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# VINDICATING RIGHTS THROUGH THE TORTIOUS LIABILITY OF PUBLIC AUTHORITIES: EMERGING THEMES AND TENSIONS IN COMPARATIVE PERSPECTIVE

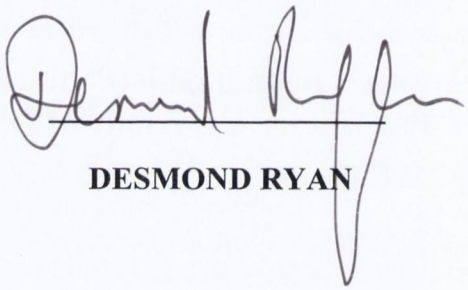
Thesis Submitted In Partial Fulfilment of the Requirements of the Degree of Ph.D. at the University of Dublin, Trinity College

by

DESMOND RYAN

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*To my parents, Maureen and Kevin Ryan*

## SUMMARY

The specific question addressed in this thesis is: to what degree are the core constituent ingredients in, and the outcomes of, domestic causes of action in the tortious liability of public authorities being influenced by vindicatory pressures?

This thesis is organised in the following way. In Part I, the key thematic tensions permeating the tortious liability of public authorities at present are identified and explored. Central to these is the ongoing difficulty in providing an "account" of the objectives of tort law. In this regard, emphasis is placed on what, it is argued, is an emerging theme in this area: that of vindication. The understandings of vindication emerging from the courts are identified and explored, and their relationship with and influence upon the archetypal goal of tort law – corrective justice – considered.

Building on this broad conceptual framework, Part II identifies and appraises the influence of this vindicatory theme on two distinct causes of action in public authority tort litigation: negligence and misfeasance in public office. In separate Chapters, the evolving judicial approaches to the constituent ingredients of each cause of action are analysed in comparative perspective. This enables reflection upon the overarching organisational structure of these torts, their capacity to accommodate vindication objectives, and the doctrinal consequences of such accommodation being made.

Part III of the thesis devotes attention to ways in which human rights instruments can and do exert an impact on common law causes of action in public authority tort

litigation. In this section, the influence of both the Constitution of Ireland and the European Convention on Human Rights is explored. In relation to each, the ongoing thematic tension between convergence and separation is considered, and its impact in each context assessed. It is argued that the most difficult and topical question here is that of whether and to what extent the influence of human rights protection can serve as a catalyst for fundamental change in the constituent ingredients of causes of action in tort law generally, and the tort of negligence in particular. In this context, very recent jurisprudence embodying this debate is analysed and its implications considered for the capacity of tort law doctrine to be infused successfully with vindicatory objectives.

In the final Part, attention shifts to the distinct issue of "outcomes" in tort litigation against public authorities. Here, emphasis is laid on two distinct areas of relevance: the awarding of exemplary damages against, and the imposition of vicarious liability upon, public authorities. In both contexts, it is argued that the objective of vindication has significantly affected how the courts approach such outcomes in public authority litigation. The broad thematic tensions identified and explored in earlier Chapters in relation to the erosion of corrective justice and the ascendancy of the theme of vulnerability, are once again engaged and explored in further depth.

The thesis concludes with a reflection on how the vindicatory objective of tort law has influenced both ingredients and outcomes in the causes of action under scrutiny, and the implications of this evolution for the tortious liability of public authorities.

## ACKNOWLEDGEMENTS

I wish to acknowledge my sincere thanks to my Supervisor, Professor William Binchy, by whom I had the privilege of being lectured in Tort Law as a Junior Freshman Law student at Trinity College Dublin. These inspirational lectures instilled a fascination in tort law – one that led to my embarking on this Ph.D. thesis and one that continues to grow. Since that time, both as a Ph.D. candidate and as a colleague in the School of Law at Trinity College Dublin, I have benefited enormously from Professor Binchy's unique insights, his generosity, and constant encouragement. I am most grateful to him.

The original idea for the specific topic of this Ph.D. began when I worked, while a Graduate Student at the University of Oxford, as a Research Assistant to Cherie Booth QC and Dan Squires in advance of the publication of their leading and seminal text, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006). I wish to thank the authors of this text for enabling me to gain an initial appreciation of the complexities of this fascinating area of tort law, which inspired me to pursue this thesis.

The first two years of my research for this thesis were generously supported by an Ussher Foundation Scholarship awarded by Trinity College Dublin, and a Government of Ireland (Easter Week Commemoration) Scholarship awarded by the Department of Education and Science.

In the final two years of my researching this thesis, I have been a Lecturer in Law at Trinity College Dublin. I wish to thank all of my colleagues in the Law School who have encouraged and supported me in the completion of this thesis, particularly Dr. Neville Cox, Professor Hilary Delany and Professor Yvonne Scannell. I should also like to acknowledge the very insightful and helpful guidance provided by my (now) colleagues, Dr. Liz Heffernan and Dr. Eoin O'Dell, who acted as Viva Examiners during my Qualifying Transfer Test in May 2007 to progress from the M.Litt to the Ph.D. register: their many invaluable comments greatly assisted me in clarifying the focus of the thesis in the final years.

There are a number of people whom I wish to thank for having assisted me at various points during the four years spent researching and writing this thesis. First, special thanks to Ray Ryan BL for all his support and encouragement throughout the process. I also wish to thank the following people who generously provided guidance and encouragement at various points: Dr. Deirdre Ahern, Mr. John Ahern, Ms. Patricia Brazil, Mr. Donal Coffey, Ms. Cathryn Costello, Dr. Catherine Donnelly, Dr. Oran Doyle, Ms. Catherine Finnegan, Dr. Fiachra Mac Góráin, Ms. Kelley McCabe, Mr. David Prendergast, Dr. Fergus Ryan.

I was fortunate to have the use of several excellent libraries during the course of writing this thesis. I should like in particular to extend thanks to all the staff of the Berkeley Library, Trinity College Dublin, especially Ms. Elizabeth Gleeson, Mr. Tony Carey and

Mr. Jimmy O'Keeffe. I am also most grateful to the staff at the following libraries where various parts of the research for this thesis were carried out: the Bodleian Law Library, Oxford; Balliol College Library, Oxford, particularly Dr. Penelope Bulloch; the University of San Francisco School of Law Library, particularly Mr. John Schafer.

Finally, I wish to acknowledge the enormous debt of gratitude I owe to my family for all their love and support: to my parents, Kevin and Maureen, and to my sister, Louise, and my brother, Ray.

I hereby acknowledge that an early draft of the material in Chapter 2 was presented at the Public Authority Liability Panel at the international *Law and Society Conference*, Berlin, Germany, on 25 July 2007. Part of the material in Chapter 2 is extracted from Ryan, "The Position in Tort of Public Authorities after *Beatty*" (2006) 1 *Quarterly Review of Tort Law* 12. Early drafts of the material in Chapters 2 and 3 were presented at the Dublin Legal Workshop, Trinity College, Dublin, on 4 April 2007 and at King's College, London, 13 April 2007. Similarly, part of the material in Chapter 7 was presented at the Society of Legal Scholars (Ireland) conference held in Trinity College Dublin on 16 February 2008 and appears in Ryan, "Making Connections: New Approaches to Vicarious Liability in Comparative Perspective" (2008) 30 *DULJ* 41 and in Ryan, "Connections without Consensus: Recent Approaches to Vicarious Liability in the Irish Supreme Court" (2009) 31 *DULJ* (forthcoming).

The law is stated as of 24 September 2009.

**Desmond Ryan**
**24 September 2009**

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"The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached."

(*Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 *per* Lord Hope of Craighead, [87]).

"There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever."

(*Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679 *per* Hardiman J, [79]).

# INTRODUCTION

## NOTES ON METHODOLOGY, NOMENCLATURE AND SCOPE

### Comparative Methodology

The comparative methodology adopted accords principal focus to common law developments in Ireland, Australia, Canada and the United Kingdom, but reference is also made where appropriate to developments in Germany, India, Kenya, Northern Ireland, New Zealand, Singapore, South Africa, and Trinidad and Tobago.

### References

Where available, the vendor neutral citation of law reports is given.

The terms "plaintiff" and "claimant" are both used in this thesis; their use is governed by the prevailing convention in the particular jurisdiction in which the case was decided.

### Nomenclature of "Public Authority"

An important point about nomenclature needs to be made at the outset. "Public authority" is not used as a term of art in the herein work. Thus, the considerable body of jurisprudence[1] and scholarship[2] that has built up around the meaning to be ascribed to a "public authority" – and, in particular, in the context of the United Kingdom, what

---

[1] A striking recent example is the judgment of the House of Lords in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

[2] See generally the report of the House of Lords and House of Commons Joint Committee on Human Rights, "The Meaning of Public Authority under the Human Rights Act" Ninth Report of Session 2006–07 (HL Paper 77 HC 410) published on 28 March 2007; see also Catherine M. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (Oxford: OUP, 2007).

constitutes a public authority for the purposes of the Human Rights Act 1998 – is not explored in the herein work.

For present purposes, a public authority can be defined generally as a body or person exercising public functions, the very nature of which requires them to be exercised in the public interest.[3] Throughout this thesis, then, we will encounter consideration of public authorities which include the government, local authorities within the meaning of the Local Government Act 2001, statutory authorities *stricto sensu*, that is, the creature of statute, individual officials acting or purporting to act pursuant to a statutory authority[4], and private individuals exercising statutory powers for a particular public purpose. What is important to note at this juncture is that, regardless of the precise characteristics of the defendants under scrutiny in this thesis, they are all united by one common over-arching characteristic: they are charged with the task of exercising powers in the public interest.

**Scope**

Finally, in terms of scope, it is necessary preliminarily to indicate related matters with which the present work is *not* concerned. First, it is important to emphasise that whilst this thesis is concerned with the vindicatory influence upon actions taken against public authorities generally, it has been necessary to focus on a selected number of areas within that inquiry. Having identified and analysed various meanings of vindication in Chapter 1, for example, the thesis proceeds to focus in Part II on two selected causes of action: negligence and misfeasance in public office. As such, relevant but distinct causes of

[3] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, *per* Mason J, 456; *Stovin v Wise* [1996] AC 923, *per* Lord Nicholls, 935.
[4] Seen most prominently in Chapter 3 of this thesis concerning Misfeasance in Public Office.

action in tort law are not considered in detail, such as, for example, the tort of breach of statutory duty which is not under scrutiny here. Notwithstanding the focus upon negligence and misfeasance in public office, however, other torts are discussed where relevant: these include, *inter alia*, defamation, trespass and malicious prosecution.

# PART I

# VINDICATING RIGHTS THROUGH TORT LAW

# Chapter 1

# VINDICATING RIGHTS THROUGH TORTIOUS LIABILITY: EMERGING THEMES AND TENSIONS

> "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached."[1]
>
> "The [main] function of the civil law of tort is… to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others."[2]

## Chapter Overview

*The objective pursued in this Chapter is to examine the role which vindication plays in providing redress in tort actions against public authorities. In order to do this it is necessary first to identify the nature of corrective justice, the prism through which tort law has traditionally been understood. In this regard, particular attention is devoted to the correlativity theory of Weinrib. Focus then shifts to an analysis of the vindicatory emphasis that is increasingly to be discerned in the legal framework of the tortious liability of public authorities.*

*The Chapter then proceeds to explore the various meanings of vindication, and to consider the distinction between vindicatory purposes and vindicatory effects. This lays the groundwork for the analysis which will be engaged in during subsequent Chapters in which the thesis is presented that the reworking of the constituent ingredients or elements of discrete torts, such as those of negligence and misfeasance in public office, as well as the approaches taken to exemplary damages and vicarious liability, is predicated upon a move away from a strict corrective conception of tort liability, and reflects the impact of vindicatory pressures.*

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[1] *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 *per* Lord Hope of Craighead, [87].
[2] *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962 *per* Lord Scott of Foscote, [18].

## A. INTRODUCTION: THE PROBLEM OF PROVIDING AN ACCOUNT OF TORT LAW

### The Multiplicity of Different Rationales for the Imposition of Tortious Liability

Scholars have long acknowledged that the multiplicity of different rationales espoused for the imposition of tortious liability has served to pull the law of torts in competing directions, thereby frustrating its coherent development. The argument was perhaps most famously made by Professor Glanville Williams when in 1951[3] he identified four main objectives or goals of tort law: appeasement, justice, deterrence and compensation, concluding that there was a lack of coherence due to the law of tort attempting to serve such a myriad of different purposes but succeeding in none. The intensity with which scholarship has focused on the objectives of tort law and the attempt to provide an account of same certainly supports the statement made recently by Murphy to the effect that "no one could ever accuse tort law of being under-theorised".[4]

In this thesis, it is sought to argue that the increasingly vindicatory function of tort law being manifested in the context of litigation against public authorities is emerging as the chief thematic tension in tort law today: the tension embodied in what have been termed "the tort wars"[5] between two main camps. These tort wars consist of the collision between the "[t]wo incompatible conceptions of the law of torts…discernible within the

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[3] Glanville Williams, "The Aims of the Law of Tort" (1951) 4 *CLP* 137. See further Bob Hepple, "Negligence: The Search for Coherence" (1997) 50 *CLP* 169.
[4] John Murphy, "Rights, Reductionism and Tort Law" (2008) 28 *OJLS* 393, 393.
[5] Nicholas J. McBride and Roderick Bagshaw, *Tort Law* (3rd ed, Harlow: Pearson Longman, 2008), *xiii*.

common law."[6] One camp is comprised of scholars who adopt what Stevens has termed the "loss model" of tort theory[7]: tort law is concerned with the determination of whether A should be held liable to compensate B for a loss that A has caused B to suffer. The other camp, drawing inspiration from the work of such leading scholars as Professor Weinrib[8] in Canada and the late Professor Birks[9] in Oxford, is that which embraces the "rights model"[10]: tort law is concerned with the determination of whether A has infringed B's rights and, if so, what remedies can flow from this.

Recent scholarship has identified an increasing dimension of a vindicatory function in other areas of private law, such as contract law.[11] So too is focus increasingly being placed upon the vindicatory rôle of tort law. As society becomes more rights-focused and Irish law more rights-based, the vindicatory function is set to become increasingly relevant. The central question with which this thesis is concerned is the extent to which the core constituent ingredients of the two causes of action in tort law under scrutiny here – negligence and misfeasance in public office – and the "outcomes" of the imposition of exemplary damages and vicarious liability upon public authority defendants, are being recast in light of this rights model.

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[6] Robert Stevens, *Torts and Rights* (OUP: Oxford, 2007), 1.
[7] *Ibid.*, 2.
[8] As illustrated in particular in Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard UP, 1995).
[9] See for example Peter Birks, "The Concept of a Civil Wrong" in David G. Owen ed, "Philosophical Foundations of Tort Law" (Oxford: Clarendon Press, 1995).
[10] Robert Stevens, *Torts and Rights* (OUP: Oxford, 2007), 2.
[11] See for example David Pearce and Roger Halson, "Damages for Breach of Contract: Compensation, Restitution and Vindication" (2008) 28 *OJLS* 73.

**Providing an "Account" of Tort Law: Relevance for Public Authority Liability**

Attempting to provide an account of tort law is undoubtedly "one of the oldest and most intriguing of legal conundrums".[12] Scholars' and jurists' inability to locate tort law in one single organising conceptual framework has led some, including Sir John Salmond, to maintain that tort law is comprised merely of a series of unconnected wrongs.[13] Other tort lawyers have long strived to identify "the" single or "pure" underpinning moral basis of tort law. This concern with identifying a pure, unifying theory is well captured by Postema when he explains:

> The purist holds that whatever does not fit the conceptual or normative pattern of the core of the tort system falls outside that system and so is not properly the concern of a theory of torts.[14]

**The Traditional Theoretical Accounts of Tort Law**

Theoretical accounts of tort law typically revolve around one or more of three concepts: corrective justice, where the goal of tort law is viewed as providing a remedy for the wrong done to the plaintiff by the defendant; economic analysis of law, where the goal is

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[12] Lord Bingham of Cornhill, "Tort and Human Rights", Chapter 1 in Jane Stapleton and Peter Cane, eds, *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998), 2.

[13] See further Ernest J. Weinrib, "The Special Morality of Tort Law" (1989) 34 *McGill Law Rev* 403; Richard W. Wright, "Substantive Corrective Justice" (1992) 77 *Iowa Law Rev* 625; Tony Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999), 73-76; Jules Coleman, *The Practice of Principle* (OUP, Oxford, 2001); R.A. Epstein, "A Theory of Strict Liability" (1972) 2 *The Journal of Legal Studies* 151; Peter Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16 *OJLS* 471; Ernest J. Weinrib, "Corrective Justice in a Nutshell" (2002) *UTLJ* 349; Norman S. Wilson, "Is Corrective Justice Subsidiary to Distributive Justice – Which Answer Better Captures the Meaning of Tort Law Practice?" (2007) 10 *TCLR* 44. For an argument that the degree of disagreement between scholars on the different accounts of tort law is generally overstated see Ernest J. Weinrib, "Correlativity, Personality and the Emerging Consensus on Corrective Justice" (2001) 2 *Theoretical Inquiries in Law* 107, 109.

