foreign to the adjudication of common law claims: once the court has ascertained what the relevant duty of care requires, its remaining task is to decide whether there has been a breach of the duty causing damage. No margin of discretion enters into the exercise.'

66 See eg *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 736 f per Lord Browne-Wilkinson.

67 *Barrett v London Borough of Enfield* [2001] 2 AC 550, 571 per Lord Slynn.

his opinion in *Anns v Merton LBC*,[68] Lord Wilberforce resorted to a distinction between *policy* and *operational* spheres of a public body's activities:

> 'Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion", meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes, also, prescribe or at least pre-suppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion". It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose on it a common law duty of care.'

28 It may be noted that Lord Wilberforce used the term 'policy' in this passage in a special sense. He was not referring to considerations of public policy that bear upon the fairness, justice and reasonableness of imposing a duty of care. Rather, he was highlighting the need to enquire whether activities undertaken by a public authority in the policy sphere (eg in assessing budgetary priorities) raise issues that are truly suitable for judicial resolution.

4) Justiciability

29 This point was reinforced when Lord Wilberforce's distinction between policy and operational spheres was subsequently considered by Lord Keith, delivering the advice of the Privy Council in the case of *Rowling v Takaro Properties Ltd*:[69]

> '[T]his distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks … [C]lassification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist.'

30 In the quoted passage, Lord Keith underlines that the policy–operations distinction is not 'a touchstone of liability'. It does not itself determine whether there is a duty of care; it is only a mechanism for filtering out claims which are unsuitable for judicial resolution. In the literature, this idea of suitability

68 [1978] AC 728, 754.
69 [1988] AC 473, 501.

for judicial resolution frequently goes by the name 'justiciability'.[70] How justiciability is to be assessed remains somewhat uncertain, and there is an element of circularity in doing so with reference to ideas of discretion and policy which themselves already express the unsuitability of certain matters for judicial decision. And yet, there is no more fundamental notion to which reference can be made at this point, and it is thus inevitable that the courts will rely on somewhat intuitive judgments as to what is 'discretionary' or 'in the policy sphere' and so 'non-justiciable'.

5) Irrationality

31 A final concept used by the courts in determining whether public authority liability can arise is 'irrationality' or '*Wednesbury* unreasonableness'. As mentioned above (no 15), conduct is unreasonable in the necessary sense if it is so unreasonable that no reasonable public authority would have acted that way. A finding of irrationality thus presupposes that the conduct in question was indeed suitable for judicial evaluation – indeed, it is the outcome of such evaluation. The test is sometimes presented as an alternative to the ordinary test of negligence, but it has been convincingly argued that it *is* simply the ordinary test of negligence in the form it must assume when applied to contexts in which a range of reasonable courses of action were open to a public authority defendant.[71]

6) Integration within Ordinary Approach to Liability

32 How the various factors listed above can be integrated within the ordinary approach to liability is far from self-evident, but there seems to be an emerging consensus that three distinct phases of inquiry should be distinguished:[72] (1) Does the alleged negligence relate to policy considerations that are unsuitable for judicial resolution (ie non-justiciable): if so, the claim fails *in limine*; if not, the court must determine whether the public authority owed the claimant a duty of care. (2) In deciding whether or not the public authority owed the claimant a duty of care, if the alleged negligence relates to the exercise of a discretion involving the evaluation of policy considerations may be a reason for finding that it would not be fair, justice and reasonable to recognise such a duty on the circumstances of the case; if so, the claim fails for that reason. (3) If, however, the

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70 See *PP Craig*, Negligence in the Exercise of a Statutory Power (1978) 94 LQR 428; *Booth/Squires* (fn 4) ch 2.

71 *Bailey/Bowman* [1986] CLJ 430, 434 ff; *Bailey/Bowman* [2000] CLJ 85, 130 f. But cf *D Nolan*, Varying the Standard of Care in Negligence [2011] CLJ 651, 659–63 and 667–69.

72 This approach is broadly consistent with that adopted by Lord Browne-Wilkinson in the leading case of *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 740 ff and by *Booth/Squires* (fn 4).

public authority did owe the claimant a duty of care, the court must determine whether the authority breached that duty on the facts, and where the alleged breach of duty relates to the exercise of a discretion the court should ask whether the authority's conduct was *irrational* in the sense of being so unreasonable that no reasonable public authority would have acted that way.

