

PRIVATE LAW CLAIMS AGAINST PUBLIC AUTHORITIES

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INTRODUCTION

1. English public law, unlike some of our continental counterparts such as that of France, or EU Law, does not impose upon the state any liability to compensate those injured by maladministration. Thus, in order to obtain compensation, those who are harmed by maladministration must bring themselves within the ordinary law of tort.
2. There are some highly valued interests, generally of a personal character, any interference with which is tortious unless done with lawful authority. Thus any unjustified interference with a person's bodily integrity is liable to constitute an assault/battery or the tort of false imprisonment. The law of tort similarly protects the right to property. While public authorities are no more immune from liability in relation to such torts, the fact that they are the repositories of statutory powers exercisable for the public benefit is likely to mean that they have available to them lawful justifications for the interference with such personal interests that are not available to the private person. The police are given powers of arrest¹ and the prison authorities powers to detain² which, if exercised, lawfully will provide them with a defence of lawful justification. By the same token, if the arrest or detention does not fall within the scope of the statutory power a claimant will have an unanswerable claim for assault or false imprisonment. These torts are plainly very well suited to securing compensation for the unlawful exercise of coercive state power, including in addition to the policing and penal functions of the state, those arising in the fields of e.g. immigration detention, or the treatment of the mentally ill. But, being targeted at such a narrow spectrum of state activity, they are of little relevance to most public

¹ Under e.g s. 24 of the Police and Criminal Evidence Act 1984.

² Under the Prison Act 1952.

lawyers³. The public lawyer needs a tort that can be applied to any form of executive action, a tort of general application. There are really only two candidates for this: misfeasance in public office and negligence.

3. The aim of this paper is to look at these two torts and consider why, despite their general application, they offer only limited redress against public authorities. Negligence is by far the more complicated of the two and it takes up the majority of the discussion. Misfeasance in public office can be dealt with much more briefly.

MISFEASANCE IN PUBLIC OFFICE

4. Misfeasance in public office is unique among torts in that it is targeted exclusively at those exercising public power. All other torts are actionable against anyone. A second important feature, which it shares with negligence, is that it is (in principle at least) capable of applying to any exercise of public power. The combination of these two characteristics, suggests that this tort might be the perfect choice for the public lawyer wanting to secure some compensation for his client from maladministration. But there are two features of the tort, both given recent clarification by the House of Lords, which limit greatly its utility and this can readily be seen by the very small number of cases that are brought, or if brought, succeed⁴.

³ Most often claims in tort for assault or false imprisonment arise out of immediate physical conduct on the part of a public official towards a person. But this need not be so. The interference might also arise from the exercise of public power which is more remote and strategic in character. Thus, in *R (Lumba) v Secretary of State for the Home Office* [2012] 1 AC 245, the Defendant's unpublished policy of blanket detention had been applied to numerous sentenced foreign nationals and their detention thereby continued following the completion of their prison terms. The policy was declared unlawful with the result was that there was no lawful justification for their detention. The criteria for the tort of false imprisonment were thereby met. In *R (Evans) v Governor of Brockhill Prison* [2001] 2 A.C 19 the Governor calculated prisoners' release dates in accordance with a previous court decision later held to have been wrong. He was found to have lacked lawful justification for the Claimant's resulting detention.

⁴ This is well exemplified by the recent case of *Muuse v Secretary of State for the Home Department* [2010] EWCA 453 where the Court of Appeal reversed the trial judge's finding that the Defendant's officials were liable in misfeasance. Those officials were guilty of a catalogue of appalling failures which had resulted in the claimant spending many months in unnecessary detention. The appeal was allowed on the ground that the judge had not made the necessary findings of reckless indifference by the officials involved, as to the illegality of their actions.

5. The first decision of the House of Lords, *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 A.C 1 clarified what conduct on the part of the defendant must be proven to establish the tort.
 - a. The public officer exercised public power and either:-
 - i. Did so for an ulterior purpose specifically intending to injure the claimant.
 - ii. Did so, with reckless indifference to the fact that he had no power to do the act complained of and with reckless indifference to the probability of injury being caused to the claimant, or a class of persons of which the claimant was a member.
6. Bad faith is an element of both forms and it is this requirement which makes the tort very difficult to apply in practice to maladministration. It sets a high threshold of misconduct which is forensically difficult to prove save in the clearest of cases⁵.
7. *Watkins v Home Office* [2006] 2 A.C 395 was concerned with the question whether proof of material damage is an element of the tort. This was not in issue in *Three Rivers*, a case arising from the huge financial losses suffered by depositors following the collapse of the bank, BCCI. The claims were brought in respect of the failure by the Bank of England lawfully to discharge its regulatory functions over the bank, which was said to have led to those losses. *Watkins* concerned an entirely different exercise of public power. Together the two cases show just how widely the

⁵ It is inherently improbable that a public official will act in bad faith, and as the Court have repeatedly remarked: "The inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established": *H (A minor) (Sexual abuse: Standard of Care)* [1996] A.C 563, per Lord Nicholls at p. 586; but see also *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] 1 A.C 11 at 13.

tort can be applied. In *Watkins* the claim was brought against prison officers for having unlawfully searched the claimant prisoner's legally privileged correspondence which he kept in his cell. The claimant did not suffer any form of material loss, that is, loss of the kind ordinarily recognised by the law of tort such as personal injury or financial loss.

8. The House of Lords rejected the arguments advanced that misfeasance in public office does not require proof of damage so reversing the decision of the Court of Appeal⁶ which had trodden a middle path. The Court of Appeal had held that, in those cases where the misfeasance had resulted in the interference with a constitutional right, it was actionable without proof of material damage. Where no such right was infringed then proof of such material damage was required. In the House of Lords this approach was criticised in part on the ground that in a nation such as ours, with an unwritten constitution, there is much room for argument about which rights are constitutional⁷.

9. In *Watkins* Lord Bingham identified the two principles that come into conflict in relation to this tort:-

“8. There is great force in the respondent's submission that if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity.

“9 On the other hand, it is correctly said that the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not. If public officers behave with outrageous disregard for their legal duties, but without causing material damage, there are other and more appropriate ways of bringing them to book. It is said to be unnecessary and untimely to develop this tort beyond the bounds hitherto recognised.”

⁶ [2005] QB 883.

⁷ See e.g Lord Bingham at [27] and Lord Walker at [72(3)].

10. Being attracted to both principles Lord Bingham determined the case by conducting a historical review to ascertain the approach our courts and those in other jurisdictions had actually taken so far⁸. From this he concluded that the tort has never been actionable *per se*. In truth, in all the cases considered, the issue had never arisen or it had simply been assumed that material damage had to be proven. *Watkins* was the first case requiring the matter to be determined. No doubt a substantial reason for such conservatism, was that the Law Commission was in the process of conducting a detailed review of the field of monetary remedies against public authorities⁹. At that time, there was reason to believe that the outcome might be the creation of a statutory liability to pay compensation for maladministration. But, following *Watkins* the strong and unified objection across all central government departments to the Law Commission's final proposals left them a dead duck¹⁰.