[14] Gerald Postema, "Introduction: Search for an Explanatory Theory of Torts" in Gerald Postema (ed), *Philosophy and the Law of Torts* (Cambridge: CUP, 2001), 15.

the prevention of those accidents worth preventing, and the efficient allocation of resources[15]; and distributive justice, where the goal is the just distribution of resources within society.[16] In 2009, the first of these concepts – corrective justice – continues to be regarded as the core basis for explaining tort law; if anything, corrective justice has "experienced something of a renaissance in academic circles".[17] So, in a recent article, Morgan maintains that "only through faithful adherence to principles of individual responsibility and corrective justice, inherent as these are within the structure of tort law, can we hope to preserve coherence in the law of tort".[18] Similarly, judicial and academic statements to this effect abound in a survey of case law and literature from the last decade. Thus in Australia, it could recently be observed in the High Court that tort law is "an instrument of corrective justice";[19] in the United Kingdom's House of Lords, that "the existence of a sanction by way of damages is the essential mark of a tort[20]; in the 2009 edition of an Irish textbook, that "[t]ort law is predominantly concerned with corrective justice".[21]

This traditional account of tort law in terms of corrective justice does, as Professor Atiyah cautions, "surely pose problems for the liabilities we impose every day

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[15] See, for example, Richard A. Posner, "A Theory of Negligence" (1972) 1 *JLS* 29; William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, 1987).
[16] See below.
[17] Kenneth S. Abraham, "Twenty-First-Century Insurance and Loss Distribution in Tort Law", Chapter 3 in M. Stuart Madden ed, *Exploring Tort Law* (Cambridge University Press, 2005), 81, 82.
[18] Jonathan Morgan, "Tort, Insurance and Incoherence" (2004) 67 *MLR* 384, 384.
[19] *Per* McHugh J in *Perre v Apand Pty Ltd* [1999] HCA 36, 73 ALJR 1190, 164 ALR 606, [103], [151].
[20] *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, (2008) 2 WLR 975, *per* Lord Carswell, [81].
[21] Eoin Quill, *Torts in Ireland* (3rd ed, Gill & McMillan, 2009), 5.

on...public bodies".[22] Throughout this thesis, this perennial concern is explored both through a scrutiny of the separate constituent causes of action of negligence and misfeasance in public office, and through the awarding of exemplary damages and the imposition of vicarious liability upon public authority defendants. At this juncture, the nature of the corrective justice paradigm and its role in tort law is considered in greater depth.

## B. THE CORRECTIVE JUSTICE PARADIGM AND ITS ROLE IN TORT LAW

### Correlativity in Tort Law

Described by Weinrib[23] as "the theoretical notion that accounts for whatever coherence private law might have"[24], corrective justice is anchored in the notion of correlativity, a term that refers to the fact that through private law we organise the world in terms of bilateral relationships between individuals. An important consequence of this characterisation of tort law is that it is to be viewed in an "interpersonal"[25] way, with reference to the relationships between individuals and to "the two-dimensional world of loss shifting between the wrongdoer and the victim".[26]

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[22] Patrick S. Atiyah, "Personal Injuries in the Twenty First Century: Thinking the Unthinkable", Chapter 1 in Peter Birks ed, *Wrongs and Remedies in the Twenty First Century* (Clarendon Press, Oxford, 1996), 1, 14.

[23] Who is himself a self-professed 'purist': Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard UP, 1995), 13.

[24] Ernest J. Weinrib, "The Disintegration of Duty", Chapter 5 in M. Stuart Madden ed, *Exploring Tort Law* (Cambridge University Press, 2005), 143, 146.

[25] Allan Beever, "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28 *OJLS* 475, 477.

[26] Sir Bob Hepple, "Negligence: The Search for Coherence" (1997) 50 *CLP* 69, 72.

This correlativity of private law is manifested both in the bipolar nature of private law litigation and in private law doctrines. From the perspective of tort law, of course, many of these doctrines themselves represent core constituent ingredients which must necessarily be present to generate a cause of action, such as, for example, the duty of care requirement or the need to establish causation in the context of the negligence inquiry[27], both of which, in their different ways, establish a connection (or correlation) between the plaintiff and the defendant. Weinrib contends that in order to articulate a proper account of private law, it is necessary to explain this central feature of correlativity. Such an explanation, he argues, can only be done from an "internal" perspective, because correlativity comprises a structural feature of private law – and this is the reason why "external" explanations of private law have consistently failed to provide a satisfactory account of private law in terms of its social purposes.

Two examples of "external perspective" explanations that fail to convince may be briefly noted at this stage. First, the notion that the idea of private law is to compensate for harm suffered does not assist us in understanding why any particular person or entity should pay this compensation; nor does it shed any light on the question of why private law refuses to countenance recovery of damages for losses caused in certain ways.[28] Secondly, the idea that the core function of private law is to deter certain types of conduct does not account for the fact that such conduct will not attract liability if it does not result in loss to the plaintiff, as in the tort of negligence, for example, where a person "is entitled to be as negligent as he pleases towards the whole world if he owes no duty to

[27] Each of these constituents of the negligence inquiry is analysed in detail in Chapter 2 below.
[28] See further Peter Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16 *OJLS* 471, 471.

them".[29] By contrast, when one analyses private law from the internal perspective, both apparent lacunae are filled[30]: in the first instance, the fault principle and the rule against remoteness are generally pre-requisites to the imposition of liability[31]; so too in the second, does the internal perspective enable us to point to core constituent ingredients of particular private law causes of action that independently contribute to explaining why liability is or is not imposed. So, to stay with the tort of negligence, for example, damage as the "gist" of the negligence action serves the purpose of precluding plaintiffs who have sustained no loss as a result of the impugned conduct of the defendant.[32]

If private law is to be properly understood, according to Weinrib, it must be recognised as an end in itself as opposed to a means to some other end: "the [only] purpose of private

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[29] *Le Lievre v Gould* [1893] 1 QB 491, 497 (CA), quoted with approval by Fitzgibbon LJ in *Petrie v Owner of SS "Rostrevor"* [1898] 2 LR 556, 575 (CA). The damage requirement of the negligence action against public authorities is discussed in detail below in Chapter 2.

[30] Albeit not entirely, as, for example, in the case of plaintiffs who struggle to establish breach or causation in the negligence action; see the comments of Lord Hoffmann in *The Gleaner Company Ltd v Abrahams* [2003] UKPC 55, [2004] 1 AC 628, [51].

[31] Although this is admittedly problematic in areas of strict liability, and in particular in the context of vicarious liability which is explored in detail in Chapter 7 of this thesis. Weinrib argues that to the extent that the tort of the employee was fault-based, vicarious liability does not comprise a "pure instance" of liability without fault and as such can be accommodated within his corrective justice paradigm. This approach, which has been described as "suspect" (Christian Witting, "The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence" (2008) 71 *MLR* 621, 622, fn. 2), is, with respect, problematic on a number of fronts. First, and most straightforwardly, an employer may be vicariously liable for a strict liability tort committed by an employee (such as, for example, trespass to land): how then, can this not be described as a "pure instance" of liability without fault? As the case law discussed in detail in Chapter 7 of this thesis will show, however, even allowing for the fact that there will have been fault on the part of the wrongdoing employee, it is still problematic at a conceptual level to explain the basis on which vicarious liability is imposed in such cases. In many such cases the only connection between the victim's loss and the defendant is the fact that the latter employed the tortfeasor. It thus seems difficult to maintain, as Weinrib does, that vicarious liability can be accommodated within his corrective paradigm. See Peter Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16 *OJLS* 471, 487; Claire McIvor, *Third Party Liability in Tort* (Oxford: Hart Publishing, 2006), 3 ("It is not to be denied that...the doctrine of vicarious liability represent[s] [a] real [obstacle] to the corrective justice view"). McIvor (at 4) criticises Weinrib's attempt to house vicarious liability within the principles of corrective justice on the basis of what she describes as "resorting to legal fictions" such as the treatment of employers' liability as an application of the old master's tort theory (on which see Stevens who also argues for the master's tort as opposed to the servant's tort theory of vicarious liability: Robert Stevens, *Torts and Rights* (OUP: Oxford, 2007), 244.)

[32] This damage requirement is discussed in detail in Chapter 2.

law is to be private law".[33] Weinrib describes his account of private law as "formalistic" in that it seeks to explain private law solely in terms of its structure of correlativity. For Weinrib, the reason why correlativity is of such paramount importance is that private law embodies the concept of corrective justice.

**Corrective Justice: A "Mystery Worth Exploring"[34]**

At this juncture, then, it is necessary to further consider the meaning of corrective justice. The concept is notoriously malleable, but is indeed "a mystery worth exploring"[35]. As recently observed by Calabresi:

> While the existence of corrective justice imperatives has been recognised at least since Aristotle, just what those imperatives were for any given society has been extraordinarily mutable.[36]

A definition of corrective justice offered in one of the most recent and important accounts of the law of negligence – that by Dr. Allan Beever – is as follows:

> [A] wrong-sufferer has a claim in corrective justice only if the wrongdoer violated *her* right, and she can claim from the wrongdoer only if her right was violated by *that particular wrongdoer*.[37]

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[33] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard UP, 1995), 5.
[34] Allan Beever, "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28 *OJLS* 475, 477.
[35] Allan Beever, "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28 *OJLS* 475, 477.
[36] Guido Calabresi, "Toward a Unified Theory of Torts" (2007) 1 (3) *Journal of Tort Law* 1, 4 fn. 3.
[37] Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007), 45 (emphasis in original).

As Witting has observed[38], Beever's above conception of corrective justice and his notion of "right" are very similar to those of Peter Benson.[39] According to the accounts of both Beever and Benson, a "right" is a protected interest, harm to which will ground a claim for redress. The rights recognised by law are said to include the right to the performance of contractual obligations, to property, to bodily integrity and to reputation[40].

In what circumstances is correction just? According to Weinrib, this can be determined by reference to the concept of "Kantian right", a concept providing a lens through which human behaviour can be assessed as right or wrong. This "principle of right" underpins the relationships between individuals, and it requires that "the free choice of the one must be capable of coexisting with the freedom of the other in accordance with a universal law".[41] The principle judges persons according to their external interactions: its focus is upon "the sequence from one person's performance of an action to another's suffering of its effects".[42] On this analysis, then, the key function of private law is to enforce such judgments: the courts act as the guardians and overseers of this principle of right. In providing sanctions for breaches of the principle, the law confers upon the principle of right a "juridical standing"[43], also embodying a standard-setting function that imposes

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[38] Christian Witting, "The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence" (2008) 71 *MLR* 621, 627.
[39] Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", Chapter 19 in Owen ed, *Philosophical Foundations of Tort Law* (Clarendon Press, Oxford, 1995), 427.
[40] Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007), 212.
[41] *Ibid.*, 104. For discussion see Peter Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16 *OJLS* 471, 473 *et seq*.
[42] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard UP, 1995), 98.
[43] *Ibid.*, 107.

minimum levels of acceptability for human conduct and provides incentives to adhere to those standards.

Weinrib argues that tort law reflects corrective justice in a number of key respects. First, tort law compensates for some losses but not others, which shows that the law of torts is concerned with normative gains and losses, not factual gains and loses. Secondly, tort liability is liability for breach of a duty which "embodies"[44] the right which the plaintiff claims the defendant infringed. Further examples given include the fact that tort law adopts an objective standard of liability: a subjective standard would be inconsistent with the Kantian principle of right which is concerned not with a person's moral abilities but with their actions.[45] The rarity with which strict liability is imposed in tort law is deemed by Weinrib to be a further illustration of its corrective nature. The imposition of strict liability would be inconsistent with the Kantian principle of right in that it does not require any breach of "a duty, operative at the moment of action, to abstain from the act that causes the harm".[46]

Relevantly for present purposes, many other arguments put forward by Weinrib as to why tort law should be regarded as corrective involve an intense focus on the constituent ingredients of tort actions. Thus the requirement of causation is heavily emphasised[47]; as is the foreseeability requirement in both the duty and the causation context[48]; so too is

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[44] *Ibid.*, 134.
[45] *Ibid.*, 183.
[46] *Ibid.*, 179. The relevance of this point to vicarious liability is clear: see below, Chapter 7. It should be noted that in the passage quoted above Weinrib indeed goes on to contend that, when properly scrutinized, supposed cases of strict liability do not in fact amount to such: Weinrib, 185-196.
[47] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard UP, 1995), 154-158.
[48] *Ibid.*, 158-164.

reference made to the fact that damages awards seek to correct and that in any event the basic rule is that they are not punitive.[49] These points are all of particular relevance for the Chapters to follow in which these constituent ingredients of causes of action, issues of vicarious liability and exemplary damages in relation to public authority defendants, will be explored so as to argue that the corrective function is having increasingly to bend the vindicatory function.

A criticism of Weinrib's account that is particularly salient for present purposes, however, concerns the manner in which he offers a rather selective focus of particular constituent ingredients of certain torts that best advance the thesis he seeks to build. Take for example Weinrib's account of the tort of negligence, which involves a detailed focus on causation and the standard of care, but pays little attention to the duty concept. Commentators[50] have criticised this selective approach to the constituent elements of the tort of negligence in an analysis that purports to offer an overall account of the function of tort law and it is submitted that this criticism is especially noteworthy at this juncture given the attempts being made herein to subject the constituent ingredients of both negligence and misfeasance in public office to detailed scrutiny so as to argue that the vindicatory function of tort law is now in the ascendancy. This theme will be returned to later in the present work.

Critics of the corrective justice account of tort law contend that it does not provide a comprehensive or all-encompassing explanation of modern tort liability. The notion of

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[49] *Ibid.*, 135. See below, Chapter 6.
[50] Such as for example Peter Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16 *OJLS* 471, 487.

personal responsibility, for example, which is, as we have seen, at the root of Kantian/Weinribian conceptions of corrective justice, has been rejected[51] as an unrealistic characterisation of tort liability in an era where tort actions are in the main no longer brought against individuals, but against employers, liability insurers, corporations and crucially for present purposes, public authorities. In all of these cases, the wrongdoer may be either impossible to identify or simply not worth suing. Adherence to corrective justice principles thus cannot account for the imposition of liability in these cases where plaintiffs who go in search of "peripheral" parties.[52]

Other criticisms of Weinrib's corrective justice theory flow from a rejection of corrective justice as being the sole rationale for tort law. This rejection can be explained both in terms of a general and specific reluctance. The general reluctance flows from an unease amongst many scholars with what has been termed "relentless single-mindedness"[53] in attempts to provide a "monistic" account of tort law. More specific reluctance to subscribe to Weinrib's theory is based on distinct arguments against the feasibility of having recourse to corrective justice as providing that monistic account. Uniting both these general and specific approaches, a plurality[54] of approaches is instead advocated. Amongst[55] the leading exponents of pluralistic approaches[56] is Professor Peter Cane, who

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[51] Particularly strident criticism of the personal responsibility paradigm is articulated by Professor Atiyah: PS Atiyah, "Personal Injuries in the Twenty First Century: Thinking the Unthinkable" in Peter Birks ed, *Wrongs and Remedies in the Twenty First Century* (Oxford: Clarendon Press, 1996).

[52] See Jane Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 *LQR* 301.

[53] John C. P. Goldberg, "Ten Half-Truths about Tort Law" (2008) 42 *VALULR* 1221, 1253.

[54] "While chemistry is less glamorous than alchemy, experience has shown the former to be a more productive academic pursuit" (Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate, 2007), 15). I am grateful to Dr. Fergus Ryan for recommending this latter monograph.

[55] A similar contention is advanced by S.M. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, Cambridge, 2003), 2.

in *The Anatomy of Tort Law* rejects the notion that the corrective justice paradigm is capable of fully explaining the basis for tort law, particularly when analysis moves beyond a study of individual cases and outcomes by way of damages awards. Professor Cane says:

> Once we take account of the fact that court decisions can create legal precedents which can be used to guide people's conduct and to decide disputes other than that before the court, we can see that the law of tort is also concerned with distributive justice.[57]

Aristotle's classic formulation of distributive justice[58] explains the concept as a means of distributing benefits and burdens amongst the members of a group having regard to a particular criterion for distribution, such as merit or need, for example. As with corrective justice, a number of models of distributive justice may be presented; perhaps one of the most apt is its description as being "directed at distributing a given object among persons according to a criterion of merit".[59] Writing more recently, Professor Cane has observed

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[56] Pluralist scholars do, of course, differ concerning the question of which set of goals should be promoted by tort law. See, for example, Gary T. Schwartz, "Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice" (1997) 75 *Tex L Rev* 1801, 1819, fn. 132.

[57] Peter Cane, *The Anatomy of Tort Law* (Oxford: OUP, 1997), 18.

[58] Aristotle, *Nicomachean Ethics* (translated by Martin Ostwald, Book Five, New York, 1962), 117-120.