D. INDIVIDUAL AND INSTITUTIONAL LIABILITY[73]

33 A public employer is strictly liable for torts committed by its employees in the scope of their employment (*vicarious liability*), but the employee may also be sued personally by the victim, and is in theory subject to the employer's right of indemnity,[74] though this is almost never exercised.[75] The same applies in respect of relationships of principle and agent, and similar relationships in which there is no contract of employment.[76] Where multiple tortfeasors are responsible for the same damage, the ordinary rule of *joint and several liability* applies in claims against one or more of them by the victim[77] – there is no discretion to make a proportional award instead.[78] As between themselves, however, the relative responsibility of each tortfeasor is reflected in the rights of contribution and indemnity that arise – here, apportionment is the rule.[79]

34 There is no general principle by which the State as such (ie the Crown) assumes liability for torts committed by public bodies or the latter's officers, agents or employees. By statute, the Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject in respect of torts committed by its servants or agents, any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer, and any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.[80] No such liability arises, however, in respect of the discharge or purported discharge of responsibilities of a judicial nature or responsibilities connected with the execution of judicial process.[81]

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73 See generally *Booth/Squires* (fn 4) para 5.56 ff.

74 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

75 Reliance on the indemnity is normally excluded by collective agreement. See generally *R Lewis*, Insurers' agreements not to enforce strict legal rights: bargaining with Government and in the shadow of the law (1985) 48 MLR 275, 281 ff.

76 For the police, see Police Act 1996, sec 88(1).

77 See *S Steel*, Joint Torts, in: K Oliphant (ed), The Law of Tort (3rd edn 2015).

78 Cf *Law Commission* (fn 11) para 4.84 ff, and no 50 ff below.

79 See Civil Liability (Contribution) Act 1978.

80 Crown Proceedings Act 1947, sec 2.

81 Ibid, sec 2(5). See further *D Feldman* (ed), English Public Law (2nd edn, 2009) para 6.57 ff and no 43 below.

E. RANGE OF APPLICATION

35 In English public authority liability law, more attention is typically paid to areas of 'no duty' or 'restricted duty' than those where a duty of care is readily established. The following may be given as illustrations of no-duty or restricted-duty situations: the investigation of crime by the police;[82] the response of the fire service to emergency calls[83] (but cf the ambulance service[84]); financial regulation;[85] dangerous driving conditions on a road subject to highway authority control;[86] and the investigation by social services of suspected child abuse (duty to a child taken into care but not to the parents,[87] or to children not taken into care but left in harmful domestic environment[88]). Several of these examples reflect the common law's reluctance to impose duties of affirmative action, no less upon public authorities than private persons.[89] The exclusionary rule generally applicable to pure economic loss also applies in public authority liability claims, again with the effect of limiting the circumstances in which such claims can succeed.[90] To some limited extent, these restrictions may be circumvented by bringing a claim under the HRA, which is considered below (no 40).

36 As regards the various situations in which an immunity from liability may arise – for example, in the judicial and legislative contexts – see no 43 ff below.

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82 *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of the Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495; *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225; *Michael v Chief Constable of South Wales Police* [2015] United Kingdom Supreme Court (UKSC) 2, [2015] AC 1732. Cf *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225 (HRA claim only).

83 *Capital & Counties plc v Hampshire County Council* [1997] QB 1004. See also *OLL Ltd v Secretary of State for Transport* [1997] 3 All England Law Reports (All ER) 897 (coastguard).

84 *Kent v Griffiths* [2001] QB 36.

85 *Davis v Radcliffe* [1990] 1 WLR 821. For specific statutory immunities, see no 45 below.

86 *Stovin v Wise* [1996] AC 923; *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057. Although sec 41(1) of the Highways Act 1980 imposes on every highway authority the duty to maintain the highways, and sec 58 expressly contemplates that breach of the duty is actionable in damages, this applies only to the maintenance in good repair of the physical fabric of the road and does not extend to the erection of traffic signs (*Lavis v Kent County Council* (1992) 90 Local Government Reports (LGR) 416) or the removal of dangers on land adjacent to the highway (*Stovin v Wise* [1994] 1 WLR 1124, CA). See further under Case 3.

87 *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373.

88 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

89 See especially *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; *D Nolan*, The Liability of Public Authorities for Failing to Confer Benefits (2011) 127 LQR 260.

90 See eg *Jain v Trent Strategic Health Authority* [2009] 1 AC 853 (pure economic loss caused by revocation of registration). On this case, see further under Case 2.