11. The House of Lords may well have taken a different course had *Watkins* been decided in 2011 after the Law Commission's final report. As Lord Walker said in relation to the reliance Lord Bingham had placed on the historic origins of the tort, the tort had come a long way since then. Its unique character distinguishes it from other torts where the principle of corrective justice is much more dominant. In misfeasance a preventative purpose is plainly inherent. As such it is peculiarly well suited to be fashioned as a tort whose aim is to remedy maladministration *irrespective* of whether injury is caused. Even with such a broad compass, the inherent forensic challenges mean claims will remain few. There is then no public policy objection based on the risk of opening the floodgates, nor on the basis of the wasted cost to public authorities of having to field a

⁸ Lord Hope at [28] and Lord Carswell at [77] agreed.

⁹ See Law Commission discussion paper, 11 October 2004, "Monetary Remedies in Public Law" and its subsequent Consultation Paper, No. 187 "Administrative Redress: Public Bodies and the Citizen"

¹⁰ The review's completion in 2010 was unfortunate in its timing, coming in the wake of the 2008 banking crisis and the resulting drive towards austerity in public spending. For the final report see Law Comm No 322 "Administrative Redress: Public Bodies and the Citizen" (25 May 2010).

multitude of actions. And in those rare cases in which claimants do succeed, damages are likely to be very modest where no material loss has been suffered, compensating largely for distress and inconvenience. Where a larger award is made this will be because the Court judges it appropriate to mark its disapproval of the abusive, oppressive and unconstitutional conduct with an award of exemplary damages¹¹.

NEGLIGENCE

12. So is the law of negligence any more promising? Like misfeasance it is capable in principle of applying to any form of conduct which causes material loss. Unlike misfeasance there is no need to establish bad faith, the test being one of reasonableness. But there are other features of the law of negligence that confine its application within reasonable bounds. The accepted modern formulation remains that stated by the House of Lords in *Caparo v Dickman plc* [1990] 2 AC 605 at 617, 618. This requires that (1) the loss be reasonably foreseeable; (2) a sufficient relationship of proximity exists between the claimant and defendant and (3) that it is fair, just and reasonable to impose a duty of care. The case also established that while the categories of cases in which the law will recognise the existence of a duty of care are not closed, any novel categories of negligence will be recognised only incrementally and by analogy with established categories.

13. The law of negligence has been fashioned to regulate the relationship between private persons, not the business of governance by the state as it impinges on the individual. The courts have steadfastly refused to develop a special law of negligence as it applies to the discharge of public power or within the field of governance. The self same test applies to determine

¹¹ In the third case to have been considered by the House of Lords in the last decade, *Kuddus v Chief Constable of Leicestershire* [2002] 2 A.C 122 it was held that exemplary damages can be awarded in relation to this tort.

whether a public authority is liable in negligence as applies to a private person.

(1) The problems posed by the application of the law of negligence to public authorities.

14. The application of a tort fashioned to ensure corrective justice between private persons has caused very real problems for the courts in determining how it should apply to the business of governance. In governing the state performs a multitude of functions some of which protect or benefit society as a whole or classes of individuals, but do so nonetheless in the public interest. This is well exemplified by Lord Hoffman in *O'Rourke v Camden London Borough Council* [1998] 1 AC 188 at p. 193. The homeless claimant brought his claim in negligence for the failure of the local authority to provide him with accommodation in accordance with its duty under s. 63(1) of the Housing Act 1985:-

“[the [1985 Act] is a scheme of social welfare, intended to confer benefits at the public expense on grounds of public policy. Public money is spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest: because, for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services. The expenditure interacts with expenditure on other public services such as education, the National Health Service and even the police. It is not simply a private matter between the claimant and the housing authority. Accordingly, the fact that Parliament has provided for the expenditure of public money on benefits in kind such as housing the homeless does not necessarily mean that it intended cash payments to be made by way of damages to persons who, in breach of the housing authority's statutory duty, have unfortunately not received the benefits which they should have done”.

15. As well as acting in the general public interest, public authorities exercise powers and discharge duties which private persons simply cannot. The distinct nature of the exercise of public power and the business of governance gives rise to four critical concerns which lie at the heart of the problem of public authority liability in negligence:-

- a. Statutory powers and duties are conferred by Parliament on public bodies. Their exercise involves the taking into account and weighing of numerous competing considerations in the public interest. Those considerations involve questions of political, social and economic choice, often about the allocation of scarce resources and how risks should be distributed within society. Such choices are ones which the Court should not be making both as a matter of institutional competence but also on grounds of democratic accountability.
- b. Secondly, the lawful exercise of public law powers and duties is already regulated by public law principles, those principles themselves having been developed by the courts so as to ensure that the separation of powers is properly respected. Given this, there is a real danger that the imposition of a duty of care will cut across the application of those principles with the result that action which is lawful as a matter of public law will be unlawful in private law. In other words action which amounts to a perfectly lawful exercise of a discretion vested by Parliament in public authority can nonetheless land that authority in court and subject to an order to pay compensation to anyone injured by such lawful conduct.
- c. The powers or duties of public authorities, the manner of exercise of which gives rise to the claim in negligence, are conferred by Parliament in statutes. Yet the statutes do not themselves confer a cause of action for breach¹². The Courts are understandably wary of finding that as a matter of common law negligence a right to obtain compensation nonetheless arises where Parliament did not intend this: *Stovin v Wise* [1996] AC 923 at 952-3 per Lord Hoffman:-

“If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty

¹² This will inevitably be so if the Court is being asked to consider a negligence claim. If the statute conferred a cause of action in breach of statutory duty, there would be no need to bring the claim in negligence.

of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If 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”.

- d. By imposing a duty of care, the Court is elevating the interest in the delivery of corrective justice to the individual over and above the public interest with potentially damaging consequences. For example, the imposition of a duty of care could lead to unnecessarily defensive practices so skewing their conduct in the future and diverting scarce resources needlessly away from other important functions of the public authority. Or the imposition of a duty of care might undermine or cut across the very purpose for which the statutory power or duty was conferred¹³.

16. The problems these concerns have posed for the courts have found no easy or satisfactory resolution leading many commentators to despair over the lack of a coherent body of principle which can be applied to determine when a duty of care does nor does not arise. And it is not through want of trying; there have been numerous occasions, no less than 16 in the last 15 years alone, when the House of Lords has had the opportunity to revisit the problem¹⁴. Thus Booth and Squires observe that:-

“An attempt to reconcile the decisions, and to extract from the *X, Stovin, Barrett, Phelps* and other cases a unified set of principles toward which a ‘clarified law’ is ‘evolving’¹⁵, may lead to little more than

¹³ This was the view taken by Lord Browne-Wilkinson in *X (A Minor) v Bedfordshire* [1995] 2 AC at p. 749H as to the likely effect of imposing a duty of care on social workers in relation to their child protection functions when the decisions they had to take were made in a multi-disciplinary context involving very many actors, such as doctors, teachers, the police. Imposing liability on one party alone would, in his view, be manifestly unfair. But if liability were to be imposed on all parties this would lead to possibly insuperable difficulties in disentangling the respective responsibilities of the parties for the negligent decision.