[59] Izhak Englard, *The Philosophy of Tort Law* (London: Dartmouth, 1993), 11. The use of the term "merit" here presumably embraces a broader conception of that term as typically understood (and as used above as an example of Aristotle's criteria for distributive justice) since, as Carol Harlow points out, "[a]rguably merit is immaterial; distributive justice is often aimed specifically at the underprivileged, irrespective of merit" (Carol Harlow, *State Liability* (Oxford: OUP, 2004), 2, fn. 4.). The fact that Aristotle did not commit himself to any one criterion for distribution is emphasised by Keren-Paz in his important recent account of distributive justice in tort law: Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate, 2007), 5.

that "[t]he relevance of distributive justice to tort law is currently perhaps the hottest topic of discussion amongst those who take a theoretical interest in the subject".[60]

**Specific Problems posed by Corrective Justice Paradigm in the context of the Tortious Liability of Public Authorities**

From the perspective of public authority liability in tort law, the corrective justice paradigm is problematic in a number of specific ways, each of which will be explored throughout the course of this thesis in the context of constituent ingredients of causes of action and outcomes against public authority defendants. Focusing on the specific cause of action of misfeasance in public office, for example, to be examined in detail in Chapter 3 herein, the argument advanced as to the capacity for recovery to lie in the absence of damage, is one which is not easy to house within the corrective justice paradigm. Similarly – and more broadly – in the context of the negligence liability of public authorities generally, the "gains and losses" element of a strict correlativity analysis breaks down when the defendant in question is not the individual wrongdoer but a public authority. Thus Carol Harlow argues that with the demise of the welfare state in post-Thatcherite Britain, tort law came to assume a "'last ditch function' of filling gaps in declining welfare services" with which the corrective justice model was unable to cope: this "last ditch function" thus became "machinery for distributive justice".[61]

Similar problems will be analysed in the context of vicarious liability. Whilst this is a species of tort liability that could be said to compromise the corrective justice principle regardless of the status of the defendant, public authority or otherwise, it will be argued

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[60] Peter Cane, Review of Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate, Aldershot Hants, 2007) (2008) 16 *Torts L J* 75, 75.
[61] Carol Harlow, *State Liability* (OUP, 2004), 5.

that it is in the context of the vicarious liability of public authorities that the corrective justice paradigm is particularly unconvincing.[62]

So too is the awarding of exemplary damages troublesome when viewed through the prism of corrective justice. Because corrective justice does not permit punitive responses[63], the award of exemplary damages seems inconsistent with a fundamental tenet of corrective justice: that compensation be made for the extent of the harm suffered, no less and no more. Again, while this argument could be said to apply to tort defendants generally, it is particularly acute when the defendant is a public authority, since a perusal of the key jurisprudence in this jurisdiction demonstrates that it is in the context of public authority defendants that such awards are most likely to be made.[64]

In light of the foregoing analysis, it will thus be argued in this work that it is now accurate to assert that corrective justice "does not adequately explain modern tort law".[65] On the contrary, Professor Atiyah's concern, noted above, that corrective justice does not convincingly account for the tortious liability of public authorities will be reassessed in light of shifts currently taking place in this area of tort law. Instead of being limited to an exclusive reliance on corrective justice principles, the tortious liability of public authorities is increasingly being influenced by concerns about the need to vindicate plaintiffs' rights in tort law. The Chapters that follow examine how these concerns are

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[62] See below, Chapter 7.

[63] See for example Allan Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 *OJLS* 87; E.J. Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003) 78 *Chicago-Kent Law Review* 55.

[64] A striking example, to be discussed in detail below in Chapter 6 is the Supreme Court decision in *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9, [2007] 4 IR 587.

[65] Elizabeth Adjin-Tettey, "Accountability of Public Authorities through Contextualised Determinations of Vicarious Liability and Non-Delegable Duties" (2007) 57 *UNBLJ* 46, 50.

affecting the substantive position in tort of public authorities, with particular emphasis on the effects of this vindicatory analysis on the constituent ingredients of causes of action in tort law. At this juncture, more detailed consideration is given to the rôle of tort law in the vindication of rights.

## C. TORT LAW AND THE VINDICATION OF RIGHTS

### Burgeoning scholarship exploring the nature of rights protection in tort law

A considerable body of theoretical scholarship has now built up concerning the priorities of tort law and the nature of rights protection within tort law. The most significant recent contributions include Robert Stevens's *Torts and Rights*[66] and Allan Beever's *Rediscovering the Law of Negligence*.[67] The present thesis is not concerned with attempting to consider the nature of rights[68] or their place within the priorities of tort law; rather it is concerned with exploring and elaborating upon the extent to which a "vindicatory" function is now discernible within developing judicial approaches to the tortious liability of public authorities. It is undoubtedly correct to emphasise, however, that "[t]he language of vindication is intimately linked with rights-based conceptions of legal entitlements and legal wrongs".[69] The argument underscoring this thesis is that pressures to provide vindication are manifesting themselves in fundamental shifts occurring not only in judicial approaches to the constituent ingredients of causes of action

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[66] (Oxford, OUP, 2007).
[67] (Oxford: Hart Publishing, 2007).
[68] And the problems of nomenclature thereof, on which see, for example, W.N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913–1914) 23 *Yale LJ* 16.
[69] Normann Witzleb and Robyn Carroll, "The Role of Vindication in Torts Damages" (2009) 17 *Tort L Rev* 16, 16.

in tort against public authorities – here, negligence and misfeasance in public office – but also in the approaches being taken to "outcomes" in tort litigation against public bodies, with two particular "anomalies" of special relevance to public authorities – the awarding of exemplary damages and the imposition of vicarious liability – comprising the clearest examples of this latter trend. In order to consider the difference between these two classes, the author seeks to explore the range of meanings accorded to the term "vindication" in the growing jurisprudence and scholarship in this area, as well as the distinction between tort law pursuing a vindicatory purpose and achieving a vindicatory result – or, more simply, the difference between a vindicatory "purpose" and a vindicatory "effect".[70]

**The Meanings of "Vindication"**

Interest in the vindicatory function of tort law is in the ascendancy. The meaning and rôle of vindication in the law of torts has been accorded significant consideration in recent jurisprudence both in this jurisdiction and elsewhere. It is thus important at this stage to identify the various meanings of the term "vindication". It has been correctly observed that "this rather imprecise word has various shades of meaning".[71]

In the recent Irish Supreme Court decision in *Grant v Roche Products (Ireland) Ltd*[72], discussed in detail below in this Chapter, Hardiman J devoted considerable analysis to the nature and etymology of the word "vindication", referring to "the ordinary and natural

[70] This distinction is identified and elaborated upon in detail by Normann Witzleb and Robyn Carroll, "The Role of Vindication in Torts Damages" (2009) 17 *Tort L Rev* 16, 20.
[71] W.V.H. Rogers, *Winfield and Jolowicz on Tort* (17th ed, Sweet & Maxwell, London, 2006), [22-5].
[72] [2008] IESC 35, [2008] 4 IR 679.

meaning of the word "vindicate" as set out in the Oxford English dictionary" which he summarised in the following terms:

> [T]he word, which is a transitive verb, is said to derive from the Latin *vindicare*, which is defined as meaning to claim, to set free, to punish, or to avenge. The English term is given the following meanings:
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> - avenge, revenge,
> - take revenge (on a person) for a wrong,
> - claim, assert, or establish the possibility of,
> - clear of blame, justify by evidence or argument,
> - establish, assert, or maintain,
> - defend against encroachment or interference.[73]

**Vindication as Vengeance and Punishment**

It is instructive to consider each of these meanings in turn. First, there is the notion of vindication in the sense of vengeance or, perhaps harsher still, of *taking revenge on* a person for a wrong committed. Whilst this language may appear singularly inappropriate to contemporary tort law, it is salutary to recall that this notion that to vindicate should involve punishment or retribution apparently explains the erstwhile use of the terminology of "vindictive damages" in older case law[74] – a practice which, indeed,

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[73] *Ibid.*, [71].

[74] A point made by Normann Witzleb and Robyn Carroll, "The Role of Vindication in Torts Damages" (2009) 17 *Tort L Rev* 16, 18, citing *Williams v Settle* [1960] 1 WLR 1072; *Cruise v Terrell* [1922] 1 KB 664; *Whitham v Kershaw* (1886) 1 KB 244. In an Irish context see *Worthington v Tipperary County Council* [1920] 2 IR 233.

continued until relatively recently[75] and was not authoritatively discouraged until the 1970s when, in the leading case of *Cassell & Co Ltd v Broome*[76], Lord Hailsham LC deprecated the use of the language of vindictiveness in the awarding of damages, calling for such language to be substituted with that of exemplary damages. He said:

> In my view it is desirable to drop the use of the phrase "vindictive" damages altogether... Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment.[77]

Indeed, writing as recently as 1998, the Irish Law Reform Commission observed that "[t]erms such as "vindictive damages... appear to have largely fallen into disuse and can be disregarded".[78] It is important to stress, however, that in both instances, Lord Hailsham LC and the Law Reform Commission respectively called for the replacement of the term "vindictive damages" with that of "exemplary damages". Clearly, then, this first conception of "vindication" has significant implications for the awarding of exemplary damages, an argument that is considered and advanced in detail in Chapter 6.

A separate way in which this conception of "vindication" retains a contemporary significance is in its emphasis on the importance of motive. It is elementary to observe that tort law generally is not overly concerned with motivations on the part of the defendant, with the general position in tort law being that "motive does not matter"[79] or,

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[75] See for example *Williams* v *Settle* [1960] 1 WLR 1072.
[76] [1972] AC 1027.
[77] *Ibid.*, 1073.
[78] Law Reform Commission, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages* (LRC CP 12-1998) [1998] IELRC 2 (May 1998) para 9.34, fn. 19.
[79] The leading case on point is arguably *Allen v Flood* [1898] AC 1. For analysis see Tony Weir, *Economic Torts* (Clarendon Press, Oxford, 1997), who concurs, at 6, with Professor Heuston's description of *Allen* as

as stated in a leading textbook, "the general rule [is] that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant and that, if conduct is lawful apart from motive, a bad motive will not make him liable".[80]

A notable exception to this rule is the only truly public law tort, that of misfeasance in public office, considered in detail in Chapter 3 herein. With its emphasis on the ill-will of the defendant as triggering the cause of action in the form of a malice requirement, the tort thus provides a significant exception to this general rule in tort law that motive is irrelevant, and thus squarely engages this first conception of vindication as being the law's response to improper conduct driven by ill-will or *animus* on the part of the defendant.

**Vindication as the ability publicly to assert or make a claim**

The second distinct understanding of "vindication" presented in the OED definition considered by the Supreme Court in *Grant* is to "claim, assert, or establish the possibility of". This meaning has a particular resonance in the context of legal proceedings and underlines how the facilitation of access to a court can serve to further the interests of vindication. That torts scholarship in this jurisdiction lends support to this construction of vindication is illustrated in, for example, the claim of Quill that "[v]indication is an important element of tort law and, for some litigants at least, the manner in which their claim is dealt with is almost as important as the winning or losing of the action".[81]

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"indeed an important case, perhaps the most important in the history of the law of torts" (R.V.F. Heuston, "Judicial Prosopography" (1986) 102 *LQR* 90, 97).

[80] W.V.H. Rogers, *Winfield and Jolowicz on Tort* (17th ed, Sweet & Maxwell, London, 2006), 78.

[81] Eoin Quill, "Maintaining the Distinction Between Duty and Liability" (1998) 20 *DULJ* 183. Detailed analysis of Quill's vindicatory approach is undertaken in Chapter 2 herein.

It is submitted that this meaning of "vindication" has proven particularly influential in the context of domestic tort litigation against public authorities being scrutinised by the European Court of Human Rights. As will be argued in detail in Part III of this thesis, the highly significant influence of Article 6 ECHR, which has been interpreted as guaranteeing the right of access to a court, and landmark rulings of the European Court of Human Rights thereunder in cases such as *Osman v United Kingdom*[82] and *Z v United Kingdom*[83], can be understood as embodying this conception of vindication. In this context, the ability to have access to a court so as to make an argument – "establish, assert or maintain" – is viewed as in and of itself a concomitant aspect of the process of vindication: accordingly, domestic strike-out mechanisms have come under particular scrutiny as regards their compatibility with Article 6 ECHR. In this part of the thesis, it will be argued that the complex and often confusing line of case law (of both the Strasbourg and the domestic courts) emanating from the *Osman* decision may be better understood through an appreciation of the influence of this particular model of vindication.

**Vindication as the upholding of a right**

Turning to the last model of vindication from the OED definition recently accepted by the Irish Supreme Court in *Grant*, this regards the term "vindicate" as to "defend against encroachment or interference". On this analysis, "vindication" describes the making good of the plaintiff's legal right and defending it against attack by the granting of an appropriate remedy. Unless an infringed right is met with a remedy which is adequate, the right is, as has recently been observed, "a hollow one, stripped of all practical force

[82] [1998] ECHR 101, (1998) 29 EHRR 245.
[83] [2001] ECHR 333, (2002) 34 EHRR 97.

and devoid of all content".[84] In this way, vindication is seen as a necessary process in order to ensure that adequate protection is given to a legal right. The classic judicial articulation of this concept is undoubtedly the much-cited passage in the dissent of Holt CJ in *Ashby v White*[85], a case that is discussed in detail in the treatment of misfeasance in public office in Chapter 3. The relevant passage of Holt CJ's judgment contains the following statement:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment to it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[86]

This conception of vindication is one which, it will be argued, is at present exerting a powerful influence over the manner in which the courts are addressing claims concerning the tortious liability of public authorities. For, pressures – whether stated explicitly or otherwise – not to leave a wronged plaintiff without a remedy, are affecting the manner in which the courts are approaching both the constituent ingredients of the causes of action within which claims are brought, and the way in which liability is imposed. Thus, it is argued in Chapters 2 and 3 that in the torts of both negligence and misfeasance in public office, key constituent ingredients of the causes of action have been and are undergoing rapid, dramatic alteration in order to accommodate this vindicatory paradigm. It will be argued, for example, that in the tort of negligence, significant shifts in terms of what the

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[84] *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134, [87] *per* Lord Hope of Craighead. This case is considered in detail in Chapter 2.
[85] (1703) 2 Raym 938, 99 ER 126.
[86] (1703) 2 Raym 938, 99 ER 126, 136.

courts will require in order for plaintiffs to be permitted to clear the obstacles of, *inter alia*, the causation and damage requirements, are occurring in direct response to this conception of vindication. As to the manner in which liability is imposed, it will be argued in Chapter 7 that the developments in approximately the last decade concerning the imposition of vicarious liability on (almost invariably) public authority defendants provide further evidence of the unstated pressures of this aspect of the vindication model and that the relaxation of the orthodox rules of vicarious liability can, at least in part, be better understood through this focus.

On this latter point, it is necessary to consider a key distinction that between tort law having a vindicatory purpose, on the one hand, and a vindicatory effect, on the other.[87]

**The Distinction between Vindicatory Purposes and Effects**

In exploring the influence of vindication upon the tortious liability of public authorities it is helpful to have regard to the distinction between tort law pursuing vindicatory *purposes* and, by contrast, tort law having *vindicatory effects*. By vindicatory purposes is meant tort law's permitting recovery to plaintiffs so as to pursue and achieve vindication of that plaintiff's rights in tort law. Thus, in the tort of negligence for example, it will be argued that where the courts – as they have recently done in a number of jurisdictions – apply a looser test as to whether a plaintiff has met the causation hurdle, they do so to enable the tort of negligence to pursue a vindicatory purpose. Similarly, where long-standing restrictive rules in a particular cause of action, such as misfeasance in public office, are abandoned so as to enable a claim in misfeasance to be made out, this occurs

[87] For detailed discussion of this distinction in the context of tort remedies (which the authors describe as the distinction between "vindication as a purpose and an effect of a remedy") see Normann Witzleb and Robyn Carroll, "The Role of Vindication in Torts Damages" (2009) 17 *Tort L Rev* 16, 20-21.

in recognition of the purpose of vindication which, it will be argued in Chapter 3, that tort serves. By contrast, the courts may accept that certain rules in tort law do not (or at least do not solely) pursue vindicatory objectives. In relation to such rules – the two best examples of which are, it is argued here, exemplary damages and vicarious liability – the significant developments currently taking place in their application manifest the importance of vindicatory effects in tort law. Concerning the imposition of vicarious liability upon (almost always) public authority defendants, for example, the newly-established "close connection" test accepted in many common law jurisdictions provides a telling example: whilst vicarious liability is not expressly imposed in order to advance the purpose of vindicating plaintiffs' rights, being instead concerned with notions of enterprise risk, fairness and costs allocation norms, there can be little doubt that the recent developments across the common law world analysed in Chapter 7 herein have as their effect, if not their stated or unstated purpose, the vindication of the rights.

On this point, however, it is conceded that the distinction between vindicatory purposes and effects will not always be clearcut. The issue of exemplary damages bears this out. As analysed in Chapter 6 – and as already seen above in the context of the earlier discussion of "vindictive damages" – this species of damages may be said to pursue vindication in the sense of punishment of the defendant and to this extent this area of tort law is another example of the pursuit of a vindicatory purpose. The chief emphasis of the function of such damages, however, is their rôle in making an example of the defendant, rather than vindicating the plaintiff's rights. In this way, a very large award of exemplary damages may have the effect of vindicating the plaintiff's rights, even though its apparent

purpose is defendant-focused. As such, the topic comprises an example of how the questions of purpose and result may become intermingled. A more precise approach may be to have recourse to the language of "primary" and "secondary" purposes[88], but even here the line between "secondary purpose" and a "result" may be difficult to delineate. This area is treated in greater detail in Chapter 6.

## D. THE INCREASING EVIDENCE OF THE RECOGNITION OF THE VINDICATORY FUNCTION OF TORT LAW

In this last section of the Chapter, two key examples of recent jurisprudence are selected in which senior appellate courts have recently expressly considered the vindicatory function of the law of torts: first, the decision of the Irish Supreme Court in *Grant v Roche Products (Ireland) Ltd*[89] and, secondly, the House of Lords judgment in *Ashley v Chief Constable of Sussex Police*.[90] Each of these two cases is referred to frequently throughout other Chapters of this thesis and for this reason it is instructive to set out the background to these cases and their importance for the theme of vindication at this juncture.