37 In practice, the following may be regarded as typical examples of public authority liability for negligence: the failure to maintain the highway;[91] the conduct of dangerous police operations without taking adequate precautions to avoid collateral damage;[92] a school's failure to identify and respond to a pupil's special educational needs;[93] and the failure of an official in the land registry to record an interest in land.[94]

38 Liability also arises outside the tort of negligence for (by way of example) assault, battery or false imprisonment by the police[95] or false imprisonment by the prison authorities in prolonging imprisonment beyond the term imposed.[96]

39 Actions for clinical negligence against health-care practitioners in the public sector are not considered to raise issues of public authority liability and are treated in the same ways as claims against health-care practitioners in the private sector. The same applies as regards road traffic accidents caused by public servants, even when driving in the performance of public functions, and to the liability of public authorities as employers or as occupiers of land. These are not considered to be claims with a specifically public character.[97]

F. VIOLATIONS OF HUMAN RIGHTS

40 Beyond the ordinary tort law claims discussed to this point, it should also be noted that the HRA established a statutory mechanism for obtaining compensation from a public authority in respect of its violation of rights under the ECHR.[98] The Act makes it unlawful for a public authority to act in a way which is incompatible with a person's Convention right[99] and provides that such conduct may be the subject of proceedings before a court.[100] Under the Act, the court has the power to grant whatever remedy within its powers it considers

91 Highways Act 1980, sec 58. As regards the liabilities of highway authorities, see further under Case 3.

92 *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242.

93 *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

94 *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.

95 See eg *Wilson v Commissioner of Police for the Metropolis* [2002] EWCA Civ 434 (battery); *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 (false imprisonment).

96 *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19.

97 Thus *Booth/Squires* (fn 4) addresses the liability of the ambulance service (para 12.34 ff) but not the liability of the National Health Service in general.

98 It must be noted that, at the time of writing, it was declared Government policy to repeal the HRA, though no concrete proposals had been published.

99 Sec 6(1) HRA. Sec 1(1) HRA specifies that 'Convention rights' means the rights and fundamental freedoms set out in arts 2 to 12 and 14 of the Convention, arts 1 to 3 of the First Protocol, and art 1 of the Thirteenth Protocol.

100 Sec 7(1) HRA.

'just and appropriate', including the award of damages where this is necessary to afford 'just satisfaction' to the victim.[101] The relationship of the statutory remedy with the general law of tort is much debated. Though some have argued for a convergence of the two bases of liability,[102] the prevailing approach is to treat them as separate and distinct, and the courts have been mostly resistant to arguments that the ordinary law of tort should be adapted the better to protect the Convention rights against violations by public authorities.[103] Conversely, where a claimant is able to recover damages in ordinary tort law, that generally has the effect of rendering it inappropriate to make any further award under sec 8.[104] To that extent, the common law liability may be regarded as primary, and that under the statute as secondary. The sec 8 case-law certainly suggests that the award of damages for violation of a Convention right will be rare. In 2006, the Department of Constitutional Affairs (now the Ministry of Justice), reviewing the first five years of the Act's operation, found only three cases in which damages had been awarded[105] – and one of these was subsequently overturned.[106] There seems to be a particular reluctance to recognise duties of affirmative action on public authorities in circumstances where no such duty would arise in the law of tort, and, even in the case of public authorities who (like the police) have general responsibilities for public safety, a duty to intervene to protect life arises only where there is a 'real and immediate risk' to an identified or identifiable individual.[107] Nevertheless, the courts have now awarded HRA damages in a number of different contexts – for example, the

101 Sec 8(1) HRA. See generally *Booth/Squires* (fn 4) ch 7.

102 See eg *J Steele*, Damages in Tort and under the Human Rights Act: Remedial or Functional Separation? [2008] CLJ 606 (favouring a degree of convergence); *J Varuhas*, A Tort-Based Approach to Damages under the Human Rights Act 1998 (2009) 72 MLR 750; *id*, 'Damages: private law and the Human Rights Act 1998 – never the twain shall meet?', in: D Hoffman (ed), The Impact of the UK Human Rights Act on Private Law (2011).

103 See eg *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225 at [136] ff per Lord Brown; *Michael v Chief Constable of South Wales Police* [2015] AC 1732 at [123] ff per Lord Toulson; *F Du Bois*, Human rights and the tort liability of public authorities (2011) 127 LQR 589; *D Nolan*, Negligence and Human Rights Law: The Case for Separate Development (2013) 76 MLR 286. For criticism, see *Giliker*, Europeanisation (fn 10) 140 ff.