¹⁴ Though there are many also who have welcomed the more recent flexible formulations of how the Court should approach its task in *Barrett v Enfield LBC* [2001] 2 AC 550 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619

¹⁵ The optimistic observations of Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (HL) a case which itself has generated much further uncertainty about the current state of the law and which is considered in detail below.

frustration. The courts' decisions have shifted to such an extent that there are simply few if any coherent principles that emerge from any one case which are not contradicted by other subsequent cases"¹⁶.

17. At the heart of the court's failure to find a principled way forward lies the simple fact that there is no objective answer to whether and if so to what extent governmental functions should be subjected to the law of negligence, that is, where the balance between corrective justice and untrammelled (by private law at least) governance should lie. All judges are agreed that the special features involved in the discharge by public authorities of their executive functions necessarily mean that there are many activities to which the law of negligence should not attach. At one extreme, are those judges who consider that the problems highlighted are capable of only one solution, namely that the law of negligence has absolutely no business whatever treading into territory that is exclusively governmental in nature¹⁷. For the vast majority who take a less extreme position, disagreement remains on what the decisive features are which mean cases should be excluded, or in other cases where it is not possible to take such a decisive position, on where the balance should lie between the two competing principles in the particular case. The inevitable result is inconsistency and contradiction across the decided cases.

18. It is really only through an examination of the ways in which the Courts have attempted to grapple with the problem that an understanding can be reached as to why we are today no nearer to a solution.

(2) Treating claims against public authorities as non-justiciable

(i) Claim in negligence against a public authority in respect of exclusively public law functions is not justiciable

¹⁶ *The Negligence Liability of Public Authorities*, Booth and Squires (OUP), 2006.

¹⁷ This would appear to be the firm view of the majority of the their Lordships in the House of Lords in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (HL)

19. As indicated there are some judges who consider that the law of negligence has no part to play in regulating the distinctly public aspects of public authority activities. Here, two factors which are special to public authority decision making come together to dramatic effect. The first, that statutory powers and duties are concerned to enable public authorities to develop policies and take action for the public benefit; and the second, that Parliament itself has not intended to confer a right of action for the breach of such powers and duties. It is possible to conclude from these two factors that the common law of negligence which has evolved to deal with relations between private individuals has absolutely no role to play in regulating the conduct of government in the exercise of statutory powers and duties, unless by its conduct the public authority has entered into a relationship with an individual which is no different from a relationship between private individuals and which has already been recognised as giving rise to a duty of care.

20. On this analysis it is the very fact that public authorities are exercising statutory powers and performing duties that private persons are simply incapable of doing and that they are doing so for the wider public benefit that means they should be not be subject to the same constraints as a private actor unless the terms of the statute themselves confer a right to sue for breach of statutory duty. This is so even if their functions are targeted at benefiting or protecting a particular community of highly vulnerable individuals who are entirely reliant on the public authority. The significance of the peculiarly governmental function and the wider public benefit for which it is performed are paramount.

21. The upshot of this is that a common law duty of care simply cannot be derived from the statutory powers or duties conferred on public authorities to govern. Those duties are wholly irrelevant to the task of discerning whether a duty of care is capable of arising and it follows that the Court has no jurisdiction to inquire whether a duty of care exists by reason of the existence of a particular statutory power or duty or the actual performance. Thus even if the exercise of the power or discharge of the duty was wholly

irrational, the gate remains firmly shut; the statutory power/duty simply cannot be used to impose a duty of care.

22. This is one way of reading the House of Lords decision in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057¹⁸. This was an omissions case arising out of the defendant's failure to act. It therefore gave rise to the added complication that save in exceptional circumstances the law of negligence does not impose a duty to act. While the case was itself concerned with omissions, the reasoning of the House or Lords is equally applicable to negligence claims brought in relation to the acts of officials. What is critical is whether the claimant is seeking to derive the duty of care from powers and duties conferred on the public authority by statute. It matters not whether what is complained of is an act done in the performance of such statutory functions or a failure to act in accordance with them.

23. In *Gorringe* Lord Hoffman appears to maintain a bright line distinction between cases where a duty of care is sought to be derived from the statutory power/duty alone, and those cases where, on analysis, the duty is said to arise by virtue of something specific and additional that had been done by the public authority beyond the performance of its statutory function, whether that be an act, the entering into a relationship or the undertaking of a responsibility. In the latter case the duty derived from what was done, not the source of the power by which that something was done, whether that be a statutory power/duty or otherwise. It was on this basis that he analysed the decisions in *Dorset Yacht v Home Office* [1970] A.C 1004 (bringing the young offenders onto an island and then leaving them unsupervised), *Barrett v Enfield London Borough Council* [2001] 2 A.C 550 (common law duty of care arising from the fact that the LA had assumed parental responsibility and thereafter undertaken certain actions

¹⁸ Given the potentially far reaching consequences of this decision it is remarkable that it was not reported in the Appeal Cases. This may well be because its implications have not been properly understood.

in relation to the child – that it did so in exercise of statutory powers was irrelevant) and *Phelps v Hillingdon LBC* [2001] 2 A.C 619 (the duty of care owed by the educational psychologist arose because s/he had impliedly undertaken to exercise proper professional skill in diagnosis in the same way as a doctor provided by the National Health Service. The fact that the doctor-patient relationship was brought into being pursuant to public law duties was irrelevant).

24. Lord Scott took a similar approach. At [71] he said this:-

“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 has 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”.

25. As noted, this principle that no duty of care can be derived from the statutory framework applies equally to the fashioning of a duty of care in respect of acts or omissions. It applies whenever the claimant is seeking to derive the duty of care from the existence or terms of the statutory duty or power. Whenever this principle applies, it necessarily must follow that no duty of care can be owed where the acts or omissions complained of are in respect of the performance or non-performance of a statutory function, because the only source from which a duty of care can arise in relation to such functions are the statutory functions themselves. It also follows that it makes no difference whether the performance or non-performance was

irrational or otherwise unlawful in a public law sense. The exclusively statutory nature of the exercise rules out the imposition of a duty of care.

26. The effect of such an exclusionary rule is dramatic both in the breadth of what is excluded but also, the resulting simplicity of the law in its application to public authorities.

The courts' approach since Gorringe

27. However, since the decision in *Gorringe* both the House of Lords and Supreme Court have frequently taken a different approach. Thus in *JD v East Berkshire Community Health NHS Trust* [2005] 2 A.C 373 in holding that no duty of care arose towards the parents of children who are allegedly negligently assessed by social workers to have been sexually abused by them, their Lordships did not refer to *Gorringe* or *Stovin* though the cases were cited in argument. Their Lordships asked whether it was fair, just and reasonable to impose the duty given the statutory context and more specifically the purpose for which the statutory functions were conferred, namely the protection of children. They held that it was not because the imposition of such a duty might inhibit social workers in discharging their statutory duties and so undermine the statutory purpose of protecting children. On a narrow reading of *Gorringe* this entire analysis was misplaced. The simple answer would have been that the issue was non-justiciable because a duty of care would necessarily need to be derived from the statutory functions the social workers were performing.