[88] Thus Witzleb and Carroll state that "[v]indication is thus a secondary purpose of exemplary damages": Witzleb and Carroll, *loc cit*, 27.
[89] [2008] IESC 35, [2008] 4 IR 679.
[90] [2008] UKHL 25, [2008] 1 AC 962.

### *Grant v Roche Products (Ireland) Ltd*

The rôle and nature of vindication in the imposition of tortious liability was the subject of detailed consideration by the Supreme Court in *Grant v Roche Products (Ireland) Ltd.*[91] *Grant* is significant for at least four reasons: first, the Supreme Court afforded analysis to what is meant in law by the term "vindication"; secondly, the Court considered the vindicatory function of tort law through the prism of the Constitution, specifically by reference to Article 40.3; thirdly, the Supreme Court specifically rejected the argument put before it to the effect that vindication could not be achieved through tort law but only via criminal or regulatory law; fourthly, *Grant* provides a recent and very strong example of a case in which the Supreme Court held that a vindicatory rationale could be invoked in order to allow proceedings to be maintained in causes of action in tort law. For these reasons, the judgment merits close analysis at this stage.

This wrongful death claim arose from the tragic circumstances of a twenty-year old who committed suicide. His family sought to argue that the deceased had suffered depression as a result of taking Roaccutane, a drug designed to cure acne, and sought damages from a number of defendants for the mental distress, loss and suffering which the death caused. The plaintiffs claimed that depression, suicidal ideation and suicide itself were recognised side effects of the drug Roaccutane; that the drug was a defective product when used for medical treatment in the manner intended by the relevant defendants and that they were negligent and in breach of duty in various ways. The relevant defendants brought a motion to determine the preliminary issue of whether the matter could continue

[91] [2008] IESC 35, [2008] 4 IR 679.

to trial in circumstances where they had put an offer to the plaintiff, arguing that the High Court should exercise its inherent jurisdiction to stay the proceedings. The High Court declined to accede to the application, and the defendants appealed to the Supreme Court. In the Supreme Court judgment, significant reliance was placed by Hardiman J (with whom Murray CJ and Geoghegan JJ concurred) on the vindicatory interest being pursued through tort law by the plaintiffs. As seen above earlier in this Chapter, Hardiman J embraced a particularly expansive approach to the meaning of vindication in this regard, recognising a broad range of different constructions of the term, which have been analysed above. Significantly for present purposes, Hardiman J then applied this broad construction of vindication to Article 40.3 of the Constitution of Ireland[92], laying particular emphasis on the Irish language version as well as the English text.[93] Hardiman J emphasised that attention must be focused on the use of the term "a shuíomh", translated by Ó Cearúil as "vindicate", noting that the same word is used in the preceding sub-Article, 40.3.1, where it is translated by Ó Cearúil, literally, as "assert".[94] The model of vindication envisaged by Hardiman J is interesting for present purposes, in that three characteristics of vindication were identified. These were:

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[92] Article 40.3 of the Constitution, as far as relevant, provides:

> 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

[93] *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679, *per* Hardiman J, [72], citing Micheál Ó Cearúil, *Bunreacht na hÉireann: A Study of the Irish Text* (The All-Party Oireachtas Committee on the Constitution, The Stationary Office, Dublin 1999). Hardiman J noted Ó Cearúil's analysis that the matter expressed in English as "and, in the case of injustice done, vindicate…", found in the middle of the English subsection, is found at the end of the Irish version where the same thought is expressed as "agus iad a shuíomh i gcás éagóra" which means "and vindicate them in case of injustice". This pronoun "iad" (them) refers to "beatha agus parsa agus dea-chlú agus maoinchearta an uile shaoránaigh" (the life and person and good name and property rights of every citizen).

[94] *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679, *per* Hardiman J, [73].

(i) a judicial process which

(ii) featured a determination of liability and

(iii) a pronouncement of liability.

Hardiman J emphasised that under the terms of Article 40.3, the function of vindication imposed as an obligation on the State is to be "carried out by its laws". He continued:

> It is, therefore, to the body of law in force in the State, i.e. statute law, common law, and law deriving from any other legitimate source such as the [European Convention on Human Rights], that one must look to for the mechanism of vindication.[95]

The explicit inclusion of a reference to "common law" in this passage is significant: it specifically underlines the potential of the law of torts to be developed having reference to the vindicatory principles of (amongst others) Article 40.3. In this regard, of crucial importance is Hardiman J's rejection of the proposition of the defendants in *Grant* to the effect that the vindication of personal rights is a matter only for the "criminal or regulatory" law and not civil law. Describing this as a "highly artificial distinction [that] has no basis in the Constitution or in the law itself", Hardiman J rejected it chiefly on the basis that "it does not conduce to justice which, by Article 34.1 of the Constitution is what the courts are to administer". Referring both to *Meskell*[96] and *Hanrahan*[97] (two

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[95] *Ibid.*, [76].
[96] *Meskell v Córas Iompair Éireann* [1973] IR 121.

"constitutional tort" cases considered in detail in Chapter 4), Hardiman J affirmed the rôle of tort law in "implementing the State's duties under Article 40.3 and the personal rights Articles of the Constitution."[98]

Whilst it must be emphasised that *Grant* concerned an application to have the proceedings stayed and as such did not involve the making of any damages award, the approach evinced in the case is significant in signalling a willingness to countenance the making available of remedies in tort law on the basis of a vindicatory function.

In this regard, another recent case from the United Kingdom is also highly relevant: it is to this case that our analysis now turns.

### *Ashley v Chief Constable of Sussex Police*

Although the judgments of the House of Lords in *Ashley v Chief Constable of Sussex Police*.[99] concerned consideration of the sustainability of the plaintiff's action in trespass to the person and as such are not concerned with either the tort of negligence[100] of misfeasance in public office[101], the case is highly relevant for present purposes in light of the competing perspectives it evinces amongst members of the House of Lords concerning the vindicatory function of tort law, and the question of the relationship between that function and that of corrective justice. As such, it is instructive to have

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[97] *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd* [1988] ILRM 629.

[98] *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679, *per* Hardiman J, [77].

[99] [2008] UKHL 25, [2008] 2 WLR 975, [2008] 1 AC 962. This case is discussed below in this Chapter.

[100] The defendant Chief Constable having conceded negligence liability earlier in the course of the proceedings (other concessions including liability for false imprisonment and liability for all damage including aggravated damage).

[101] Although it should be noted that an attempt to advance a claim in misfeasance was made in *Ashley*; this aspect of the case is further discussed in Chapter 3 on Misfeasance in Public Office.

regard to *Ashley* in laying the analytical groundwork for the detailed treatment to be accorded to the vindicatory aspects of both negligence and misfeasance in public office in the Chapters to follow.

Briefly, the key issue under consideration before the House of Lords in *Ashley* was whether a cause of action in trespass to the person could be sustained in light of the fact that the wrongs had been compensated due to concessions made by the defendant in respect of other causes of action. By a three to two majority, the House of Lords held that there was still an issue that could be permitted to go to trial. The different approaches taken in the case on this question reveal a tension amongst the different judicial perspectives about the rôle of contemporary tort law. Lord Scott, for example, was most forthright in expressing his view that there exists a strong vindicatory element to the law of tort, speaking of its general purpose as being "to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others".[102] Lord Scott continued:

> How is the deceased Mr Ashley's right not to be subjected to a violent and deadly attack to be vindicated if the claim for assault and battery, a claim that the chief constable has steadfastly and consistently disputed, is not allowed to proceed? Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose. But it is difficult to see how

[102] *Ashley*, [18].

> compensatory damages can could ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place.[103]

It is significant that Lord Scott couched this interpretation in general terms rather than as being confined only to torts such as trespass to the person. In discussing the *Ashley* case, Palmer and Steele rightly[104] emphasise that the tort of trespass is "distinctively different"[105] from both negligence and misfeasance in public office in that these latter torts require that a threshold of actionable damage be crossed by the plaintiff. It is thus significant, it is submitted, that Lord Scott framed the language of vindication within the parameters of tort law generally, as opposed to focusing exclusively on the trespassory claim. In his judgment, Lord Scott reiterated a point he had made both in an earlier case[106] and extra-judicially[107] to the effect that the award of compensatory damages may have the purpose of vindicating rights – extending this principle to form the proposition that even where compensation is already granted through other mechanisms, the pursuit of vindication can itself justify permitting a claim to be brought to trial.

In stark opposition to the approach of Lord Scott on this question is the stance taken by Lord Carswell in *Ashley*, who was firmly of the view that, as the claimant had obtained compensation, there was no basis on which the stand-alone claim in trespass could be

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[103] *Ashley*, *per* Lord Scott, [22].
[104] At least in the context of English law concerning the damage requirement in misfeasance following the judgment of the House of Lords in *Watkins v The Home Office* [2006] UKHL 17, [2006] 2 AC 395; as discussed in Chapter 3, the position in Irish law on this point is unclear.
[105] Phil Palmer and Jenny Steele, "Police Shootings and the Role of Tort" (2008) 71 *MLR* 801, 806.
[106] *Merson v Cartwright* [2005] UKPC 38.
[107] Lord Scott, "Damages" [2007] *LMCLQ* 465.

allowed to proceed.[108] Expressly disagreeing with Lord Scott's opinion that this was "a suitable case for what he terms vindicatory damages"[109], Lord Carswell only acknowledged a function for such damages "when there is no other remedy which will meet the case [...] except a nominal award of damage to establish formally the validity of the claim".[110]

Between these polarised positions, the approaches of the other Law Lords in *Ashley* can be viewed as more nuanced. Lord Bingham, for example, was in favour of the claimant's being permitted to proceed on the basis that the claim in trespass was a valid one that had not hithertho been decided upon by the courts, referring to the litigant's individual autonomy and right to conduct proceedings as he or she wishes as long as a cause of action can be identified as applying to the case. Whilst it is thus correct to note that Lord Bingham in *Ashley* "avoided taking any stance on the appropriate rôle of the law of tort or of damages"[111], it is submitted that his stance indicates support for (or, at the very least, is not inimical towards) the "vindication approach" of Lord Scott, and is also consistent with the proposition advanced earlier in this Chapter to the effect that vindication can be achieved through the recognition of an entitlement to institute and progress legal proceedings.

The other member of the majority, Lord Rodger, also indicated a degree of acceptance for the vindication approach – illustrated, for example, in his acceptance that in the context

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[108] *Ashley*, [81].
[109] *Ibid.*, [80].
[110] *Ibid.*
[111] Phil Palmer and Jenny Steele, "Police Shootings and the Role of Tort" (2008) 71 *MLR* 801, 809.

of trespass to the person, damages are not limited to a compensatory function and may aim at vindication.[112] Lastly, Lord Neuberger joined Lord Carswell in dissenting but did so on a basis that emphasised how finely balanced the case was, laying emphasis on the many avenues of recovery already pursued by the claimant.

For the purposes of ascertaining the significance for present purposes of the different approaches in *Ashley*, a number of points can be made. As we have seen, the strongest approach in terms of vindication was that taken by Lord Scott. In this approach, there are two points of particular note for present purposes. First, Lord Scott's reiteration of the proposition that the awarding of compensatory damages can comport with vindication provides a salutary reminder of the futility, already explored above, of attempting to reduce the purpose of the law of tort to one single objective. Secondly, it is significant that Lord Scott expressly referred to the protection of the right to life within Article 2 of the European Convention on Human Rights as a reason to support the claim for vindicatory damages: this has significant implications for the study to be undertaken in this thesis of the relationship between domestic tort law and the European Convention on Human Rights.[113]

The fundamental divergence of approach between the majority and minority – exemplified by contrasting the judgments of Lords Scott and Carswell – underlines the tension in contemporary thinking on tort law about the rôle that vindication should play in this area of the law. Whilst two key points about Lord Scott's pro-vindication approach

[112] Though admittedly this approach appears narrower than Lord Scott's approach, for the reason identified above, text following n 107.
[113] See below, Chapter 5.

have been noted above, it should also be stressed that Lord Carswell's disinclination to confer upon tort law a vindicatory rôle is echoed in a number of emerging themes and tensions in both the torts of negligence and misfeasance in public office, to be analysed separately in subsequent Chapters of this thesis. The division in approach between the members of the Appellate Committee further underlines how a range of factors will influence judicial approaches to the question of whether a purely vindicatory objective can comprise a sufficient, stand-alone basis on which to allow tort actions to proceed. The majority judges, for example, did not consider it appropriate to have recourse to the court's extensive case management powers so as to prevent the claimants from advancing with their battery claim, notwithstanding that the only benefit that they claimants stood to gain was public vindication of their right. By contrast, Lords Carswell and Neuberger considered that the public interest militated against the additional expense of a new trial, and that considerations such as, *inter alia*, economic efficiency could countervail against the demands of vindication. Regardless of these tensions within the judgments in *Ashley*, however, it is undoubtedly true that this case has "raised the profile of vindication as a potentially independent purpose of the law of torts".[114]

Indeed, Lord Scott's express suggestion[115] that the deceased's family members might be able to claim "vindicatory damages" has led McBride to argue that this "may mark the emergence of a new category of damages".[116] As other examples of this emerging category, McBride refers to the proposal advanced by Lord Hoffmann of a "modest

[114] Normann Witzleb and Robyn Carroll, "The Role of Vindication in Torts Damages" (2009) 17 *Tort L Rev* 16, 36.
[115] *Ibid.*, [22].
[116] Nicholas J. McBride, "Trespass to the Person: The Effect of Mistakes and Alternative Remedies on Liability" [2008] *CLJ* 461.

solatium" for the claimant in *Chester v Afshar*[117], a negligence case involving informed consent to medical treatment; McBride also refers to the "conventional sum" of £15,000 approved in *Rees v Darlington Memorial Hospital NHS Trust*[118], awards which he comments "may also be rationalised as being an example of this new form of damages".[119] Each of these cases is analysed in detail in the next Chapter, where their vindicatory implications can be more fully explored. For the present, suffice it to note that, on the basis of cases such as these, it is clear that this category of "vindicatory damages" is one that is now in the ascendancy – with all the implications, practical and philosophical, that this poses for the tortious liability of public authorities.

**_Ashley_ Vindication Approach recently endorsed in Northern Irish context**

The vindicatory approach taken in *Ashley* has more recently been endorsed by the High Court of Northern Ireland. In June 2009, in delivering a landmark judgment in favour of relatives of victims of the Omagh Bombing[120], the Court explicitly referred to *Ashley* and to the vindicatory aspect of the approach taken therein. The 12 plaintiffs sought damages (including aggravated and exemplary damages) for personal injuries sustained by them as a result of the Omagh bombing in August 1998. In addition there were three further fatal accidents claims as a result of the death of members of their families in the explosion.

Some of the defendants sought to raise a preliminary argument to the effect that the plaintiffs' action constituted an abuse of process. The basis for this argument was

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[117] [2004] UKHL 41, [2005] 1 AC 134, [34].
[118] [2003] UKHL 52, [2004] 1 AC 309.
[119] Nicholas J. McBride, "Trespass to the Person: The Effect of Mistakes and Alternative Remedies on Liability" [2008] *CLJ* 461, 463.
[120] *Breslin v McKenna (Omagh Bombing case)* [2009] NIQB 50 (8 June 2009).

apparently two-fold: first, that the particular public funding arrangements for the action might have the effect of nullifying any prospect that the plaintiffs could obtain any financial benefit from the action even if successful; and, secondly, that the "collateral purpose" behind the action was to identify the defendants as those responsible for the bombing. This preliminary ruling had been rejected by Morgan J in January 2008[121]; as seen above, the House of Lords handed down its judgment in *Ashley* in April 2008. In light of this, Morgan J referred to this preliminary application in the substantive judgment in the case in light of the subsequent ruling in *Ashley*. Interestingly for present purposes, Morgan J explicitly referred to, *inter alia*, the approach of Lord Scott in *Ashley* already considered above in this Chapter, since Lord Scott had specifically recognised that the proceedings had a vindicatory purpose. Morgan J also emphasised that the dissenting judges in *Ashley* had been influenced by the admissions made by the defendant Chief Constable leading to the entry of judgment for the plaintiffs in negligence in that case, which admissions were described by Morgan J as "critical to their [the dissenting Law Lords'] reasoning."[122] The significance of this latter point for present purposes lies in its apparent manifestation of agreement on the part of the Northern Irish High Court with the vindicatory approach witnessed in *Ashley*.

## E. CONCLUSIONS

[121] *Breslin v McKenna* [2008] NIQB 9 (25 January 2008).
[122] *Breslin v McKenna (Omagh Bombing case)* [2009] NIQB 50 (08 June 2009) [5].

It has been observed that "rights language begins at a different starting point from that of the language of wrongs".[123] This important point enables the themes and tensions explored in this Chapter to be readily understood. Starting with an identification of the fundamental opposition between the "loss model" and the "rights model" conceptions of the law of torts, this Chapter in analysing the concept of corrective justice has sought to demonstrate how this orthodox explanation of tort law cannot provide a complete account of the objectives of tort law in a contemporary setting. Such an account, it has been argued, is also increasingly having regard to the manner in which vindicatory objectives are pursued through tort law. Having identified various models of vindication recently accepted by the Irish Supreme Court, this Chapter then identified and explored two recent senior appellate court judgments – one in this jurisdiction and one in the United Kingdom – in which vindication clearly exerted a marked influence over how the tort claim was determined.