104 The award of damages in ordinary tort law will normally constitute 'just satisfaction' for any claim brought under the HRA, as it is most improbable – if not inconceivable – that such damages will be exceeded by an award for the infringement of Convention rights under sec 8. Consequently, no additional 'top up' award of HRA compensation will normally be necessary, though such an award may be appropriate where the claimant is not someone entitled to bring an action for damages in ordinary tort law: see *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28, [2009] 3 All ER 319.

105 *Department of Constitutional Affairs*, Review of the Implementation of the Human Rights Act (2006), 18.

106 *van Colle v Chief Constable of the Hertfordshire Police* [2006] 3 All ER 963 (QB), reversed [2008] UKHL 50, [2009] 1 AC 225.

107 See *van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225; *Michael v Chief Constable of South Wales Police* [2015] AC 1732.

provision of psychiatric care,[108] child protection,[109] imprisonment,[110] detention under the mental health legislation,[111] the provision of social housing,[112] and police investigation of crime.[113] The award of HRA damages is discretionary and governed by principles distinct from those applying to ordinary tort claims.[114] In quantum they broadly reflect the level of awards made by the ECtHR in comparable cases brought by applicants from the UK or other countries with a similar cost of living.[115]

G. DEFENCES

41 The defences available generally in tort law apply, though the defence of statutory authority (for obvious reasons) is particularly often invoked. This provides that no liability will arise for doing that which the legislature has authorised, if it is done without negligence, even if it occasions damage to another; but an action lies for doing that which the legislature has authorised if it is done negligently.[116]

42 It is not strictly a defence that the claimant failed to exhaust all available appeal, complaint, etc, procedures before claiming on the basis of State liability,

108 *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 Appeal Cases (AC) 72 (suicide of voluntary psychiatric patient allowed to leave hospital when at real and immediate risk of taking own life; awards of £5000 for each parent).

109 *Re H (A Child: Breach of Convention Rights: Damages)* [2014] England and Wales Family Court (EWFC) 38 (taking of a new-born child into protective care in breach of its parents' Convention rights; award of £6,000 for each parent).

110 *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [2013] 2 AC 254 (administrative failures prolonging period of imprisonment; award of £6,500; cf award of £300 in conjoined case for anxiety and distress caused by delay in review hearing, even though the delay did not affect the period of detention).

111 *R (KB) v South London and South and West Region Mental Health Review Tribunal (Damages)* [2003] EWHC 193 (Admin), [2004] QB 936 (delay in arranging review of detentions under mental health legislation; awards of between £750 and £4,000; finding of infringement provided sufficient just satisfaction in two of the cases).

112 *R (Bernard) v Enfield LBC* [2002] EWHC 2282, [2003] Human Rights Law Reports 111 (local authority's failure to provide adequate housing for a disabled woman and her carer; awards of £8,000 and £2,000 respectively).

113 *D v Commissioner of Police of the Metropolis* [2016] QB 161 (police failures delaying identification and arrest of 'black cab rapist'; awards of £22,500 and £19,000 to victims).

114 Sec 8 HRA; *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at [19] per Lord Bingham. See further *Law Commission/Scottish Law Commission*, Damages under the Human Rights Act 1998, Law Com 266/Scot Law Com 180 (2000) and, for critical discussion, *Steele* [2008] CLJ 606; *Varuhas* (2009) 72 MLR 750; *id* (fn 102).

115 *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [2013] 2 AC 254.

116 *Geddis v Proprietors of Bann Reservoir* (1878) 3 Appeal Cases, Second Series (App Cas) 430.

though the existence of alternative procedures may stand against the recognition of a duty of care.[117]

H. SPECIAL CATEGORIES OF CASE

43 General immunities are enjoyed by the judge and the legislator. State liability for judicial and legislative acts or omissions can arise under EU law,[118] but not at common law.[119] At common law, judges are exempt from all civil liability for everything they say or do in their judicial capacity. They face civil liability only for judicial acts in excess of jurisdiction that are performed in bad faith.[120] For acts within jurisdiction, there is no liability even for acts actuated by malice.[121] Where a claim for damages is brought under the HRA, damages in respect of judicial acts may not be awarded in respect of a judicial act done in good faith except to compensate a person to the extent required by art 5(5) ECHR; such award is to be made against the Crown.[122] Otherwise, no proceedings lie against the Crown in respect of the discharge or purported discharge of any responsibilities of a judicial nature or connected with the execution of judicial process.[123] The Court Service, though an agency of the executive, was established wholly or partly to facilitate and implement the functions of the judiciary and its failure to discharge its responsibilities in connection with the execution or implementation of judicial process is covered by Crown immunity.[124] Even where Crown immunity does not arise, other mechanisms may be invoked to preclude the imposition of liability. For example, the Crown Prosecution Service owes no duty of care to a person investigated on

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117 See eg *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. Cf *Phelps v Hillingdon* [1999] 1 WLR 500, 672 per Lord Clyde (noting that alternative redress mechanisms may not provide for full compensation for the victim for both past and future harm).