28. Other cases which have taken a far broader approach than *Gorringe* include

- a. *Jain v Trent Strategic Health Authority* [2009] 1 A.C 853: a case brought by the proprietors of a nursing home who claimed for financial loss suffered when the defendant health authority which was the registration authority for the purposes of the Registered Homes Act 1984, exercising the powers of the Secretary of State,

applied and were granted under section 30 of the Act an ex parte order for the cancellation of the claimants' registration in respect of the nursing home. As a result the home was closed for four months until the claimant home successfully appealed. Lord Scott, with whom the other Law Lords agreed, did not even refer to *Gorringe* even though the case was cited in argument and took markedly different approach. He rejected the claim not on justiciability grounds but on the basis that it would not be fair, just or reasonable to impose a duty of care given the statutory purpose namely the protection of residents in the home.: [20] and [28].

- b. *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861 (CA). strike out of negligence claim brought by claimant mother and children in respect of the Child Support Agency's assessment and enforcement of child maintenance payments. The claimants' complaints were that the CSA (i) delayed in carrying out the maintenance assessment; (ii) obtained inadequate information on which to base the assessment; (iii) made interim final assessments that were wrong; (iv) delayed in enforcing the assessments; and (v) delayed in dealing with the claimants' appeal. The CA embarked upon a full scale inquiry whether a duty of care should be imposed in accordance with the three-stage *Caparo* test and held that it should not. It focused upon three issues: (1) whether the role of the CSA is sufficiently close to that of a solicitor acting before the 1991 Act by claiming child support on behalf of a client through the courts so as to justify the imposition of a duty of care by analogy in accordance with the incremental approach: [56]; (2) whether it would be fair, just and reasonable to impose a duty of care by reference to a careful assessment of whether such a duty would be compatible with the statutory context: [60]-[77]; (3) the Court considered whether in a paradigm application to the CSA there was a sufficient assumption of responsibility to give rise to a duty of care, this being an issue relating to proximity: [51]-[55].

- c. *Home Office v Mohammed* [2011] EWCA Civ 351 the Court of Appeal had to consider a negligence claim brought by a number of Iraqi Kurds who came to the UK between 1999 and 2001 but were not dealt with expeditiously by the immigration authorities with the result that they were not granted indefinite leave to remain until 2007. In the case of some of the claimants this was because their cases were put on hold pursuant to a priority policy which was subsequently held to be unlawful. In the case of others it was because the Home Office failed to apply the appropriate ministerial policy to them. The CA considered the question of proximity in the context of the statutory purpose and whether that context prevented the necessary proximity arising¹⁹. The Court even asked whether the fact that the Home Office acts almost entirely according to the dictates of policy, makes any difference: [17]. In the final analysis the Court decided that no duty of care was owed in part because other, possibly equivalent forms of redress, were available: [18].
- d. *Rice v Secretary of State for Trade and Industry* [2007] I.C.R 146. This is a particularly interesting case exemplifying how real injustice can arise from a narrow interpretation of *Gorringe*, explaining perhaps why the courts have been so reluctant to apply it.

29. There have also been cases where the courts have applied the approach in *Gorringe* strictly. See e.g.

- a. *X v Hounslow LBC* [2009] EWCA Civ 286 two claimants who were tenants of the local authority and vulnerable adults, alleged that the local authority took inadequate steps to protect them after their officials discovered that they were vulnerable to attack including by way of sexual assaults by a group of local youths. The Court of

¹⁹ It did do by reviewing and approving the approaches adopted in *W v Home Office* [1997] Imm AR 302 and *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861.

Appeal held that the local authority did not owe a duty of care and had not assumed responsibility solely by reason of the fact that it was discharging its statutory duties under the National Assistance Act 1948 and Housing Act 1996.

- b. *Davies v Secretary of State for Justice* [2008] EWHC 397 (Admin) Owen J held that the Prison Rules 1999 made under the Prison Act 1952 could not give rise to a cause of action in negligence for the negligent performance of a statutory duty. The claimant was a life sentence prisoner who claimed that the SSJ had negligently moved him from an open prison to closed conditions.
- c. *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] EWCA Civ 1041; [2008] Bus LR 663 perfectly exemplifies the distinction between those acts of a public official which are not capable of giving rise to a duty of care because they are actions done in the course of carrying out the statutory function, and those which are because they go beyond such functions and which are, therefore, capable of giving rise to a voluntary assumption of responsibility. See in particular [72]-[73].
- d. *Cooper v Surrey County Council* [2011] QB 429 is the most striking because it shows how even on a narrow reading of *Gorringe* a defendant can still be held liable for failing to discharge a statutory function. Here a head teacher was required to work with a dysfunctional governing body for a number of years, the local authority having failed to exercise its powers under sections 14 and 16A of the School Standards and Framework Act 1998, to dissolve it and replace it with an interim executive board. The resulting stress caused her psychiatric injury. Thus the claimant's case was premised squarely on a failure to exercise a statutory power. The Court of Appeal had due regard to *Gorringe*, but held that where the only or primary means of fulfilling a *pre-existing duty of care* would on the facts consist in the exercise of a public law discretion, the duty of care could extend so as to require the duty owner to exercise the discretion. Such a duty was owed to the claimant as an employee of the local authority. Whether or not

such a duty did arise depended, the Court of Appeal held, on whether it would be consistent with the duty owner's full performance of its statutory duties. Upon an analysis of the statutory context the Court of Appeal concluded that it would be so consistent and that there had been a breach because the Defendant's failure to discharge the duty had been irrational.

(ii) Other bases upon which to exclude liability as a matter of justiciability

Ultra vires/irrationality

30. There is a powerful and attractive argument that powers which Parliament has entrusted to be exercised by a public authority for the public good should not be trammelled in any way as long as their exercise falls within the ambit of discretion conferred. According to such principle, it is the exclusive province of the public authority to determine how those powers should be exercised to achieve the particular public purpose. This principle is the very bedrock of public law. But its logic extends equally into the law of negligence. To hold that a claim in negligence can arise when a statutory power is being exercised within the ambit of the discretion conferred, can equally be said to be contrary to Parliament's clear intention that such conduct should be permitted.

31. This was certainly the view of Lord Diplock, who was in no doubt that the public interest in public authorities being free to get on with task of governance must take precedence over what Lord Bingham called the "rule of public policy that has the first claim on the loyalty of the law: that wrongs should be remedied"²⁰. According to the test established in the seminal case of *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 at p. 1067G-1068A, no common law duty of negligence could ever arise in relation to the exercise of public power unless that exercise was itself *ultra*

²⁰ *X (A minor) v Bedfordshire County Council and others* [1995] 2 AC 633 at 663

*vires*²¹. On this approach the law of negligence is incapable of ever cutting across governmental action conducted within the scope of the statutory discretion afforded to the public authority however negligent the exercise of that discretion might have been; or however low down the hierarchy the negligent action takes place between, at one end, policy formulation by a central government department to, at the other extreme, the straightforward application of a clearly formulated policy in the relation to a particular individual.