In light of the analysis in this Chapter, the central question with which this thesis is concerned is the extent to which rights can be vindicated through the tortious liability of public authorities, and the effects of this vindicatory influence on tort law doctrine. Thus, in Part II the influence upon the core constituent ingredients of the two causes of action in tort law under scrutiny in that Part – negligence and misfeasance in public office – of vindicatory pressures is assessed. In Part III, focus turns to the two explicitly vindicatory human rights instruments of relevance in this jurisdiction: the Constitution and the European Convention on Human Rights, with their influence upon the common law tort

[123] William Binchy, "Constitutional Remedies and the Law of Torts", essay in James O'Reilly, ed, *Human Rights and Constitutional Law: Essays in Honour of Mr. Justice Brian Walsh* (Round Hall, 1992), 201, 205.

liability of public authorities being explored. Finally, the tort litigation "outcomes" considered in Part IV of the imposition of exemplary damages and vicarious liability upon public authority defendants, are considered insofar as developments indicate evidence of their being doctrinally recast in light of this rights model.

Whilst each of these areas remains to be explored in the coming pages, at this juncture it can be concluded that attempts to provide single, all-encompassing accounts of tort law as an instrument of corrective justice – with no scope for other objectives to be accommodated within its contours – are no longer compelling. Vindicatory influences have created and are creating a more nuanced picture, breathing new vitality into the already highly apt description of Professor Kelly who, with characteristic eloquence, spoke of the character of tort law over forty years ago in the following terms:

> [I]t is wrong to say, as a statement of principle, that the basic character of tort actions is "compensatory", just as it would be misleading to judge the basic character of a river from its usual water-line; damages in tort cannot fall below the supposed "compensation"-level, but they tend to react upwards immediately if elements of wickedness are present, just as the river will rise quickly after heavy rain.[124]

[124] J.M. Kelly, "The Inner Nature of the Tort Action" (1967) II *Ir Jur* (ns) 279, 283 (footnotes omitted).

# PART II

# CAUSES OF ACTION AT COMMON LAW: THE INCREASING INFLUENCE OF VINDICATORY PRESSURE

# Chapter 2

# VINDICATING RIGHTS THROUGH THE NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES

> Liability in negligence depends on the duty of care to be observed by the defendant: it does not depend on the "rights" of the plaintiff, other than the plaintiff's right not to be negligently injured.[1]

### Chapter Overview

*This Chapter identifies and explores the effects on the constituent ingredients of the negligence action – duty of care, breach of duty, causation and damage – of the theme of rights vindication in the provision of remedies in tort law involving public authority defendants. In so doing, it seeks to illustrate that the above quotation, though articulated scarcely more than 25 years ago, is increasingly unsustainable. Beginning with the duty of care, analysis is given to developing case law and scholarly analysis which, it is argued, support the claim that emerging pressures to utilise negligence law to vindicate rights have resulted in the duty concept coming under increasing strain. In some instances, this has led to significant shifts in the inter-relationship between the duty and breach stages of the negligence inquiry. Later sections of the Chapter explore similar trends and their consequences also being manifested in relation to the separate constituent ingredient of negligence: causation and damage. In order to conduct this inquiry, detailed case studies are selected from the courts in Ireland, the United Kingdom, Australia and Canada. The effect is to reveal an emerging legal framework in which the key constituent ingredients of the negligence action are undergoing evolution due to the influence of the pressure being exerted upon tort law to vindicate plaintiffs' rights. Implications of this pressure are then identified and explored.*

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[1] *Sidaway v Governors of Bethlem Hospital* [1984] 1 QB 493, *per* Browne-Wilkinson LJ (as he then was), 519-520.

## A. INTRODUCTION: THE NATURE OF THE TORT OF NEGLIGENCE

### A Behemoth Tort

Negligence, it has been said, is "the Flanders of the law of tort...and in no section of the line has the contest been fiercer than where the defendant is a public authority".[2] The impact of this tort on public authorities – an impact that has been "profound and troubling"[3] – has spawned a significant body of academic comment since the 1970s.[4] It nevertheless remains "the most urgent problem in the law of tort today".[5] The continued confusion that pervades the area is essentially composed of two distinct difficulties: one is the ongoing debate about the appropriate approach to negligence claims generally; the other is a concern about the status of public authorities as defendants in negligence actions. It has been pointed out that one reason why public authority liability in negligence is so troubling is because of the fact that in this sphere these two sources of confusion have become intertwined.[6] Before proceeding to unpack the constituent

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[2] Lord Bingham of Cornhill, "Foreword" in Cherie Booth QC and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006), *v.*

[3] Tony Weir, "The Staggering March of Negligence", Chapter 5 in Jane Stapleton and Peter Cane, eds, *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998), 134.

[4] Among the more recent studies are Basil Markesinis et al, *Tortious Liability of Statutory Bodies: A Comparative Analysis of Five English Cases* (Oxford, Hart, 1999); Jane Wright, *Tort Law and Human Rights* (Oxford, Hart 2001); Duncan Fairgrieve et al, (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London, BIICL, 2002); Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford, OUP, 2004); Carol Harlow, *State Liability* (Oxford, OUP, 2004); Stephen Todd, *The Law of Torts in New Zealand* (Wellington, Brookers, 4th ed, 2005); Cherie Booth QC and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006). Significant articles include Richard A. Buckley, "Negligence in the Public Sphere: Is Clarity Possible?" (2000) 51 *NILQ* 25; Stephen Bailey, "Public Authority Negligence: The Continued Search for Coherence" (2006) 26 *LS* 155; Gordon Anthony, "The Negligence Liability of Public Authorities: Was the Old Law the Right Law?" (2006) 57 *NILQ* 409.

[5] Tony Weir, *A Casebook on Tort* (9th edition) London, Sweet & Maxwell 2000, "Preface", *viii.*

[6] Richard A. Buckley, "Negligence in the Public Sphere: Is Clarity Possible?" (2000) 51 *NILQ* 25, 25.

ingredients of the tort in order to analyse the extent to which same are undergoing transformation due to vindicatory pressures, it is necessary preliminarily to place this analysis in its appropriate context by offering a brief overview of the development of these distinct ingredients within the tort of negligence. This analysis then enables an exploration of how the key ingredients of the negligence inquiry – duty, breach, causation, and damage – are being approached by the courts in light of vindicatory concerns.

**A Tort of Infinite Adaptability**

The tort of negligence is itself a complex and fascinating subject. It is "a fluid field of law which constantly changes to absorb different human endeavours".[7] The tort is infinitely adaptable, due in large part to its organisational structure: it is composed of a number of discrete elements, each of which can be manipulated so as to develop its scope and breadth. The malleability of the three-stage test for establishing the duty of care[8], for example, is amply illustrated by the *volte face* which has taken place in English law from the decision of the House of Lords in *X (minors ) Bedfordshire County Council*[9] to *JD v East Berkshire Community Health NHS Trust*.[10] The third limb of the duty inquiry, which asks whether it is "fair, just and reasonable" that a duty should be imposed, in particular has been derided as "a euphemistic way of describing virtually unstructured judicial discretion".[11]

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[7] Barbara Ann Hocking, *Liability for Negligent Words* (The Federation Press, 1999) Introduction, *xxi*.
[8] As adopted by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, and approved and adopted by the Supreme Court in this jurisdiction more recently in *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 IR 84.
[9] [1995] 2 AC 633.
[10] [2005] UKHL 23, [2005] 2 AC 373.
[11] Carol Harlow, *State Liability – Tort Law and Beyond* (Oxford, 2004), 30.

This theme is perhaps nowhere better illustrated than in an analysis of negligence litigation involving public authorities, which has grown dramatically in recent years. One obvious reason for this growth is the fact that such authorities are a good mark as defendants in negligence actions – insolvency "is not an option for defendant authorities"[12] – and thus offer the potential to yield high damages awards. In addition, the substantive scope of the tort of negligence has itself been developed, with the recognition, for example, that an action may lie in the case of pure economic loss and that the tort may embrace, for example, harm such as psychiatric damage.

The dominance of the tort of negligence – the fact that it has "overshadowed all other torts, encroached on their territory, and sometimes entirely overwhelmed them"[13] – is perhaps most strongly demonstrated in the context of actions against public authorities.[14] Moreover, in addition to being an area of notorious complexity due to the peculiar concerns, conflicts and policy issues with which public authority negligence is fraught, the situation has been compounded by a judicial treatment of the topic that has served to perpetuate and exacerbate the confusion. It seems difficult to contest the view that "[the] story thus far does not show the common law method of developing the law in a flattering light".[15]

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[12] S.H. Bailey and M.J. Bowman, "Public Authority Negligence Revisited" [2000] *CLJ* 85.
[13] Sir Bob Hepple, "Negligence: The Search for Coherence" (1997) 50 *CLP* 69, 69.
[14] See below n 68.
[15] Stephen Bailey, "Public Authority Negligence: The Continued Search for Coherence" (2006) 26 *LS* 155, 156.

In embarking on an analysis of how present themes and tensions in public authority jurisprudence have shaped the constituent ingredients of the negligence action, it is necessary first to acknowledge that the nature of the negligence inquiry is such that it will to an extent always remain elusive. Writing in the context of the law of negligence in New Zealand, Cooke P was undoubtedly correct in observing that:

> Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.[16]

In terms of the "formulae" referred to by Cooke P in the above passage, the key constituent ingredients of the tort of negligence must be analysed. It is essential to stress that these key ingredients of duty, breach, causation and damage constitute individual thresholds to be crossed by the plaintiff if a negligence action is to succeed. As Fennelly J has observed in the leading Irish authority on the duty of care in the context of a negligence claim against a public authority defendant:

> The elements of the tort of negligence are the existence of a duty of care, lack of proper care in performing that duty and consequential damage. The lack of care which we commonly call negligence consists in commission or

[16] *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 294. See also Jane Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in Peter Cane and Jane Stapleton eds, *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998), 59.

> omission of acts. In order to be actionable, the acts or omissions must be such as will reasonably foreseeably cause damage to any person to whom the duty is owed.[17]

Another key point to be acknowledged at this juncture is that, in contrast to vindicatory torts such as defamation, negligence is primarily concerned with compensation. It has thus been observed that negligence is "defendant– rather than rights-holder– or victim–orientated", focused "less on the interests or rights of the claimant and almost solely on the duties and conduct of the defendant".[18] Throughout this Chapter, emerging themes are analysed that serve to illustrate a growing tension between this conception of negligence and the capacity of the tort to vindicate rights.

## B. DUTY: THE FIRST CONSTITUENT INGREDIENT IN NEGLIGENCE

### The rôle of the duty concept

The duty concept forms an integral ingredient in the elements of the tort which must be made out before a plaintiff can succeed in a negligence action. In negligence, the duty concept dominates judicial approaches because it is the central and principal control device for delimiting the scope of the tort. Indeed, it has been said that the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not.[19] The controversies of the case law reflect this rôle of duty as a control mechanism, since different levels of court, and different members of the same

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[17] *Glencar Explorations plc and Andaman Resources plc v Mayo County Council (No 2)* [2002] 1 IR 84, *per* Fennelly J, 154.
[18] Jason N. E. Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 72 *MLR* 750, 766.
[19] *Smith v Littlewoods Organisation Ltd* [1987] AC 241, *per* Lord Goff, 280.

court, frequently disagree about the appropriate ambit of the tort of negligence and, accordingly, the scope of the duty of care. "[C]onfusion approaching chaos has reigned."[20]

As indicated above, the very essence of the task confronting courts in delineating the scope of the duty of care is one of balancing or weighing competing considerations. This malleability is significant for the present inquiry, since it enables the duty stage to be shaped and re-shaped by relevant pressures or concerns (such as those of the vindication of plaintiffs' rights). The balancing function inherent in the duty stage is inevitably inexact, of course, since "the things that are being weighed are not always commensurate"[21] and an unduly mathematical approach to the exercise of defining the scope or existence of a duty or care can lead to an unreasonable result.[22] In this section the tests[23] and concepts which have been employed and which are at present employed by the courts in order to determine whether a duty of care exists in negligence are examined. So too is consideration given to the chief considerations of public policy which have proven so influential in particularly problematic cases.

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[20] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515, *per* McHugh J, [45].
[21] *New South Wales v Fahy* [2007] HCA 20, (2007) 81 ALJR 1021, *per* Gleeson CJ, [7].
[22] *Mulligan v Coffs Harbour City Council* [2005] HCA 63, 223 CLR 486, 80 ALJR 43, 221 ALR 764, [2].
[23] The use of the term "test" as a term of art in this context may be objected to on the basis that it is misleading in suggesting a precise formula. As Jane Stapleton has observed, "there *is* no 'test' for the duty of care. There *can* be no 'duty test' given what it is that judges do under the cloak of this analytical label. Indeed, the underlying nature of judicial reasoning here is distorted when any case is seen as laying down a 'test' for duty": Jane Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in Peter Cane and Jane Stapleton, eds, *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998) 59, 60 (emphasis in original).

It has been said that in recent years the duty concept has shown signs of becoming an arcane mystery.[24] One frequently hears the complaint that it is extremely difficult to predict whether a court will deem a duty of care to exist on any given set of facts. The "rudderless" common law position has been said to be "surprisingly fraught with difficulties and uncertainties"[25] with the lack of coherence leading to "confusion, complexity and high levels of litigation".[26] Why is the duty concept so elusive? A number of reasons may be ventured. An obvious, but crucial, point is that a negligence case is not decided in the abstract but on its own unique factual matrix. In any given case in which the existence of a duty of care is in issue, the court must ask whether a duty of care is owed to *this particular plaintiff* and on *these particular facts*. In light of this, attempts to espouse one catch-all formula for determining whether liability in negligence can be imposed have been dismissed. Consider for example the following passage from a recent judgment of May LJ in the English Court of Appeal:

> But I also think that it is reaching for the moon – and not required by authority – to expect to accommodate every circumstance which may arise within a single short abstract formulation. The question in each case is whether the law recognises that there is a duty of care.[27]

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[24] W.V.H. Rogers, *Winfield and Jolowicz on Tort* (17th ed, Sweet & Maxwell, London, 2006), 135.
[25] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 3, *per* Chan Sek Keong CJ, [2] (Sing. C.A.) noted Kumaralingam Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" [2007] *Sing JLS* 350.
[26] Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 *LQR* 249, 295.
[27] *Merrett v Babb* [2001] EWCA Civ 214, [2001] 1 QB 1174, *per* May LJ, [41].

Competing with this intensely personalised judicial inquiry, however, is the awareness that the approach taken in any given case may well have important and lasting ramifications for how subsequent cases are framed, argued and ultimately decided.[28]

Such is the extent to which the duty concept has become entrenched in the law of negligence that it may seem surprising to some that there still exists a degree of opposition to recourse being had to the duty concept in the judicial approach to negligence. Both scholars and judges alike, however, have articulated concerns about the utility of the concept. Thus Professor Fleming has observed:

> The duty concept has been reproached as otiose, an unnecessary fifth wheel on the coach, as just duplicating the function of 'standard of care' and 'remoteness of damage'. Foreseeability of injury admittedly plays a role in 'duty' as well as 'breach of duty' but while being a necessary element of 'duty' it is not a sufficient one. Again, to be sure, 'remoteness' could have sufficed (and for a good while did) for the task of marking the outer perimeter of liability.[29]

Such sentiments have more recently expressed in an English context by two members of the House of Lords in the leading public authority negligence case of *JD v East Berkshire Community Health NHS Trust*.[30] Lord Bingham in his dissenting judgment in that case remarked that the duty concept "had proved itself a somewhat blunt instrument for

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[28] Though particularly acute in the context of public authority claims, this reality is one that attends all negligence actions. It is submitted that this tension is very clearly in evidence, for example, in the landmark judgment of the Irish Supreme Court in *Fletcher v Commissioners of Public Works* [2003] 1 IR 465, a judgment having very significant implications both for public authority and private defendants.
[29] J. G. Fleming, *The Law of Torts* (9th ed, 1998, Sydney: LBC Information Services), 150.
[30] [2005] UKHL 23, [2005] 2 AC 373.

dividing claims which ought reasonably to lead to recovery from claims which ought not".[31] Lord Nicholls, for his part, observed:

> If, as some respected academic authorities suggested, *Barrett v Enfield London Borough Council*[32] shifted the emphasis of the English courts from consideration of duty to consideration of breach ... I would for my part regard that shift as welcome...[33]

Lord Nicholls ultimately concluded, however, that while the idea of jettisoning the duty of care concept[34] and instead tracing "the contours of liability" by the use of a "modulated" standard of care was an approach that was not without attraction, he considered it more appropriate to the field of human rights than the law of negligence.[35]

Such clarion calls for the rejection of the duty concept flow from the position that it "has been thoroughly demystified: it contains no inherent truth or logic, but is merely an expression of current judicial thinking on the proper limits of tortious liability."[36] This unpredictability surrounding the duty concept can also be traced to the somewhat unstable relationship that exists between intuitive notions of responsibility on the one

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[31] *Ibid.*, [49].