118 As regards the legislator, see Joined Cases C-46/93 and C-48/93, *R v Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029; *R v Secretary of State for Transport, ex parte Factortame Ltd (No 5)* [2000] 1 AC 524.

119 As regards judicial acts, see Crown Proceedings Act 1947, sec 2(5).

120 *Sirros v Moore* [1975] QB 118; *Re McC (A Minor)* [1985] AC 528. As to magistrates, see Courts Act 2003, sec 31 f. *Re McC (A Minor)* provides an example of a case that was allowed to proceed in the basis of an excess of jurisdiction by magistrates. As to judicial immunity generally, see *A Olowofoyeku*, Suing Judges: A Study of Judicial Immunity (1993); *id*, Accountability versus independence: The impact of judicial immunity, in: G Canivet/M Andenas/D Fairgrieve (eds), Independence, Accountability and the Judiciary (2006); *J Murphy*, Rethinking tortious immunity for judicial acts (2013) 33 Legal Studies (LS) 455.

121 *Anderson v Gorrie* [1895] 1 QB 668.

122 Sec 9(3), (4) HRA.

123 Crown Proceedings Act 1948, sec 2(5).

124 *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306 (failure to implement judge's instruction to refer case to court for correction of error in calculation of prison term).

suspicion of crime and so cannot be liable for loss caused by its negligence in prosecuting such person.[125]

44 It is inconceivable that a liability in damages could be imposed upon a legislator. Under the HRA, both Houses of Parliament are excluded from the definition of the 'public authorities' owing the obligation to act compatibly with the Convention rights,[126] while the failure to make primary legislation is excluded from the definition of 'an act' within the scope of that obligation.[127]

45 Specific statutory immunities from tortious liability apply to the Financial Services Authority and Prudential Regulation Authority[128] and to designated universal postal service providers.[129]

46 A common law 'combat immunity' applies to members of the armed forces, both in actions inter se and in claims brought by non-combatants.[130] The immunity applies to actual or imminent armed conflict, but not to things done – for example, training or the provision of technology and equipment – before hostilities commenced or became imminent.[131]

III. LIABILITY FOR LAWFUL CONDUCT

A. PRINCIPLES

47 English law recognises State liability for lawful conduct only exceptionally, reflecting its rather hostile attitude towards strict liability for damage in general. Such strict liabilities as are recognised (eg under the rule in *Rylands v Fletcher*[132]) in principle apply to the State to the same extent as they do to private individuals. Sometimes, legislation authorising the pursuit of a potentially dangerous activity will subject the undertaker to a statutory liability

125 *Elguzouli Daf v Commissioner of Police of the Metropolis* [1995] QB 335.
126 Sec 6(3) HRA.
127 Sec 6(6) HRA.
128 Financial Services and Markets Act 2000, sch 1ZA para 25 and sch 1ZB para 33 respectively. The immunity does not extend to acts done in bad faith or contrary to sec 6(1) HRA.
129 Postal Services Act 2000, sec 90. The provider has a limited liability for loss of or damage to postal packets (sec 91) but is not otherwise liable for loss or damage caused by anything done or omitted to be done in relation to a postal packet in the course of transmission by post or the omission to carry out arrangements for the collection of anything to be conveyed by post: sec 90(1). Liability is also excluded for the provider's employees: sec 90(2).
130 *Mulcahy v Ministry of Defence* [1996] QB 732. This survives the abolition of the former exclusions of tortious liability in cases involving the armed forces by Crown Proceedings (Armed Forces) Act 1987, sec 1.
131 *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52.
132 (1868) LR 3 HL 330.