32. As with the approach in *Gorringe*, the requirement that the act/omission be *ultra vires* is one going to the justiciability of the claim. Unless this condition is met, a duty of care is simply incapable of arising.

Policy/operational dichotomy

33. The irrationality/*ultra vires* condition does not necessarily overcome all of the constitutional and institutional concerns of applying the law of negligence to public administration because, even where a decision is *ultra vires*, the fact that it was taken by a public authority in the intended exercise of a statutory power can still point strongly against the imposition of a duty of care. Thus, where the decision is one of high policy involving the evaluation of competing goods and their balancing against the risks to the public in pursuing them, it is highly questionable whether even in the face of an irrational decision, the law of negligence should tread. Here the justification for refusing to embark on any form of inquiry is that the courts lack the democratic mandate (and in some instances the institutional competence) to do so given the essentially political character of such decisions²². In *Anns v Merton London Borough Council* [1978] AC 728

²¹ What their Lordships meant by *ultra vires* was not the same. Lords Morris and Reid both had in mind irrationality or *Wednesbury unreasonableness* (see pp. 1031 and 1037). Lord Diplock at p. 1068 appears to have meant any form of public law illegality including procedural impropriety. In *X v Bedfordshire County Council* [1995] 2 AC 633 at [736] the House of Lords adopted the approach of Lords Morris and Reid.

²² This was the approach taken by the House of Lords in *X v Bedfordshire CC* [1995] 2 AC 633, at p. 738.

Lord Wilberforce described the policy/operational distinction in these terms:

“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 presuppose 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 upon it a common law duty of care.

34. Basing themselves on this distinction, at one time or another the courts have sought to identify the sorts of decisions which are non-justiciable because policy based. In *X v Bedfordshire County Council* [1995] 2 A.C 633 Lord Browne Wilkinson held to be excluded decisions, ones which involve the courts in taking into account policy matters such as ‘social policy, the allocation of finite financial resources between the different calls made upon the public authority, the balance between pursuing desirable social aims against the risk to the public inherent in doing so’²³. But where the alleged negligence arises in relation to the manner in which the statutory duty is implemented in practice the grounds of objection do not apply. Lord Browne Wilkinson tried to capture the distinction in the following passage in his judgment in *X v Bedfordshire* at p. 735-

“An example of (a) in the educational field would be a decision whether or not to exercise a statutory discretion to close a school, being a decision which necessarily involves the exercise of a discretion. An example of (b) would be the actual running of a 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. The 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

²³ At p. 737

agreed to accept. The distinction is between (a) taking care in exercising a statutory discretion whether or not to do an act and (b) having decided to do that act, taking care in the manner in which you do it”²⁴.

The problem with the vires and policy/operational tests as a means of determining justiciability

35. It soon became apparent that these tests, if applied categorically as decisive of justiciability, were liable to produce unsatisfactory and unjust results. An obvious difficulty is that it is often almost impossible to decide on which side of the line, as between policy and operational, public authority action lies. This is well illustrated by the analysis of Lord Hoffman in *Stovin v Wise* of a series of Canadian cases where the courts had come to contradictory decisions about whether the conduct of highways authorities was policy or operational. In one case the Supreme Court had held that the decision as to how frequently inspections of the highway should be carried out was a policy decision²⁵, but in another that it was operational²⁶. In a third case, the plaintiff was injured when his truck skidded on black ice. He claimed that the highways authority should have sanded and gritted the road. The reason they had not was because they had taken a decision to continue their infrequent summer schedule of road maintenance into November. The Supreme Court held that its decision fell on the policy side of the divide²⁷. The court could easily have reached the

²⁴ The *X v Bedfordshire* case required the House of Lords to consider Social Service Authorities’ duties under the Children Act 1989 to protect children at risk of abuse, and Local Educational Authorities duties in relation to children with special educational needs under the Education Act 1981. The House of Lords held that all of the alleged acts of negligence were operational, consisting of failures to take practical steps towards the claimants in the discharge of their statutory duties, e.g by failing to act on the evidence of abuse by removing the child claimants from the source of danger. But, as discussed further below, the Court ultimately struck most of the claims out on the ground that the statutory context in which the duties were being discharged meant that it was not fair, just or reasonable to impose a duty of care.

²⁵ *Barratt v District of North Vancouver* (1980) 114 D.L.R. (3d) 577.

²⁶ *Just v British Columbia* (1989) 64 DLR (4th) 689.

²⁷ *Brown v British Columbia (Minister of Transportation and Highways)* (1994) 112 D.L.R (4th) 1.

opposite conclusion. As Lord Hoffman said of the distinctions drawn between the cases, they are 'hardly visible to the naked eye'.

36. But even if it is possible to place a decision firmly in the operational camp, unsatisfactory results still followed if the second justiciability test of irrationality was required to run in tandem as it was according to the decision of the House of Lords in *X v Bedfordshire CC*. The result would be that a cause of action could only ever arise in relation to the operational decisions and actions of a public authority if that conduct was first established to be irrational. The problem here is that operational acts carried out on behalf of public authorities are very often indistinguishable from the actions of private individuals. Why, should the high threshold of irrationality be imposed as a limit on possible liability where the defendant is a public authority but not where the same negligent act is performed by a private person?

37. The potential for injustice can best be understood by a few examples. It would mean that many routine acts, if performed in the discharge of a statutory function by a public authority, would fall to be treated differently from the same acts by a private person. Thus, if a car being driven for the purpose of delivering food to an elderly person in the discharge of a local authority's statutory community care functions, crashed causing injury to a pedestrian, the self same act as would found a claim in negligence had the driver been a private person would only do so if the threshold of irrationality was crossed²⁸.

38. More importantly the law of negligence does not operate in this way. Claims against public and private actors are routinely considered in myriad

²⁸ It may well be that in an example such as this the two tests of unreasonableness would produce the same result. Certainly it has been argued that the capacity for the reasonableness standard to be applied flexibly both in negligence (which includes for example a light touch *Bolam/Bolitho* standard in relation to the acts of experts and specialists) and public law (where greater and lesser degrees of latitude are allowed depending upon the subject matter e.g *R v MOD ex parte Smith* [1996] QB 517) means that the law could be developed to overcome some of the apparent difficulty: see Hickman "The reasonableness principle: reassessing its place in the public sphere" (2004) CLJ 166.

cases without the former having to jump through an irrationality hoop first. On the contrary their claims are subject to the same negligence standards as are applied to private actors. This can be seen in relation to road users, NHS and private doctors, or teachers irrespective of whether they are working in the state or private school system.

39. To address this problem, the courts on occasion sought to distinguish those cases where a *vires* test is applicable from those where it is not according to whether the claimed negligence involves the exercise of a discretion. Arguably it is this distinction in part which the policy/operational dichotomy is trying to capture. But even this is not satisfactory, as almost every decision involves an element of discretion. As Paul Craig wrote²⁹:-

“There are many instances where a public body exercises discretion, but where the choices thus made are suited to judicial resolution. The mere presence of some species of discretion does not entail the conclusion that the matter is thereby non-justiciable. In the United States, it was once argued that the very existence of discretion rendered the decision immune from negligence. As one court scathingly said of such an argument, there can be discretion even in the hammering in of a nail.