[32] *Barrett v Enfield London Borough Council* [2001] 2 AC 550. The approach in *Barrett* has been widely regarded as comprising an example of such a shift Thus Matthews, Morgan and O'Cinneide refer to *Barrett* and to *Phelps v Hillingdon London Borough Council* [2000] UKHL 47, [2001] 2 AC 619 (discussed below in this Chapter in the context of causation) as "being seen as something of a shift from duty to breach" (Martin Matthews, Jonathan Morgan, Colm O'Cinneide, *Hepple and Matthews's Tort Cases and Materials* (Oxford: OUP, 2008), 56). This issue is best treated in the context of the analysis in Chapter 5 of this thesis of the fall-out from the decision of the European Court of Human Rights in *Osman v United Kingdom* [1998] ECHR 101, (1998) 29 EHRR 245: see below, Chapter 5.

[33] *Ibid.* (internal citations omitted). The references included Paul Craig and Duncan Fairgrieve, "*Barrett*, Negligence and Discretionary Powers" [1999] *PL* 626 and Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford, OUP, 2004).

[34] For comment on this aspect of Lord Nicholls's judgment see Iain Steele, "Public Law Liability – A Common Law Solution?" [2005] *CLJ* 543.

[35] *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373, [92] – [94].

[36] Iain Steele, "Public Law Liability – A Common Law Solution?" [2005] *CLJ* 543, 545.

hand and questions of social policy on the other.[37] It has been said that: "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others".[38]

**Development of *Donoghue* in the context of public authority negligence actions**

> Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In *Donoghue v Stevenson*,[39] Lord Atkin "reasoned to a unifying principle which, once articulated, governed the host of cases that followed".[40] To this day the *Donoghue* neighbour principle remains the bedrock of the modern law of negligence. It has been said that "[s]eldom in the history of the common law has a single statement of a single judge in a single case had such a profound effect on the development of the law".[41] Lord Atkin's pronouncement has been lauded as "the sovereign principle of negligence"[42] and has even been described as "a seed of an oak tree, a source of inspiration, a beacon of hope, a fountain of sparkling wisdom, a skyrocket bursting in the midnight sky."[43]

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[37] See Bob Hepple, "Negligence: The Search for Coherence" (1997) 50 *CLP* 69.
[38] *Per* Lord Pearce in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465, 536.
[39] *Ibid.*
[40] *Dietrich v The Queen* (1992) 177 CLR 292, 322 *per* Brennan J.
[41] J.C. Smith and Peter Burns, "*Donoghue v Stevenson*: The Not So Golden Anniversary" (1983) 46 *MLR* 147, 147.
[42] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388, *per* Viscount Simonds, 426.
[43] Justice Allen Linden, "The Good Neighbour on Trial: A Fountain of Sparkling Wisdom" (1983) 17 *UBCLR* 67, 67. See also Justice Allen Linden, "Viva *Donoghue v Stevenson*!" in Peter Burns and S.J. Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence: The Paisley Papers* (1991) 227, 227; Justice Allen Linden, "Torts Tomorrow – Empowering the Injured" in Nicholas Mullany and Justice

Perhaps the most memorable tribute to the judgment, however, is that contained in the following passage:

> For me *D & S* (or at least in spirit) plays a role in the law not unlike the role that the Bible plays for Christians, or the Torah plays for Jews, or the Koran for Moslems. It inspires those noble thoughts and deeds of which we need more in the modern world, not less. It challenges us to dream of a beautiful world where people care about one another, feel responsible for one another, and even – dare I say it – love one another.[44]

The judgment of Lord Atkin[45], then, has come to be regarded across the common law world as establishing the general concept of reasonable foreseeability as the criterion of negligence. Furthermore, *Donoghue* has long been seen as creating a unified tort of negligence. Delivering judgment in the *Glencar* case, the leading Irish case on the test to be applied in establishing a duty of care in negligence and discussed below, Keane CJ described *Donoghue* as "the starting point"[46] for assessing the nature of the modern tort of negligence.

The neighbour principle was endorsed in Ireland for the first time in *Kirby v Burke Holloway & Company*[47], although the manner in which the High Court approached the

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Allen Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (Sydney: LBC Information Services 1998), 330.

[44] Justice Allen Linden, "Viva *Donoghue v Stevenson*!" in Peter Burns and S.J. Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence: The Paisley Papers* (1991) 227, 228.

[45] The judgments of Lord Thankerton and Lord MacMillan were less expansionist in approach and could be (as they initially were) construed as requiring adherence to the traditional analysis of the duty concept requiring an incremental approach, see David J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), 190.

[46] *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 IR 84, 133.

[47] [1944] IR 207.

status of *Donoghue* in this jurisdiction was perhaps somewhat roundabout. In that case, Gavan Duffy J stated that he would "humbly subscribe"[48] to the neighbour principle as framed by Lord Atkin and the majority in *Donoghue* – but only after having recourse to the views of Justice Oliver Wendell Holmes.[49] This was on the basis that *Donoghue*, decided only twelve years earlier, had been a three to two decision of the House of Lords. As Gavan Duffy J put it,

> [w]here lawyers so learned disagreed, an Irish judge could not assume, as I was invited to assume, as a matter of course, that the view which prevailed must of necessity be the true view of the common law in Ireland. One voice in the House of Lords would have turned the scale; and it is not arguable that blameworthiness according to the actual standards of our people depends upon the casting vote in a tribunal exercising no jurisdiction over them.[50]

Even the most cursory glance at decided cases in Ireland, both reported and unreported, reveals that the neighbour principle stated in *Donoghue* has been cited with great frequency over the years[51] such that it "unquestionably represent[s] the law in this jurisdiction".[52]

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[48] *Ibid.*, 215.
[49] Oliver Wendell Holmes, *The Common Law* (London, 1887), Lectures III and IV.
[50] [1944] IR 207, 215.
[51] See for example *Keegan v Owens and others* [1953] IR 267; *Collins Bros (Dublin) Ltd v Scaffolding Ltd* [1959] IR 245; *Power v Bedford Motor Co* [1959] IR 391; *Scully v Marjorie Boland Ltd* [1962] IR 58; *Donovan v Landy's Ltd* [1963] IR 441; *Healy v Bray Urban District Council* [1962-63] Ir Jur Rep 9; *O'Leary v Wood Ltd* [1964] IR 269; *Murphy v Cronin* [1966] IR 699; *Campbell v O'Donnell* [1967] IR 226; *O'Leary v O'Connell* [1968] IR 149; *Purtill v Athlone Urban District Council* [1968] IR 205; *McAuliffe v Moloney* [1971] IR 200; *Snell v Haughton* [1971] IR 305; *McNamara v ESB* [1975] IR 1; *Moynihan v Moynihan* [1975] IR 192; *Carroll v Clare County Council* [1975] IR 221; *Conole v Red Bank Oyster Company* [1976] IR 191; *Finlay v Murtagh* [1979] IR 249; *Wall v Hegarty and Callnan* [1980] ILRM 124; *Siney v Dublin Corporation* [1980] IR 400; [1980] ILRM 33; *Colgan v Connolly Construction Company (Ireland) Ltd* [1980] ILRM 33; *Keane v ESB* [1981] IR 44; *Grehan v Medical Incorporated*

## C. VINDICATING RIGHTS THROUGH THE DUTY INQUIRY

**Distinct influence of two types of vindicatory pressure**

In this section, two methods by which the duty component of the negligence inquiry has been affected by vindicatory pressures are explored. The first involves the direct inclusion, into the question of whether a duty of care exists, of vindicatory concerns, a method that is displayed most clearly, it is submitted, in the recourse that the courts have had to the concept of vulnerability of a plaintiff in recent years.[53] The second involves a more nuanced shift in emphasis from the duty stage to the breach stage of the negligence inquiry, a shift that can be understood as a direct response to the pressure to vindicate rights through tort law. In the context of this second method, in order to assess the changing relationship between the separate constituents of duty and breach in the negligence inquiry, an in-depth analysis will be conducted of two House of Lords judgments and one more recent judgment of the Supreme Court in this jurisdiction.

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[1986] IR 528; *Rooney (an infant) v Connolly* [1986] IR 572, [1987] ILRM 768; *Sunderland v McGreavy* [1987] IR 372; *Ward v McMaster* [1988] IR 337; *Burke (a minor) v Dublin Corporation* [1991] 1 IR 341; *Sheehy v Faughnan* [1991] 1 IR 424; *Lindsay v Mid Western Health Board* [1993] 2 IR 147; *Best v Wellcome Foundation Ltd* [1993] 3 IR 421, [1992] ILRM 609; *Hussey v Dillon* [1995] 1 IR 111; *Kelly v Hennessy* [1995] 3 IR 253, [1996] 1 ILRM 321; *Convery v Dublin County Council* [1996] 3 IR 153; *W v Ireland (No 2)* [1997] 2 IR 141; *Madden v Irish Turf Club* [1997] 2 IR 184; *Bates v Minister for Justice* [1998] 2 IR 81; *Curran v Cadbury Ireland Ltd* [2000] 2 ILRM 343; *Shinkwin v Quincon Ltd* [2001] 1 IR 514; *Glencar Explorations plc and Andaman Resources plc v Mayo County Council (No. 2)* [2002] 1 IR 84; *Fletcher v Commissioners of Public Works* [2003] 1 IR 465; *Breslin v Corcoran* [2003] 2 IR 203; *Boyne v Bus Átha Cliath* [2003] 4 IR 47; *Delahunty v South Western Health Board* [2003] 4 IR 361; *Leahy v Rawson* [2004] 3 IR 1, affd Supreme Court, *ex tempore* judgment, 29 November 2006; *Weir-Rodgers v The SF Trust Ltd* [2005] IESC 2, [2005] 1 IR 47; *Kennedy v The Law Society of Ireland* [2005] IESC 23, [2005] 3 IR 228; *Beatty v The Rent Tribunal* [2005] IESC 66, [2006] 2 IR 191, [2006] 1 ILRM 164; *Wildgust and Carrickowen Ltd v The Governor and Company of the Bank of Ireland and Norwich Union Life Insurance Society* [2006] IESC 19, [2006] 1 IR 570, [2006] 2 ILRM 28; *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88.

[52] *Per* Keane CJ in *Glencar*, 136.

[53] This paradigm of vulnerability and its increasing relevance in judicial approaches to the parameters of the tortious liability of public authorities is also of central relevance in the expansion of vicarious liability, dealt with separately in this thesis. See below, Chapter 7.

**Vulnerability as a vindicatory pressure**

In the context of assessing the influence that the vulnerability paradigm has exerted upon the development of the duty of care analysis, perhaps the best example of this trend is a series of high-profile decisions of the High Court of Australia, and analysed by leading torts scholars[54], commencing with *Pyrenees Shire Council v Day*[55] where the Court referred to the plaintiff's vulnerability as an aspect of his supposed reliance upon an authority to use its powers.[56]

The decision of the High Court of Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[57] may be viewed as a yet more recent illustration of the furthering of this trend at laying emphasis on the vulnerability of the plaintiff as a touchstone for the fashioning of the negligence inquiry. In that case, Gleeson CJ, Gummow, Hayne and Heydon JJ provided the following understanding of the vulnerability inquiry:

> "Vulnerability", in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, "vulnerability" is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's

[54] See for example Jane Stapleton, "The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable" (2003) 24 *Australian Bar Review* 1.
[55] [1998] HCA 3, (1998) 192 CLR 330.
[56] *Ibid.*, *per* Toohey J, [77]; *per* McHugh J, [116]. This focus on vulnerability may also explain, at least in part, the decision in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, (1999) 200 CLR 1.
[57] [2004] HCA 16, (2004) 216 CLR 515.

> want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant".[58]

Guidance can also be taken from the (dissenting) judgment of Kirby J in the same case, whose approach demonstrates an extremely broad conception of vulnerability that is premised upon the concept of rights vindication:

> Vulnerability is not confined to cases of poverty, disability, social disadvantage or relative economic power as the majority suggest. It extends to those who, like the plaintiffs in [*Perre v Apand*], might be carrying on a profitable economic enterprise but who are exposed to an insidious risk by the acts of others about which they were unaware and against which they could not reasonably protect themselves. That is also the case here.[59]

The concept of vulnerability, however, "has not been universally accepted as a useful analytical tool".[60] A leading example is the slightly earlier decision of the High Court of Australia in *Graham Barclay Oysters Pty Ltd v Ryan*[61], where Gummow and Hayne JJ treated the degree of a plaintiff's vulnerability as only one element in an evaluation as to whether a relationship may be seen to exist between a statutory authority and the class of

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[58] *Ibid.*, [23].
[59] *Ibid.*, [168].
[60] *Per* Crennan and Kiefel JJ in *Stuart v Kirkland-Veenstra* [2009] HCA 15 (22 April 2009), [133], citing *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512, *per* Hayne J, [308].
[61] [2002] HCA 54, (2002) 211 CLR 540.

persons in question.[62] Leading scholars have also expressed their reservations: Beever, for example, rejects the capacity of the vulnerability paradigm to provide "an adequate account of the law of negligence".[63]

Significantly, the most recent Australian case law at the time of writing indicates that the courts in that jurisdiction require the concept of vulnerability to be linked to a demonstrably verifiable element of the relationship between the plaintiff and defendant public authority. The best example is probably the concept of reliance. In this regard, the recent decision of the Australian High Court in *Stuart v Kirkland-Veenstra*[64] is instructive. The case involved a claim in negligence against the police for failing to prevent an individual from committing suicide, in circumstances where the police had witnessed the individual attempting to do this earlier in the day. The case was dismissed by the trial judge, but this was reversed by a majority of the Court of Appeal of the Supreme Court of Victoria.[65] This decision was in turn set aside on appeal to the High Court, where the decision at first instance to strike out the claim was restored.

Reference was made in the judgment of Warren CJ in the Court of Appeal to a class of persons, which included the plaintiff's husband, who might be described as "especially vulnerable".[66] In criticising Warren CJ's approach in this regard, Crennan and Kiefel JJ in their joint judgment in the High Court shed light on the complexity of the vulnerability inquiry:

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[62] [2002] HCA 54, (2002) 211 CLR 540, [149].
[63] Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007), 194.
[64] [2009] HCA 15 (22 April 2009).
[65] [2008] VSCA 32 (29 February 2008).
[66] *Ibid.*, [64].

> But her Honour [Warren CJ] did not connect that vulnerability to a concept such as reliance or to the existence of a relationship. The point made by her Honour was that the [relevant legislation] had a specific class in contemplation as the object of the power ...which is an exercise in statutory interpretation.[67]

It is submitted that this explicit invocation of vulnerability as a mechanism for infusing the duty inquiry with a concern for the vindication of the rights of the vulnerable has been less than persuasive. In contrast with such an approach is a more nuanced shift in the approach to the duty of care to which attention now turns.

This argument is that the judicial approach to the negligence liability of public authorities is at present witnessing a shift in emphasis from the duty stage to the breach stage of the negligence inquiry, a shift that can be understood as a direct response to the pressure to vindicate rights through tort law. This argument will now be advanced.

**From Duty to Breach**

As discussed above, the duty of care ingredient in the negligence inquiry is typically understood as a mechanism for containing and narrowing the potential liability of defendants. On this account of the duty concept, the duty of care is a filtering device through which claims will be dismissed *not* because the defendant was not negligent, but because under the third stage of the *Glencar* or *Caparo* test, it would not be "fair, just and reasonable" to impose a duty in the given case, for reasons of policy. When used in this way in public authority liability claims – and the key decisions right across the common

[67] [2009] HCA 15, [134].

law world in which the duty of care concept has been articulated have overwhelmingly been made in the context of negligence litigation against public authorities[68] – the duty concept can be seen as restricting the capacity of plaintiffs to invite judicial scrutiny of tortious conduct that amounts to an infringement of rights.

By contrast, the second stage of the negligence framework – the stage at which breach of duty is considered having regard to the standard of care – allows the courts a far greater degree of control over whether in the given case the plaintiff will recover. It is submitted that emerging developments in negligence law now illustrate a shift in emphasis from the duty stage to the breach stage that has important implications for the vindication of the rights of plaintiffs.[69] From the point of view of vindication, then, the trend is an enabling one. While it is important to acknowledge that the elements of the negligence action are frequently blurred such that "it is often difficult to determine when duty ends and breach

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[68] All of the leading Irish decisions – including the recent *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 IR 84 and *Beatty v The Rent Tribunal* [2005] IESC 66, [2006] 2 IR 191, [2006] 1 ILRM 164, and the earlier decisions in *Siney v Dublin Corporation* [1980] IR 400, *Ward v McMaster* [1988] IR 337 and *Sunderland v Louth County Council* [1990] ILRM 658 – have involved public authority defendants. Developments in the United Kingdom reflect a similar pattern: compare *Anns v Merton London Borough Council* [1978] AC 728, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, *Murphy v Brentwood District Council* [1991] 1 AC 398; *Phelps v Hillingdon London Borough Council* [2000] UKHL 47, [2001] 2 AC 619; *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373; *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 2 WLR 481. Australian cases have followed a similar trend: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, *Graham Barclay Oysters Pty Ltd v Ryan and Others* [2002] HCA 54, 194 ALR 337. So have those in Canada: see, among many examples, *City of Kamloops v Nielson* [1984] 2 SCR 2, (1984) 10 DLR (4th) 641; *Cooper v Hobart* 2001 SCC 79, [2001] 3 SCR 537, (2001) 206 DLR (4th) 193; *Edwards v Law Society of Upper Canada* 2001 SCC 80, [2001] 3 SCR 562, (2001) 206 DLR (4th) 211.