to compensate for resulting harm,[133] and provide for the same liability to be borne by the Crown where it is a government department that pursues the activity in question.[134] In some particular contexts – such as vaccine damage[135] and the slaughter of diseased animals[136] – statute provides for compensation from the public purse for those injured by measures taken for the general public good. Statutory schemes also apply to compensation for criminal injuries and miscarriages of justice. The Criminal Injuries Compensation Scheme (CICS) provides compensation in respect of personal injury which is directly attributable to being a direct victim of a crime of violence.[137] The compensation recovered under the CICS is calculated differently from that available by way of damages in tort law, being derived from a statutory tariff and not based on the personalised assessment undertaken in tort cases. The maximum award is £500,000.[138] As regards persons convicted of a criminal offence, compensation may be paid where the conviction has been reversed or the convicted person has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.[139] The entitlement to compensation is determined by the Secretary of State and its amount is assessed by an assessor appointed by him.[140] The maximum sum that may be awarded is £500,000 – or £1 million in cases of detention for at least ten years – and compensation for loss of earnings is limited to 1.5 times median annual gross earnings.[141] Compensation is awarded only when the conviction is quashed in full and there is no entitlement to compensation when a lesser verdict

133 The best example is the right to compensation for damage caused by nuclear installations (Nuclear Installations Act 1965, sec 12).

134 See Nuclear Installations Act 1965, sec 9 (read with sec 12).

135 See Vaccine Damage Payments Act 1979, analysed by *G Dworkin*, Compensation and Payments for Vaccine Damage [1979] J Social Welfare Law 330. A fixed sum of £120,000 is paid, limited to cases of severe (ie 60% or greater) disablement resulting from vaccination against specified diseases. Despite criticism of the scheme in Parliament, there are no current plans to reform it: see HC Deb 24 March 2015 vol 594 col 441WH.

136 See Animal Health Act 1981, secs 16A, 32A and 36. Following a major outbreak of foot and mouth disease in 2001, £1,158 million was paid in compensation in respect of the slaughter of over four million animals; the average payment to the farmers affected was around £125,000; the highest payment was over £4 million: *National Audit Office*, The 2001 Outbreak of Foot and Mouth Disease, HC 939, Session 2001–2002 (2002).

137 The Scheme was established under the Criminal Injuries Compensation Act 1995. See further *Ministry of Justice*, The Criminal Injuries Compensation Scheme 2012 (2012), available online at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf>. From a historical perspective, see *K Oliphant*, Landmarks of No-Fault in the Common Law, in: WH van Boom/M Faure (eds), Shifts in Compensation between Public and Private Systems (2007) nos 36–46.

138 Criminal Injuries Compensation Scheme 2012, para 31.

139 Criminal Justice Act 1988, sec 133.

140 Criminal Justice Act 1988, sec 133(3) and (4).

141 Criminal Justice Act 1988, sec 133A.

is substituted for the conviction quashed.[142] Nor is compensation paid where an innocent person who was remanded in custody for a substantial period is then acquitted or, having been convicted, has the conviction reversed by the ordinary process of appeal.[143]

48 Additionally, since the late 18th century, English law has provided for compensation for the expropriation of land for public purposes.[144] Compensation for depreciation in the value of real property caused by public works also came to be required even when there was no taking of the land affected.[145] The Law Commission has highlighted the deficiencies of the current 'patchwork of diverse rules', representing 'the result of more than 150 years of piecemeal and often incoherent development', that apply in this area[146] but its proposals for reform have yet to be implemented.[147] Though it is an established principle of statutory interpretation that legislation allowing the expropriation of property is to be construed – insofar as the wording, context and purpose allow – to provide for compensation in respect of the loss,[148] the common law recognises no overriding constitutional principle preventing the expropriation of property or interference with it without compensation.[149]

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142 *R (Christofides) v Secretary of State for the Home Department* [2002] EWHC 1083 (Admin), [2002] 1 WLR 2769.

143 For criticism of the scheme on these and other grounds, see *JR Spencer*, Compensation for wrongful imprisonment [2010] Criminal Law Review (Crim LR) 803.

144 For a summary of the current law and its historical development, see *Law Commission*, Towards a Compulsory Purchase Code: (1) Compensation, Law Com 286 (2003), Appendix C. The main current legislative provisions are the Acquisition of Land Act 1981 and, in respect of compensation, the Land Compensation Act 1961.