A further difficulty that arises is one of principle. If the starting point is that the special character of governance does not prevent a duty of care being imposed in relation to the discharge of pure public functions, then there is no reason in principle why a duty of care cannot be owed even in circumstances where the public authority is acting within the ambit of its ample discretion if in so doing it negligently causes injury to a particular individual. While Parliament might not have intended itself to confer a right of action for breach of the particular statutory duty, it must be taken to have legislated in the full knowledge that the law of negligence applies to public authorities just as much as it does to private persons³⁰.

²⁹ P Craig, *Administrative Law* (5th Ed, 2003) 898.

³⁰ In practice, even if this principle is adopted by a court, it is extremely unlikely to hold a duty of care is owed in respect of those public functions which operate at a high policy level. The Court is likely to find that the requisite degree of proximity does not exist between the parties

(3) The move away from justiciability to consider the special status of public administration in the application of the three stage Caparo test

40. As these difficulties began to emerge, the courts increasingly came to question the utility of categorical distinctions as a determinant of justiciability. For example, in *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 501 Lord Keith of Kinkel said of the policy/operational distinction:

[Their Lordships] incline to the opinion, expressed in the literature, that this 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. . . . If this is right, classification 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.'

(Emphasis added)

41. Given the problems thrown up by the categorical approach to justiciability, it was probably inevitable that the House of Lords would reject it for something more flexible. This it did in two cases which it considered in short succession: *Barrett v Enfield London Borough Council* [2001] 2 AC 550 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619. The first was a claim in negligence arising from the local authority's treatment of a child it had taken into its care. The second involved negligence in the provision of educational services to children identified as having special educational needs. In *Barrett* Lord Slynn³¹ described the more flexible approach that was called for, thus:-

or that issues of democratic accountability and institutional competence trump the importance of the principle of corrective justice.

³¹ At p. 571-2, with whom Lords Nolan and Steyn agreed.

“Where a statutory power is given to a local authority and damage is caused by what it does pursuant to that power, the ultimate question is whether the particular issue is justiciable or whether the court should accept that it has no role to play. The two tests (discretion and policy/operational) to which I have referred are guides in deciding that question. The greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought. It is true that Lord Reid and Lord Diplock in the *Dorset Yacht* case accepted that before a claim can be brought in negligence, the plaintiffs must show that the authority is behaving so unreasonably that it is not in truth exercising the real discretion given to it. But the passage I have cited was, as I read it, obiter, since Lord Reid made it clear that the case did not concern such a claim, but rather was a claim that Borstal officers had been negligent when they had disobeyed orders given to them. Moreover, I share Lord Browne-Wilkinson's reluctance to introduce the concepts of administrative law into the law of negligence, as Lord Diplock appears to have done. But in any case I do not read what either Lord Reid or Lord Wilberforce in the *Anns* case (and in particular Lord Reid) said as to the need to show that there has been an abuse of power before a claim can be brought in negligence in the exercise of a statutory discretion as meaning that an action can never be brought in negligence where an act has been done pursuant to the exercise of the discretion. A claim of negligence in the taking of a decision to exercise a statutory discretion is likely to be barred, unless it is wholly unreasonable so as not to be a real exercise of the discretion, or if it involves the making of a policy decision involving the balancing of different public interests; acts done pursuant to the lawful exercise of the discretion can, however, in my view be subject to a duty of care, even if some element of discretion is involved.”

42. In *Phelps* Lord Slynn characterised the decision in *Barrett* in the following terms:

“This House decided in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 that the fact that acts which are claimed to be negligent are carried out within the ambit of a statutory discretion is not in itself a reason why it should be held that no claim for negligence can be brought in respect of them. *It is only where what is done has involved the weighing of competing public interests or has been dictated by considerations on which Parliament could not have intended that the courts would substitute their views for the views of ministers or officials* that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion”.

(Emphasis added).

43. This echoes the view of Lord Reid quoted above. At the justiciability stage the search remains for those cases which are clearly unsuitable for judicial determination under the law of negligence. But if the categorical distinctions no longer work, then what is one left with to answer the question whether this is a decision which is unsuitable for judicial resolution? The space for uncertainty at anything other than the margins becomes very considerable. And even at the margins there is room for argument. Take those features of a decision, which to Lord Reid's mind epitomised decisions that should be treated as not justiciable, "discretionary decisions on the allocation of scarce resources or the distribution of risks". On examination, even this is debatable. As Lord Hoffman pointed out in *Stovin v Wise* at p.951, "practically every decision about the provision of [public] benefits, no matter how trivial it may seem, affects the budget of the public authority in either timing or amount". And almost any allegedly negligent act of a public authority can ultimately be traced back to a policy decision about how much funding is to be allocated to the particular function.

44. Over and above this it is clear that decisions which impact on the allocation of scarce resources or the distribution of risks' are routinely subject to judicial scrutiny in negligence claims. This is most obvious in the context of an employer's duty of care towards his employees to provide a safe system of work. In *Sutherland v Hatton* [2002] EWCA Civ 76, [2002] IRLR 263, the court characterised the approach which it must take in a negligence claim against an employer as follows:-

"The overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of commonsense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more

than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.”

45. One can see why judges like Lords Hoffman and Scott were so attracted by the narrow interpretation of *Gorringe*. Once any bright-line distinction between public and private functions is removed, there is simply no avoiding uncertainty. The Courts must, of course, have regard to the institutional and Constitutional features that everyone accepts make some public authority decision making unsuitable for judicial resolution. In doing so concepts such as vires/irrationality, discretion, policy/operation, which seek to identify the peculiar features of some governmental functions that strongly suggest they are unsuitable for judicial resolution, provide extremely useful guidance. But, save in the clearest cases where the political character of the decision is so dominant and plain, there is a great deal of room for uncertainty and for the preferences of different judges to determine the outcome.

How the Caparo test is applied to public authorities once the justiciability hurdle is surmounted.

46. The result of the more flexible approach is necessarily therefore that more cases are likely to pass through the justiciability threshold. At this stage the Court must apply the three stage *Caparo* test to determine whether a duty of care is owed. The statutory context remains equally important here, and all the factors which fall to be weighed in the balance at the justiciability stage have a role to play.

“.. 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.... A common law duty of care cannot be imposed on a statutory duty if the observance of such a common law duty would be inconsistent with,

or have a tendency to discourage, the due performance by a local authority of its statutory duties.³²

47. Thus all those features relevant to the justiciability question, policy/operational, discretion/irrationality fall to be considered against at this stage together with a host of other factors relating to the statutory context which might point against the imposition of a duty of care. Some of the most frequently cited of such reasons are:

- a. The imposition of a duty of care cuts across the statutory scheme. In *X v Bedfordshire CC* this was a decisive ground on which Lord Browne Wilkinson held that no duty of care is owed by a local social services authority in the discharge of its Children Act 1989 child protection functions. The statutory scheme had established an inter-disciplinary system involving the participation of the police, educational bodies, doctors and others as well as social workers. To impose a duty of care on just one of these would be manifestly unfair. To impose a duty on all would lead to almost impossible problems of disentangling as between the respective bodies, the liability of each for reaching the negligent decision³³.
- b. Imposing liability would lead to more cautious and defensive practices or otherwise tend to discourage the due performance of the statutory duty in the public interest³⁴.
- c. Imposing liability would divert scarce resources³⁵.