[69] This language of "shift from duty to breach" is used by many judicial and academic commentators: see for example Paul Craig and Duncan Fairgrieve, "*Barrett*, Negligence and Discretionary Powers" [1999] *PL* 626, 638-640; Stephen Bailey, "Public Authority Negligence: The Continued Search for Coherence" (2006) 26 *LS* 155; Martin Matthews, Jonathan Morgan, Colm O'Cinneide, *Hepple and Matthews's Tort Cases and Materials* (Oxford: OUP, 2008), 56; *per* Arden LJ in *Jain v Trent Strategic Health Authority* [2007] EWCA Civ 1186, [64] (when that case was in the Court of Appeal).

begins"[70], it is submitted in this section that this overlap between the distinct stages of duty and breach is particularly marked in the context of public authority negligence actions, and this is occurring due to the pressures of rights vindication.

Writing just over a decade ago, Quill argued powerfully that the traditional fixation with duty as the ultimate touchstone for determining liability in negligence ought to be replaced by greater attention being accorded to other ingredients or stages in the negligence inquiry, such as causation and remoteness of damage.[71] For present purposes, Quill's argument merits close analysis, since its concern with the constituent ingredients of the negligence inquiry and how these can be recast in order to reflect certain values and interests being pursued by tort law in any given period, is one that it is submitted has a heightened relevance today in light of trends currently taking place in public authority negligence litigation. At the centre of Quill's claim is that the *duty of care* inquiry needs to be separated out from the *liability* inquiry, on three grounds: deterrence; individual justice; and the rule of law, each of which Quill identifies as "integral to the fundamental aims of tort law".[72] The most important of these for present purposes are those of deterrence and of individual justice, since it is in relation to these justifications that tensions emerge in the fashioning of the constituent ingredients of the negligence inquiry.

[70] Justice David Ipp AO, "Themes in the Law of Torts", paper delivered 16 March 2007, available on the New South Wales Supreme Court website: http://www.lawlink.nsw.gov.au (last visited 14 August 2009).
[71] Eoin Quill, "Maintaining the Distinction Between Duty and Liability" (1998) 20 *DULJ* 183.
[72] *Ibid.*, 184.

**Quill's Criticism of the Conflation of Duty and Liability**

Quill maintains that the emphasis on duty has the potential to inhibit the development of the law in two distinct ways: first, by causing meritorious claims to be rejected on the basis that they fail to fulfil the "unnecessarily cumbersome and complex criteria" constantly being developed in respect of duty; secondly, by preventing the recognition of the concept of *obligation* as a phenomenon distinct from liability, thereby "preventing the common law from maturing beyond the view of the law as a purely remedial structure".[73] According to Quill, these two consequences raise concerns of individual justice and also raise a broader question about the rule of law. In a key passage that is of particular relevance for the present argument, Quill emphasises that the vindicatory function served by tort law embodies far more than the imposition of liability upon the defendant. As such, the recognition of a duty of care can, regardless of the ultimate outcome, fulfil a vindicatory purpose. As Quill explains:

> The shift of focus from law as a remedial structure, towards the recognition of rights and obligations also has a bearing on individual justice. Vindication is an important element of tort law and, for some litigants at least, the manner in which their claim is dealt with is almost as important as the winning or losing of the action.
>
> Distinguishing between obligation and liability can provide a degree of vindication for some losing plaintiffs, by acknowledging the importance of their rights, by means of recognising the existence of a duty of care, while protecting defendants against unfair levels of

[73] *Ibid.*, 185.

> liability, by employing a suitable control device (such as causation or remoteness) to defeat the plaintiff's claim.[74]

In terms of nomenclature, it is clear from the above passage that liability is equated with the breach ingredient in the duty of care inquiry: it is the distinction between the duty of care analysis and breach of that duty which must be maintained if, as Quill argues, "the law is to remain rational and coherent". That "obligation" is the equivalent of the breach inquiry is put beyond doubt in the following passage:

> Obligation is a prerequisite to liability; the two are not synonymous. There are many instances where negligent activity does not lead to liability, such as those cases where no harm occurs, and it would be seriously misleading to describe that behaviour as lawful, simply because no liability resulted; duty is a significant component of lawfulness and merits recognition, independent from the outcome of specific cases.[75]

It is submitted that emerging jurisprudence across the common law world is evincing a shift in emphasis from the duty stage to the breach stage of the negligence inquiry as called for by commentators such as Quill. This shift illustrates an increasingly nuanced and sophisticated approach to the ingredients of the negligence inquiry – and to the objectives of those ingredients – and is witnessed in, for example, the approaches

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[74] *Ibid.*, 185-186.
[75] *Ibid.*, 186.

examined earlier of the different judges in *JD v East Berkshire Community Health NHS Trust.*[76]

**Comparing *Hill* and *Brooks***

Exploration of the nature of the judicial approach to these two distinct stages of the negligence inquiry – that is, in determining whether a duty of care will be owed by a public authority in negligence, and whether that duty has been breached – can be further developed and illuminated by a critical comparison of a pair of cases decided by the House of Lords within a period of approximately two decades of each other. Both cases concerned attempted negligence actions brought against the police force for the manner in which a criminal investigation was conducted. The first case to be considered here is the classic decision of the House of Lords in *Hill v Chief Constable of West Yorkshire Police*[77], a decision handed down in 1988. The second case arises from the more recent re-appraisal by the House of Lords in 2005 of the rule in Hill's case: *Brooks v Chief Constable of the Metropolis.*[78]

At this point in our discussion it is opportune and appropriate to conduct this critical comparison for a number of reasons. First, by exploring the approach of the same (albeit obviously differently-constituted) tribunal – the House of Lords – to the same core issue – whether a public authority, the police force, could owe a duty of care in negligence – on two occasions spanning almost twenty years, it is possible to identify very clearly the shifts in focus which have taken place during that period regarding not only the policy

[76] [2005] UKHL 23, [2005] 2 AC 373.
[77] [1989] AC 53.
[78] [2005] UKHL 34, [2005] 1 WLR 1495.

factors considered to be of relevance in the determination of whether a duty should be imposed upon public authorities, but also the relationship between the duty and breach stages of the negligence inquiry. It will be argued that these shifts have in no small part been triggered by, and have in turn generated further, the rights vindication focus now in the ascendancy in the fashioning of domestic causes of action in tort law, of which the quintessential example is the negligence behemoth. This shifting focus is equally relevant to and apparent in other jurisdictions, including Ireland.

Furthermore, the *Hill* and *Brooks* cases – perhaps more than any other pair of public authority cases in recent years – throw into stark relief the policy concerns about imposing liability in negligence upon public authorities, and how these can affect the vindication of rights. These two cases therefore afford us an opportunity to assess the merits of these policy arguments as they were presented in the judgments in each case, and to assess their continuing relevance and usefulness in a contemporary, rights-infused, negligence context. Thirdly, we shall see that the approach in the *Hill* case has been approved in this jurisdiction: it is thus timely and appropriate to consider whether Irish negligence law can now learn from the approach taken more latterly in *Brooks*. Fourthly, over the disputes in both *Hill* and *Brooks* hangs what has been termed an "uncertain shadow"[79]: Article 6 of the European Convention on Human Rights. The implications of this aspect of *Hill* and *Brooks* are considered at some length in Chapter 5; it is first necessary to lay out the background to the two cases so as to advance the present analysis.

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[79] Tom R. Hickman, The "Uncertain Shadow": Throwing Light on the Right to a Court under Article 6(1) ECHR" [2004] *PL* 122.

## D. CASE STUDY OF VINDICATORY ACTION IN NEGLIGENCE: *HILL V CHIEF CONSTABLE OF WEST YORKSHIRE* AND SUBSEQUENT CASE LAW

### The Claim in *Hill*

In *Hill*'s case[80], it was alleged that the police had bee negligent in their failure to apprehend the notorious serial killer known as the Yorkshire Ripper, Peter Sutcliffe, who committed thirteen murders and eight attempted murders between 1975 and 1980, and whose final victim was the plaintiff's daughter, Jacqueline Hill. The plaintiff argued that the police should reasonably have inferred that the previous 20 offences were committed by the same person and that, if not apprehended, he would re-offend. Accordingly, she argued, the police owed a duty to use "their best endeavours and exercise all reasonable care and skill to apprehend the perpetrator of the crimes and so protect members of the public who might otherwise be his future victims".[81] She alleged that the police failed properly to collate information in their possession that would have identified Sutcliffe as a likely suspect, failed to give due weight to certain information and accorded excessive weight to other information. If the police had acted with sufficient care in the course of conducting their investigation, Sutcliffe would have been apprehended earlier, and consequently would have had no opportunity of committing the murder of Jacqueline Hill.

Mrs Hill's claim was heard by no less than nine judges: the trial judge, a three-judge Court of Appeal, and a five-judge Appellate Committee of the House of Lords. All nine

[80] *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53.
[81] As summarised by Lord Keith in *Hill*, 58.

judges held that her claim should be struck out as disclosing no cause of action. In the House of Lords, Lord Keith delivered the leading judgment. He summarised the key question as being whether police officers:

> in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.[82]

Prior to her murder, Jacqueline Hill was not a person whom the police were aware, or ought to have been aware, was at a special risk from Peter Sutcliffe. She was, as Lord Keith in his judgment described her, "one of a vast number of the female general public who might be at risk...but [she] was at no special risk".[83] However, it is crucial for present purposes to stress that Lord Keith, with whom Lords Brandon, Oliver and Goff agreed, indicated that even if he had been satisfied that proximity was established, a duty of care would, in any event, have been denied on grounds of public policy. Referring to what was then known as the second stage of the duty of care test[84], Lord Keith emphasised that the application of that second stage was "capable of constituting a *separate and independent* ground for holding that the existence of liability in negligence

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[82] [1989] AC 53, 59.
[83] *Ibid.*, 62.
[84] So called because it was the second step in Lord Wilberforce's two step test in *Anns v Merton London Borough Council* [1978] AC 728.

should not be entertained".[85] The italics have been added, to emphasise the distinctiveness of the proximity and public policy issues in *Hill*, with each issue in and of itself leading to the claim being rejected.[86] In relation to the public policy ground, Lord Keith continued:

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[85] *Hill*, 63, emphasis added.

[86] As McIvor has observed, the conception of proximity in cases such as these is "so rigidly construed by the courts as to effectively require close personal dealings between all the parties and very strong evidence of knowledge of the risks posed by the identified third party to the individual victim." (Claire McIvor, "The Positive Duty of the Police to Protect Life" (2008) 24 *PN* 27, 32). This has the effect of preventing claims being brought against the police by members of the general public. Jacqueline Hill, for example, as a young female living in the area targeted by the Yorkshire Ripper and with nothing to set her apart in the eyes of the police as being any more at risk than the other young females around her, did not enjoy the necessary relationship of close proximity with the police.
It is submitted, however, that subsequent judicial consideration of the proximity hurdle as envisaged in *Hill* illustrates a somewhat inconsistent approach to the relationship between the proximity and the policy strands in the reasoning in *Hill*'s case. In *Alexandrou v Oxford* [1993] 4 All ER 328 the Court of Appeal held that a cursory inspection by police officers of premises to which they had been summoned by a burglar alarm, with the result that a burglary was not prevented, was insufficient to create a proximate relationship between the owner and the police. Glidewell LJ (who had been a member of the Court of Appeal in *Hill*), with whom the other members of the court agreed, held (at 338):

> The communication with the police in this case was by a 999 telephone call, followed by a recorded message. If as a result of that communication the police came under a duty of care to the plaintiff, it must follow that they would be under a similar duty to any person who informs them, whether by 999 call or in some other way, that a burglary, or indeed any crime, against himself or his property is being committed or is about to be committed. So in my view if there is a duty of care it is owed to a wider group than those to whom the judge referred. It is owed to all members of the public who give information of a suspected crime against themselves or their property. It follows, therefore, that on the facts of this case it is my opinion that there was no such special relationship between the plaintiff and the police as was present in [*Home Office v Dorset Yacht* [1970] AC 1004].

Commenting on this and other recent cases, Booth and Squires say of the proximity and public policy limbs of *Hill* that "[i]n order to give rise to liability for a failure to prevent crime, the claimant will need to show these two bases for denying a duty of care do not apply" (Cherie Booth QC and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006), 568). This description may, with respect, be misleading in that it suggests that the claimant must separately establish both proximity and public policy in order not to have the claim struck out – but it is clear from the recent case law that this is not so, since the question of proximity can be a factor which *in and of itself* affects the court's approach to the public policy issue. An example of this trend is *Swinney v Chief Constable of Northumbria* [1997] QB 464. There the police had negligently disclosed the identity of an informer whom they had undertaken to protect. The Court of Appeal held that while the *Hill* public policy considerations were of "cardinal importance", they did not generate "a blanket immunity", and needed to be weighed against countervailing public policy factors ([1997] QB 464, 484-487). The court held that the public interest in the protection of informants had to be weighed against the public interest in protecting the police from lawsuits over the way they discharged their duties, and that on the alleged facts the proper place for this was at trial. See further the comments of Sedley LJ in *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39, *The Times*, 17

> In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure – for example that a police officer negligently tripped and fell while pursuing a burglar – others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available

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March 2008, who, having conducted a thorough analysis of the case law up to the coming into force of the UK Human Rights Act 1998 in 2000, observed (at [21]):

> [T]he two tests – the one relating to proximity, the other to whether it is fair, just and reasonable that there should be liability – have in large part merged. Hence, in *Brooks*, the acceptance by counsel for the Commissioner that cases of assumption of responsibility fell outside the *Hill* principle.

The Court of Appeal and House of Lords' judgments in *Smith* are analysed in detail in Chapter 5 of this thesis.

> resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted.[87]

Lord Templeman, in a separate speech, indicated that in his view the claim should be struck out solely on public policy grounds. Thus, the proximity question, while a key feature of the factual background in *Hill*, was not determinative of the position taken in that case: even if proximity had been satisfied, no duty was owed on the grounds of public policy. It is this aspect of the judgment which renders more recent developments particularly difficult to reconcile with *Hill*.

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[87] *Hill*, 63.

For the purposes of this Chapter, it is instructive to consider the relevant[88] different policy reasons cited by the House of Lords in *Hill* as to why no duty could be imposed on the police. This assessment of the policy concerns not only enables us to compare and evaluate the policy arguments advanced in *Hill* with those in later cases of the English courts, and with those which have been advanced in the Irish courts for declining to impose a duty of care in negligence upon a public authority, but it furthermore facilitates the inquiry, central to the vindicatory focus of this thesis, about the sustainability of conferring upon public authorities immunities from suit in negligence on the grounds of policy.

Against this detailed assessment of the reasons advanced in *Hill* for declining to impose liability, it will then be possible to move to the later of the two cases in our case study in this Chapter: *Brooks v Commissioner of the Metropolis.*[89]

**Breakdown Analysis of Arguments Invoked in *Hill* in order to Reject the Possibility of Liability being Imposed**

*(i)Public authority status of defendant*

One of the broad bases on which the claim was rejected was that the negligence action in *Hill* posed special problems flowing from the status of the defendant as a public

[88] Focus here will be restricted only to those grounds for declining to impose a duty articulated in *Hill* which appear still to hold some (however tenuous) force today. Thus, analysis will not be given to the point made in *Hill* to the effect that there was "no need" for the courts to incentivise good policing as this ground no longer holds force (at least as a matter of English law) since the House of Lords judgment in *Brooks v Commissioner of the Metropolis* [2005] UKHL 34, [2005] 1 WLR 1495. See for example the judgment of Lord Steyn in *Brooks* at [28], whose opinion was shared by Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood (at [37] and [39] respectively). Lord Bingham in *Brooks* also expressed unwillingness to endorse the full breadth of what the House of Lords had been understood to decide in *Hill* (*Brooks*, [3]); Lord Nicholls of Birkenhead similarly did not wish to be taken as endorsing the full width of all the observations in *Hill* (*Brooks*, [6]).

[89] [2005] UKHL 34, [2005] 1 WLR 1495.

authority.[90] Amongst the many points made in this regard were that it was unclear what professional standard should be applied to police officers exercising investigatory functions, and that the allegations would raise questions that the courts could not answer: such as, for example, what was the correct or appropriate police strategy to adopt in a given situation. A related concern articulated in the judgments was that tort litigation was not an appropriate vehicle through which to consider arguments about diverse and wide-ranging failings in the discharge by a public authority of its responsibilities. In the final analysis, negligence actions were deemed not a suitable vehicle for improving the effectiveness of police investigations and wondering whether a police inspector was "to be condemned for failing to display the acumen of Sherlock Holmes and whether a constable is to be condemned for being as obtuse as Dr Watson".[91]

In some instances the imposition of liability could lead to the police exercising their functions in a "detrimentally defensive frame of mind"[92], and the possibility of this happening in relation to the investigative operations of the police could not be excluded: the police authority could over-react to the threat of liability, by taking more precautions than necessary to avoid liability.[93]

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[90] In the Northern Ireland High Court decision in *Connolly v Police Service of Northern Ireland* [2006] NIQB 98, Higgins J at [31] described this ground as one of two grounds (the other being public policy) on the basis of which the claim in *Hill* was rejected.

[91] *Per* Lord Templeman in *Hill*, 64.

[92] *Ibid.*, *per* Lord Keith, 63.

[93] Twenty years on from *Hill*, Lord Bingham would question the breadth of this argument, doubting in *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [49] its application in many cases:

> This [defence policing argument] was, with respect, an entirely apt observation on the facts of *Hill*, where the plaintiff's complaint was directed to the investigative operations of the police. It is not, however, easy to see how [the imposition of liability in other cases] could induce a detrimentally defensive frame of mind. All that would be called for in the first instance would be a reasonable assessment of the threat posed to an identified potential victim by an identified person.