145 See now Compulsory Purchase Act 1965 (CPA) sec 10 (compensation for 'injurious affection' caused by the construction of public works), considered in *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC, and Land Compensation Act 1973 (LCA) Part I (compensation payable where the value of property is depreciated by physical factors (noise, vibration, smell, etc) caused by the use of highways, aerodromes and other public works). Compensation is only payable if it exceeds £50 in amount: sec 10(2) CPA; sec 7 LCA. The historical background to and main features of the LCA are described by Carnwath LJ in *Thomas v Bridgend County Borough Council* [2011] EWCA Civ 862, [2012] QB 512 at [15] ff.

146 *Law Commission* (fn 143) xiii and para 1.29.

147 Though some practical issues were addressed by the Planning and Compulsory Purchase Act 2004, this did not undertake the full revision of compensation provisions recommended by the Law Commission: *D Elvin*, The Planning and Compulsory Purchase Act 2004: reform of the law of compulsory purchase: compulsory purchase for planning purposes, compensation and procedure (2004) Journal of Planning & Environment Law 1339, 1339.

148 See eg *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744, 760 per Lord Parmoor and 763 per Lord Wrenbury. This has been buttressed by sec 3 HRA, which requires legislation to be read and given effect in a way which is compatible with the ECHR rights specified '[s]o far as it is possible to do so'; the right to property under art 1 of the First Protocol is included.

149 In *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508, 530 Lord Reid stated that, where a public authority has two alternative statutory methods of achieving the same objective, it is entitled to adopt the one which imposes the least burden on the public purse. This remains true under the HRA, though the public authority's decision

B. JUSTIFICATIONS

49 The issue of liability for lawful acts is not much discussed by English lawyers, though the idea is not without its supporters.[150] For example, Tom Cornford has argued for recognition of a principle of strict liability for lawful acts by a public authority, drawing an express comparison with the French doctrine of *égalité devant les charges publiques* and the principle of liability for lawful acts recommended in 1984 by the Committee of Ministers of the Council of Europe.[151] In his view, the same principle already underpins English law insofar as it provides compensation for the expropriation of property and there is scope for giving it wider application with reference to the ECHR right to property, now incorporated in domestic law by the HRA.[152] Though the argument is cogently put, it has not attracted significant interest from scholars or law reformers.[153]

IV. CONCLUSIONS

50 Launching a consultation in 2008 on the law relating generally to administrative redress, the Law Commission expressed the opinion that the prevailing English approach led to results which were 'inconsistent and unpredictable and in some cases unjust'.[154] It doubted whether generally applicable restrictions on liability were justified when the defendant was a public body,[155] and proposed therefore the introduction of a special regime balancing

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may have to satisfy a test of proportionality: *Cusack v Harrow London Borough Council* [2013] UKSC 40, [2013] 1 WLR 2022.

150 In addition to the work discussed in the text, see also *Street* (fn 1) 78 ff; *Spencer* [2010] Crim LR 803, 815 ff; *C Harlow*, Rationalising administrative compensation [2010] Public Law (PL) 321 (advocating adoption of a principle of compensation based on risk as a principle of good public administration). See also *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42 at [45], where Lord Nicholls accepted the fairness of spreading the cost of damage suffered by a minority placed at risk by the provision of a general amenity: the minority 'ought not to be required to bear an unreasonable burden.'

151 Council of Europe, Recommendation No R (84) 15 of the Committee of Ministers to Member States Relating to Public Liability, 18 Sept 1984, Principle II.

152 *Cornford* (fn 1) chs 5 and 9. The principle was also considered in an independent review of administrative law in the United Kingdom, which concluded in 1988 that there was no case for legislation to implement the principle because Parliamentary practice was already to intervene and provide compensation (which could be partial) in those situations in which there was a special need for protection: *Committee of the JUSTICE-All Souls Review of Administrative Law in the United Kingdom*, Administrative Justice: Some Necessary Reforms (1998) paras 11.42–11.51 and 11.92.

153 The possibility of introducing the principle to English law was not addressed by the Law Commission in its recent work on administrative redress: *Law Commission* (fn 11); *id* (fn 18).

154 *Law Commission* (fn 11) para 3.137.