³² *X (Minors) v Bedfordshire CC* [1995] 2 A.C 633 per Lord Browne-Wilkinson at p. 739.

³³ *X v Bedfordshire* at pp. 749H-750B, though note that this reason was later rejected by the House of Lords in *Phelps v Hillingdon LBC* at p. 674D-F.

³⁴ *X v Bedfordshire*, at p. 750F. This has been repeatedly invoked by the courts as a principal reason for not imposing a duty of care on the police in the discharge of their duties to prevent crime: *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 and recently in *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225. But it has been invoked also to prevent the imposition of a duty of care on doctors, social workers or other health care professionals to parents suspected of abuse: *D v East Berkshire Community NHS Trust* [2005] 2 AC 373 where it was held that it might lead to a conflict with their primary statutory obligation namely to protect children.

³⁵ *Hill v Chief Constable of Yorkshire* [1989] AC 53; *Stovin v Wise* [1996] AC 923 at p. 52

- d. The risk of opening the floodgates.
- e. There is an alternative remedy, whether established under the statute or through an ombudsman³⁶.

48. One obvious problem with many of these is that they are wholly incapable of being tested. Judges can freely assert them as a reason not to impose a duty of care without ever having to risk being proved wrong³⁷. And of course for almost every reason not to impose a duty of care, a counter-argument can be advanced in favour of doing so. Thus, as against any untested argument about defensive practices, it could be said that, there is no evidence to support the assertion³⁸, or on the contrary, the imposition of a duty of care 'may have the healthy effect of securing that high standards are sought and secured'³⁹. Or, with respect to an alternative remedy, "even if there are alternative procedures by which some form of redress might be obtained, such as resort to judicial review, or to an ombudsman, or the adoption of such statutory procedures as are open it may only be through a claim for damages at common law that compensation for the damage done to the child may be secured for the past as well as the future"⁴⁰.

³⁶ Ibid, at p. 751 A. Recently in *Mohammed v Home Office* [2011] 1 WLR 2863 at [18] and [25] the Court of Appeal placed very considerable weight on this factor.

³⁷ There has been much criticism of the absence of any evidential foundation for such assertions: see e.g B Markens et al, *Tortious liability of statutory bodies: A comparative and economic analysis of five English Cases* (1999)

³⁸ This was the approach of the Court of Appeal in *Perrett v Collins* [1998] 2 Lloyd's Rep 255 at p. 277 per Buxton LJ.

³⁹ *Phelps v Hillingdon LBC* [2001] 2 AC 619 at 672 per Lord Clyde (with whom Lords Jauncey, Lloyd and Nicholls agreed).

⁴⁰ *Phelps v Hillingdon LBC* per Lord Clyde at 672. It is notable that Lord Clyde put forward many of these counter arguments in a case which, like *X v Bedfordshire*, concerned the local authority's assessment of special educational need. In just four years since the *X v Bedfordshire* decision he was expressing entirely contrary views. This rather powerfully demonstrates the contestable nature of these factors rather than any relevant developments in the nature of public administration over the period.

49. A very powerful factor pointing in favour of the imposition of a duty of care is if the injury resulting from the discharge of a public function is caused by someone who is acting in a very similar way to a direct counterpart in the private sector. Thus, Lord Clyde observed in *Phelps v Hillingdon LBC* [2001] 2 AC 619 at pp. 670-71 if a child privately consults an educational psychologist a duty of care to exercise professional care and skill is owed. While it is owed in contract it would, in his view, be curious if it could not be owed in tort and surprising if that duty could not be owed by one employed by an education authority. The strength of this factor lies not simply in the anomaly of treating those acting in a public capacity differently in respect of the same actions. But in addition, it is very likely that the countervailing policy considerations probably do not weigh heavily because the statutory context has less impact. It is notable that it is precisely these sorts of cases which Lord Hoffman considered would not offend the narrow justiciability principle he espoused in *Gorringe* precisely because the acts in question could not properly be characterised as ones of public administration.

Changes in the Court's approach to the policy considerations weighing against the imposition of a duty of care

50. The *Barrett* and *Phelps* cases did not just mark a move away from the rigid application of justiciability criteria. They also manifested a significant shift in the court's approach to the policy arguments against imposing a duty of care. As noted the House of Lords in *Phelps* dismissed the self same policy arguments which had persuaded it only four years earlier in *X v Bedfordshire CC* to strike out most of the claims. In the years following *Barrett* and *Phelps*, courts often showed greater scepticism towards the policy objections defendants put forward, and were correspondingly less inclined to find that no duty of care was capable of arising on grounds of justice, fairness or reasonableness⁴¹. But this has not led to a flood of

⁴¹ See e.g. *A v Essex County Council* [2004] 1 WLR 1881 (social services) and *Bradford-Smart v West Sussex County Council* [2002] ELR 139 (CA) (education).

cases where the Courts have found public authorities to be negligent. The statutory framework and the policy considerations that militate against the imposition of a duty of care have continued to influence the outcome of cases, but at the next stage along the continuum, in relation to breach.

51. Before turning to breach, it is important to note that the shift in the Court's approach over time is equally capable of shifting back again. There have continued to be cases where a duty of care is excluded on the blanket basis that it is not fair, just or reasonable to impose a duty of care in whole categories of cases. The recent decision of the House of Lords in *Smith v Chief Constable of Sussex Police* [2009] 1 A.C 225 provides a good illustration. The claimants were able to point to the fact that many of the underlying policy considerations which had led the House of Lords repeatedly to hold the police immune from suit in the discharge of their crime prevention functions⁴² had fallen away since the introduction of the Human Rights Act 1998. This was because the police were now subject to suit under section 7 for breach of positive obligations imposed under Articles 2 and 3 of the ECHR. These include a duty to take such measures as might reasonably be expected to avert a real and immediate risk to life or limb whenever the police know or ought to know of its existence⁴³.

52. The advent of the HRA profoundly influenced the decision of the Court of Appeal in *D v East Berkshire Community NHS Trust* [2004] QB 558. Relying on a similar operational duty cast on social services departments under Article 3 to protect children known to be at risk⁴⁴, the Court of Appeal held that the policy objections cited by the House of Lords in *X v*

⁴² Starting with *Hill v Chief Constable of West Yorkshire* [1989] A.C 53,

⁴³ See *Osman v United Kingdom* (2000) 29 EHRR 245. These Articles, together with Article 4, also impose a duty to investigate credible allegations of ill-treatment even where the alleged wrongdoer is a private person: *OOO v Commissioner of Police of the Metropolis* [2011] HRLR 29; *Rantsev v Cyprus* (2010) 50 EHRR 1.