155 Ibid, para 3.136 ff.

the interests of aggrieved claimants against the danger that liability might create an undue burden on resources.[156] Under the proposal, the liability of public bodies for 'truly public' acts or omissions would be limited by a new requirement of 'serious fault', and restricted to situations where the underlying legislative scheme was intended to confer rights or benefits on the individual claimant. The intention was to expand the range of cases in which damages are potentially available – because the existing limitations on liability leave a number of gaps – but at the same time to counteract any consequential increase in liability costs by raising the threshold of fault. The latter consideration also underpinned the Commission's further recommendation that there should be a departure from the ordinary English rule of 'joint and several' liability by which any party liable in tort for the same damage may be ordered to compensate the victim in full, albeit with the right to seek contribution or indemnity from other responsible parties. It was felt that joint and several liability could operate harshly in the present context, as the State – always an attractive target for litigation because of its 'deep pockets' – would be left to bear the full cost of compensating the victim if other responsible parties were insolvent or could not be traced, even if its culpability was comparatively small.[157] The Law Commission's recommendation was that there should be a judicial discretion to apportion the liability of a public body for a truly public act or omission when this would be equitable in a given situation.

51 The Commission explicitly linked its proposed requirements of 'serious fault' and 'intent to confer a benefit' with the EU Court of Justice's approach to Member State liability.[158] However, the CJEU's test of 'sufficiently serious breach' seems to have been inadvertently transformed in adapting it to English law, becoming in the Law Commission's proposal a test of 'serious fault'. The CJEU test – by way of contrast – does not necessarily entail fault as it is conceived in English law, even if the degree of fault exhibited is a relevant consideration in determining seriousness.[159] To that extent, the Law Commission's proposal seemed rather more restrictive than the test on which it purported to be modelled.

52 The requirement of an intent to confer a benefit on the claimant was superficially similar to the existing requirement of the tort of breach of statutory duty that the statute was intended to confer a private right of action on the claimant. But the Law Commission's proposed test was in fact somewhat more easily satisfied because Parliament may intend to benefit particular sections of

156 Ibid, para 4.3.
157 Ibid, para 4.64 ff.
158 Ibid, para 4.4, referring to Case C-6/90, *Francovich v Italy* [1991] ECR I-5357.
159 *R v Secretary of State for Transport, ex parte Factortame Ltd* (No 5) [2000] 1 AC 524.

society by the passage of particular legislative provisions without adverting at all to the question whether an action for damages should be allowed if there is a breach of duty. Implementation of the proposal would therefore have meant that the separate tortious liability for breach of statutory duty was effectively redundant in actions against public bodies, and the Consultation Paper in fact contemplated its abolition in that context, though not as regards breaches of health and safety legislation.[160]

53 The Law Commission's proposals elicited a somewhat hostile reaction from many academic commentators, who perceived a lack of clarity and coherence in the key concepts of 'serious fault', 'truly public' and 'conferral of benefit', and objected to the State putting itself apart from the ordinary citizen by excluding its liability for 'mere' negligence. To at least one respected commentator, the proposals were 'unprincipled and lacking in coherence'.[161] The Government was no more enthusiastic, and the Law Commission announced in May 2010 its decision not to press the issue of reform further in view of this opposition of its 'key stakeholder – Government'.[162] One judge subsequently remarked that 'it is a troubling comment on the functioning of the separation of powers that the state's independent law reform advisory body has had to abandon a project affecting the liability of government to governed principally because the control exercised by government over Parliament would frustrate any reform, however wise or necessary, which would make government's life more difficult.'[163]

54 Nevertheless, the Law Commission continues to believe that reform is desirable so as to address shortfalls in the law, even if it is not politically feasible at present. In that, it probably expresses the opinion of most participants in the system and the majority of observers.[164] Where differences emerge is in precisely *how* the system should be reformed, with some advocating a move away from civil liability altogether, in favour of a general remedy for public maladministration by way of a statutory compensation scheme,[165] while others press for the rationalisation of existing liability rules through the abandonment of current restrictions on liability, which they see as arbitrary and unfair.[166] At present, however, it seems most likely that the forces of legislative inertia will prevail.

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160 *Law Commission* (fn 11) para 4.105.

161 *T Cornford*, Administrative redress: the Law Commission's consultation paper [2009] PL 70, 70.

162 *Law Commission* (fn 18) paras 1.3 and 1.6.

163 *Mohammed v Home Office* [2011] 1 WLR 2862 at [23] per Sedley LJ.

164 For a selection of views, see *C Harlow* (fn 1); *S Bailey*, Public Authority Liability in Negligence: the Continued Search for Coherence (2006) 26 LS 155; *Cornford* (fn 1).

165 See *C Harlow* (fn 1). Cf *Bailey* (2006) 26 LS 155, advocating the development of ex gratia schemes and the provision of remedies through ombudsmen to fill in the gaps in the existing system of civil liability, but not a move away from civil liability altogether.

166 See eg *Cornford* (fn 1).