⁴⁴ This duty was held to be owed by the European Court of Human Rights in *Z v United Kingdom* (2002) 34 EHRR 3, an application which the claimants in *X v Bedfordshire CC* made after their case was dismissed by the House of Lords:.

Bedfordshire CC had fallen away. However, in *Smith* the House of Lords rejected the argument, firmly reasserting the policy based arguments which underpinned the decision of the House of Lords in *Hill v Chief Constable of West Yorkshire* [1989] A.C 53, namely that a duty would encourage defensive policing and divert manpower and resources from the primary function of suppressing crime and apprehending criminals in the interest of the community as a whole. While the House of Lords did not close the door left open by it in *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 for an exception to be made in special circumstances, the Supreme Court justices in the majority certainly provided no encouragement that such circumstances are likely to be anything other than wholly exceptional.

Statutory context and the standard of care.

53. If policy considerations are not to be automatically accepted as preventing the imposition of a duty of care on grounds of justice, fairness and reasonableness, the extent to which issues of democratic accountability or institutional competence are raised by the imposition of a duty of care still need to be taken into account. In *Barrett v Enfield London Borough Council* [2001] 1 AC 550, Lord Hutton observed at p. 589:-

“Although I would allow this appeal for the reasons which I have given and would permit the action to proceed to trial, I wish to emphasise that the considerations relied on by the defendant on the issue of justiciability will be of relevance and importance when the trial judge comes to consider the question whether the plaintiff has established a breach of the duty to take reasonable care. The standard of care in negligence must be related to the nature of the duty to be performed and to the circumstances in which the defendant has to carry it out. Therefore the standard of care to be required of the defendant in this case in order to establish negligence at common law will have to be determined against the background that it is given discretions to exercise by statute in a sphere involving difficult decisions in relation to the welfare of children. Accordingly when the decisions taken by a local authority in respect of a child in its care are alleged to constitute negligence at common law, the trial judge, bearing in mind the room for differences of opinion

as to the best course to adopt in a difficult field and that the discretion is to be exercised by the authority and its social workers and not by the court, must be satisfied that the conduct complained of went beyond mere errors of judgment in the exercise of a discretion and constituted conduct which can be regarded as negligent.”

54. The attraction of this approach is that while most claims will fail and public authorities will therefore remain safe from a flood of litigation⁴⁵, justice can be achieved for deserving cases where failings are particularly stark. The case of *Connor v Surrey County Council* [2011] Q.B 429⁴⁶ provides a useful illustration. The powers of the local authority to appoint the Board of Governors of a maintained school might well be thought of as the kind of strategic decisions which are not suitable for judicial determination. But, in this case the Court was plainly influenced by what it considered to have been an unlawful decision on the part of the local authority not to act as well as the fact that there was a pre-existing duty of care owed to the head teacher as an employee.

CONCLUSION

55. From this review, the only sensible conclusion one can draw is that the law of tort does not provide any straightforward mechanism for securing compensation for general maladministration as distinct from maladministration which interferes with some of the specific personal interests protected by torts such as trespass to the person or property.

56. While misfeasance is capable of capturing any form of maladministration from the highest level of policy formulation to the very lowest operational acts, the requirement to prove bad faith and material loss makes it a tort of very limited utility.

⁴⁵ See e.g Lord Slynn in *Barrett* at p. 572 G when addressing the field of social work: ‘Both in deciding whether particular issues are justiciable and whether if a duty of care is owed, it has been broken, the court must have regard to the statutory context and the nature of the tasks involved... Much of what has to be done in this area involves the balancing of delicate and difficult factors and courts should not be too ready to find in these situations that there has been negligence by staff who are largely skilled and dedicated’.

⁴⁶ Discussed at [29] above.

57. Claims in negligence generate a profound constitutional sensitivity, the courts needing to ensure that they do not adjudicate on matters for which they are neither democratically accountable nor institutionally competent. It is highly unlikely that the law of negligence will provide a vehicle for securing compensation for any public administration with a high policy or strategic content. And while it may do so where the action in question contains a mixture of policy and operational elements, the problem is one of uncertainty. The outcome of such cases will very much depend upon how the court balances the principle of corrective justice against the principle that the law of negligence has no business regulating public administration. While a duty of care is more likely to be imposed where the act is purely operational, especially if it goes beyond the performance of a statutory function because, e.g. there has been an assumption of responsibility, uncertainty does remain even here. The statutory context and the judges' preferences can still lead the court to refuse to impose a duty of care⁴⁷. The current state of the law was neatly encapsulated by Laws LJ in *Connor v Surrey County Council* [2011] Q.B 429 at p. 469:-

“These following states of affairs may be discerned in the succession of authority. (1) Where it is sought to impugn, as the cause of the injury, a pure choice of policy under a statute which provides for such a choice to be made, the court will not ascribe a duty of care to the policy-maker. So much is owed to the authority of Parliament and in that sense to the rule of law. (2) If a decision, albeit a choice of policy, is so unreasonable that it cannot be said to have been taken under the statute, it will (for the purpose of the law of negligence) lose the protection of the statute. While this must, I think, point to the same kind of

⁴⁷ See e.g. *VL (A Child) v Oxfordshire CC* [2010] EWHC 2091; [2010] 3 F.C.R 63. In this case a child was made the subject of an interim care order having suffered serious injury when her father violently shook her. The local authority's strategy was to try to keep the family together. The social worker obtained an application form from the Criminal Injuries Compensation Board but failed to complete and submit it to make an application for compensation for the child. The court held that reuniting the family took precedence and careful thought had to be given as to whether the introduction of a claim signed by the mother naming the father as a criminal would have been viewed as something consistent with the whole process of rehabilitation. The Court held that in these circumstances it was not fair, just or reasonable to impose a duty of care. Equally, it could have rejected the case on the ground that the standard of care must be a flexible one allowing room for discretion, and that it had not been breached in the circumstances.

case as does the *Wednesbury rule* [1948] 1 KB 223 (since only a *Wednesbury* perverse decision will be outwith the statute), *Wednesbury* is not made a touchstone of liability for negligence in such cases: the immunity arising in (1) is lost, but the claimant must still show a self-standing case for the imposition of a duty of care along *Caparo* lines and he may be unable to do so. (3) There will be a mix of cases involving policy and practice, or operations, where the court's conclusion as to duty of care will be sensitive to the particular facts:

“the greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought”: per Lord Slynn, in *Barrett's case* [2001] 2 AC 550 , 571.

This is likely to be a large class of instances. (4) There will be purely operational cases, like that of the bus driver on the school trip, where liability for negligence is likely to attach without controversy.

58. All this really does raise the question whether, as the Law Commission proposed⁴⁸, the principles on which compensation for maladministration can be awarded should be a matter for Parliament to determine. But we are where we are. The Government, in this time of austerity, speaking with a single voice for all departments of state, rejected the proposals out of hand. Claimants have no choice but to continue to work within the uncertain and restrictive boundaries of these two torts if they want to secure recompense for injury caused by public administration. And public authorities faced with uncertain claims, will be left with little choice but to seek to nip their progress in the bud through summary judgment and strike out applications.

⁴⁸ See footnotes 9 and 10 above.