Permitting such negligence actions would impose costly burdens both in terms of money and in the diversion of manpower both in the instant case and in the future since resources would have to be re-directed to defend such claims. The defending of the negligence action by the public authority would deplete resources that could be better used for other activities.

Entertaining such negligence actions would deflect the attention of the police away from their overriding function, the suppression of crime: it could thus be said to be inimical to, rather than in the interests of, public policy, to allow such an action to proceed.

*(ii) The corrective justice paradigm was not strongly in evidence in* Hill, *which was fundamentally a vindicatory claim*

Very significantly for the purposes of the argument put forward in Chapter 1 of the herein thesis[94], both the corrective justice paradigm and the vindicatory nature of Mrs Hill's case were important features of the *Hill* reasoning in striking out the plaintiff's claim. The House of Lords noted two[95] discernible ways in which the corrective justice paradigm

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That the defensive policing rationale provokes strong disagreement amongst judges is well illustrated by the divergence of approach amongst members of the Supreme Court of Canada in *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129. There, a majority of the Supreme Court of Canada (McLachlin CJ and Binnie, LeBel, Deschamps, Fish and Abella JJ) rejected the proposition that the defensive policing argument militated against the recognition of a tort of negligent investigation in Canada. By contrast, the minority (Bastarache, Charron and Rothstein JJ) in a judgment that included reference to *Hill v Chief Constable of West Yorkshire*, refused to countenance the recognition of a tort of negligent policing in Canada on the basis of the defensive policing rationale. For comment see Erika Chamberlain, "Negligent Investigation: A New Remedy for the Wrongly Accused: *Hill v Hamilton-Wentworth Regional Police Services Board*" (2007-2008) 45 *Alta L Rev* 1089; Erika Chamberlain, "Negligence Investigation: The End of Malicious Prosecution in Canada?" (2008) 124 *LQR* 205.

[94] See above, Chapter 1.

[95] A third point in this regard was also highlighted in *Hill*, albeit at the Court of Appeal, rather than the House of Lords, stage. Fox LJ in his judgment in the Court of Appeal ([1988] QB 60, 73) emphasised the

was effectively uprooted in *Hill*. The first was the express statement of the plaintiff that the purpose of the action was not at all compensatory or in pursuit of an award of damages: very significantly, Mrs Hill had indicated her intention to donate any damages recovered in the case to charity. The corrective justice paradigm was further emasculated given that, as Lord Templeman took pains to emphasise in his speech[96], any damages awarded by the court would not be paid by any policeman found wanting in the performance of his duty but would be paid by the public. In a significant statement that appears, with respect, rather dismissive of the notion that value could inhere in a purely vindicatory action, Lord Templeman stated plainly of the desired finding of liability that "that finding would not help anybody or punish anybody".[97]

The House of Lords drew attention to the competing considerations of a distributive justice nature.[98] It is submitted that this aspect of *Hill* is particularly significant from the perspective of a public authority tort law analysis in 2009: while the corrective justice

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availability of other methods of compensation by a route different from the common law of negligence. Fox LJ referred to the existence of the Criminal Injuries Compensation Scheme and said:

> [T]he scheme... make[s] quite wide provision for compensation for such persons as are likely to suffer financial loss as a result of a crime of violence. It is not desirable that inequalities should be produced by providing additional remedies for negligence. Either such remedies will merely duplicate the scheme, or they will give rise to inequalities which may be offensive to the families of other victims of crimes of violence in cases where no negligence by the police was involved. I quite appreciate that the plaintiff is not seeking financial benefit for herself and that nothing can compensate her for the tragic loss of her daughter. But I think that the problems of compensation for injury from crimes of violence are best dealt with in the framework of the scheme...[95]

See further Richard A. Buckley, *The Law of Negligence* (4th ed, LexisNexis, 2003), 31. On a related point, so too was it noted at the House of Lords level that the police wrongdoing was controlled by other mechanisms of accountability. Thus Lord Templeman in *Hill* observed (at 65) that "[a] policeman is a servant of the public and is liable to be dismissed for incompetence. A police force serves the public and the elected representatives of the public must ensure that the public get the police force they deserve."

[96] *Hill*, 64.

[97] *Ibid.*

[98] In, for example, the arguments about resources and the public interest in policing alluded to above.

paradigm in *Hill* was subordinated to concerns of *distributive* justice, much more recent judicial approaches, to be analysed below, have substituted for corrective justice notions of *vindicatory* justice.

**The *Brooks* Approach to *Hill*: Acceptance without Unqualified Enthusiasm**

What, then, are those aspects of *Hill* which would appear no longer to be of equal force, and why? To answer this question, it is instructive to analyse a very similar judgment of the House of Lords decided almost twenty years after *Hill*.

The claim in *Brooks v Commissioner of the Metropolis*[99] arose from the notorious racially-motivated killing of Stephen Lawrence. Duwayne Brooks was in the company of Stephen Lawrence when the pair were set upon by a gang of white youths. He argued that the manner in which the police had handled the investigation of the incident was negligent. In particular, he claimed that the police had failed to take reasonable steps to assess whether he was the victim of a crime and to provide him with appropriate protection and support, and that the police had failed to give reasonable weight to the account he gave of the attack. This, he claimed, caused him distress and psychiatric harm for which he sought damages from the police.

The House of Lords held that the claim ought to be struck out as a matter of public policy. The House of Lords confirmed that the *Hill* case had been correctly decided, and that its "core principle"[100] remained good law. Significantly for present purposes,

[99] [2005] UKHL 34, [2005] 1 WLR 1495.
[100] See the judgment of Lord Steyn in *Brooks*, [30].

however, the House of Lords did go on to express some doubt as to whether the specific articulation of the policy factors adumbrated in *Hill*, retained all of their force. We will consider these passages presently, but first it is necessary to establish precisely what was the "core principle" of *Hill* which the House of Lords regarded as continuing to apply to *Brooks*. The House of Lords in *Brooks* regarded *Hill* as authority for the proposition that, generally, a duty of care ought not to be imposed on the police when this might undermine their ability to investigate crime effectively. Lord Steyn, with whom the majority of their Lordships agreed, said:

> With hindsight not every observation in *Hill* can now be supported. Lord Keith of Kinkel observed that "From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it": 63D. Nowadays, a more sceptical approach to the carrying out of all public functions is necessary.
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> ...But the core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill,* arose for decision today I have no doubt that it would be decided in the same way. It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police Conduct Regulations 2004 (No. 645). But to convert that ethical value into general legal duties of care on the police towards victims and witnesses

would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence...A retreat from the principle in *Hill* would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill,* be bound to lead to an unduly defensive approach in combating crime.

It is true, of course, that the application of the *Hill* principle will sometimes leave citizens, who are entitled to feel aggrieved by negligent conduct of the police, without a private law remedy for psychiatric harm. But domestic legal policy, and the Human Rights Act 1998, sometimes compel this result.[101]

[101] *Brooks*, [28] – [31] (internal reference omitted).

**Breadth of *Hill* must now be questioned**

The first important point to be made is that the full breadth of *Hill* seems now to have been doubted. Thus Lord Bingham explained that he would be "very reluctant to dismiss without any exploration of the facts a claim raised in a *contentious* and *developing* area of the law where fuller factual enquiry might enable a claimant to establish that a duty of care had been owed to him and had been broken".[102] The two epithets (which the author has placed in italics) are interesting for different reasons. By referring to this area of the law as "contentious" and "developing" Lord Bingham appears to be underscoring two of the central themes of this Chapter: first, by "contentious" Lord Bingham appears to be accepting that the fundamental debate between the vindicatory and corrective functions of tort law is encapsulated within this area of the law; secondly, the description of this area as "developing" seems to be based upon an acceptance of the growing influence of the ECHR – and, hence, the increasing importance of a rights-focused analysis of this aspect of tort law. Lord Bingham concluded by stating that he "would also be reluctant to endorse the full breadth of what *Hill v Chief Constable of West Yorkshire* has been thought to lay down, while readily accepting the correctness of that decision on its own facts".[103]

Lord Nicholls in many respects echoed this approach when he took care to state that in dismissing the appeal he was "not to be taken as endorsing the full width of all the observations in *Hill v Chief Constable of West Yorkshire*". For present purposes,

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[102] Emphasis added by the author.

[103] *Brooks*, [3], citing the reasons elaborated at some length in his dissenting opinion in *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373.

however, what is important to note is the manner in which Lord Nicholls articulated the reasoning for this approach: it was because there may be exceptional cases

> where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles *which underlie the common law*. Then the decision in *Hill's* case should not stand in the way of granting an appropriate remedy.[104]

While it is tempting to read this passage as simply endorsing the sentiments expressed by Lord Bingham, it is submitted that having regard to the words in (my) italics, a nuance of approach between the two judges immediately becomes apparent: whereas the "contentious" and "developing" epithets in Lord Bingham's reasoning seemed clearly to be premised in a rights-based focus, these epithets give way in the speech of Lord Nicholls to a competing, common law–grounded, analysis. Thus Lord Nicholls sources his concerns about possible difficulties of the *Hill* legacy *not* in explicit rights-focused language, but rather roots it in the vocabulary of wrongs – since it seems reasonable to construe "principles which underlie the common law" as being anchored in wrongs-based reasoning. (Even the most generalised – and somewhat anodyne – formulation that is now so well-worn in the public authority case law, "where there is a wrong, there is a remedy", which might be argued to bear a more vindicatory hue, is, it is submitted, still more properly to be characterised as a wrongs-based approach).

[104] *Brooks*, [6]. Emphasis added by the author.

Accordingly, while there is to be found in the judgments in *Brooks* an explicit determination to loosen the grip of immunity cast by *Hill*'s case, the reasons for taking such a step are unfortunately not only dealt with in brief passages, but arguably are conceptually separate and incapable of interconnection.

It is, moreover, important to add two points of qualification to the characterisation of *Brooks* as challenging the full breadth of *Hill*. First, whilst Lord Steyn in *Brooks* accepted that there will be instances where, if the police act in a manner which constitutes the "outrageous negligence", they will be acting outside the scope of the core principle in *Hill*, it seems that there exists a degree of judicial disagreement over the feasibility of such a distinction. In the more recent case of *Van Colle*, for example, analysed in detail in Chapter 5, Lord Carswell expressed reservations about agreeing with Lord Steyn's comments on this point, Lord Carswell stating that he had "some doubt whether opprobrious epithets provide a satisfactory and workable definition of a legal concept."[105]

Secondly, the conspicuous lack of any examples in reported cases post-*Brooks* of instances in which such "outrageous negligence" has been deemed to oust the *Hill* core exclusion rule provides strong support for the proposition that the full rigour of the *Hill* exclusion does apply. As has recently been observed in the Northern Irish High Court, the principle in *Hill* "remains unchallenged";[106] at the time of writing, the most recent House

[105] *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, *per* Lord Carswell, [109].
[106] *Fegan v Police Service in Northern Ireland* [2009] NIQB 51 (8 June 2009) *per* Gillen J, [45].

of Lords judgment confirming the correctness of such a conclusion is *Mitchell v Glasgow City Council*.[107]

**Shift from *Hill* Immunity to *Brooks* Lack of Duty**

For present purposes, arguably the most important aspect of *Hill* involves the shift taken by the Law Lords to the question of the propriety of imposing an immunity from suit in negligence as occurred in *Hill*. The point was dealt with most fully by Lord Steyn in his judgment when his Lordship stressed that, since the time of the decision being rendered in *Hill*, significant developments occurred which "affect the reasoning of that decision in part". Two points, in particular, were noted. For example, Lord Steyn noted that in *Hill* the House of Lords relied on the immunity from suit of barristers espoused in its earlier decision in *Rondel v Worsley*.[108] That immunity no longer exists in English law.[109]

The second point noted by Lord Steyn was the impact of the decision of the European Court of Human Rights in *Z and others v United Kingdom*[110], in light of which it was determined that it "would be best for the principle in *Hill* to be reformulated in terms of the absence of a duty of care rather than a blanket immunity".[111]

Notwithstanding that the shift from immunity to lack of duty language is welcome, it is submitted that reliance in *Brooks* on the "defensive policing" concern articulated in *Hill*, is unconvincing and represents a failure fully to vindicate rights in this area. Whatever

[107] [2009] UKHL 11, [2009] 2 WLR 481.
[108] [1969] 1 AC 191.
[109] *Arthur J S Hall & Co (A Firm) v Simons* [2002] 1 AC 615.
[110] [2001] ECHR 333, (2002) 34 EHRR 97, [100]. This decision is discussed in detail in Chapter 5.
[111] *Brooks*, [27].

about the capacity of this argument to be persuasive in the context of the potential imposition of far-reaching affirmative duties on the police, it is difficult to see how it can be of any application to a case involving facts such as those in *Brooks*. For, as McIvor observes:

> [I]t is difficult to see how a duty not to inflict harm on victims and witnesses through improper and racially discriminatory conduct could be said to result in the exercise of excessive caution and the inhibition of the police function. The defensive practice argument is simply unpersuasive in this context.[112]

In assessing the degree to which the *Hill/Brooks* dichotomy illuminates the rôle now being played by rights discourse in fashioning the ingredients of the tort of negligence that is under consideration, it is instructive to assess the significance of the *Hill/Brooks* development for this jurisdiction.

### *Hill/Brooks* Dichotomy Mirrored in Irish Law

From an Irish perspective, regard must be had to the highly significant recent decision of the Supreme Court in *Beatty v The Rent Tribunal.*[113] In *Beatty*, the Court considered at length whether the Rent Tribunal, a statutory body, could be sued in negligence. Although the members of the Court were in agreement in determining that, on the facts,

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[112] Claire McIvor, "The Positive Duty of the Police to Protect Life" (2008) 24 *PN* 27, 34.
[113] [2005] IESC 66, [2006] 2 IR 191, [2006] 1 ILRM 164, analysed by Des Ryan, "The Position in Tort of Public Authorities after *Beatty*" (2006) 1(1) *Quarterly Review of Tort Law* 12. (References hereafter are to The Irish Reports).

the negligence claim must fail, there was an important divergence in the approach taken by the different judges in arriving at that conclusion. Fennelly J was satisfied that the negligence claim must fail on an application of the third limb of the restated negligence test enunciated by the Supreme Court in *Glencar Explorations plc and Andaman Resources plc v Mayo County Council*[114], that is, that it would not be "fair, just and reasonable" to impose a duty of care on the tribunal in the circumstances. McCracken J agreed with this approach. However, Geoghegan J (with whom Denham and Hardiman JJ agreed) preferred to fasten his rejection of the negligence claim to the notion of an immunity from suit in negligence of public authorities exercising statutory duties in the public interest. The relevant passage in Geoghegan J's judgment is worth quoting *in extenso*:

> There is a single and simple reason why I believe that the appeal should be allowed and the claim for damages dismissed. Even though the Rent Tribunal ... is a tribunal which essentially determines rent disputes as between private parties it is a statutory body exercising statutory duties in the public interest. In these circumstances, I am quite satisfied that provided it is purporting to act *bona fide* within its jurisdiction it enjoys an immunity from an action in ordinary negligence .... In this respect it is in no different position from a court whether such court be traditionally categorised as "superior" or "inferior" ... I think that judicial immunity is a

[114] [2002] 1 IR 84.

> free standing independent concept and should not be swallowed up by the wider concepts of the general law of negligence.[115]

This "single and simple reason" prompts a number of comments. What is important about the above passage is the readiness with which Geoghegan J concludes that the tribunal, because of its capacity as a creature of statute acting in the public interest, is thereby immune from suit in negligence. Geoghegan J apparently regarded an immunity from suit as flowing directly from recognition of the tribunal as a public body exercising such duties in the public interest. It may be suggested that such a conclusion is not a *sine qua non* once the body in question is identified as performing public duties which are primarily in the public interest.

Moreover, Geoghegan J's comparison between the tribunal in this case and the immunity enjoyed by judges provides a telling indication of the stout nature of the protection of statutory bodies which Geoghegan J envisages. The immunity of the judiciary is premised upon policy considerations unique to that organ of government[116]; to extend the cloak of protection to all public bodies exercising an adjudicative function is generous indeed to public authority defendants but carries with it the danger of denying recourse in negligence to worthy plaintiffs and thus failing properly to vindicate rights in the tortious liability of public authorities. It is thus significant that this approach was not shared by all the members of the Supreme Court.

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[115] [2006] 2 IR 191, 195.

[116] And even in regard to this immunity it may be asked, as Hogan and Morgan point out, whether same is compatible with constitutional principles and whether it has survived the Supreme Court decision in *Byrne v Ireland* [1972] IR 241: see Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (3rd ed, Round Hall: Sweet & Maxwell, 1998), 921.

Fennelly J in his judgment opted instead to avoid the concept of "immunity" in favour of the conclusion that a negligence action will not lie if, in all the circumstances, it would not be just and reasonable to impose a duty of care. McCracken J delivered a separate concurring judgment in which he indicated his preference for the approach adopted by Fennelly J. McCracken J approached with great caution the attaching of immunity to a statutory body, noting that, since the tribunal is a creature of statute, there was nothing to prevent the Oireachtas from specifically providing for an immunity from suit in negligence. As McCracken J noted, "[t]he Oireachtas chose not to take that course".[117] McCracken J stressed that it was not correct to conclude that it is public policy to grant immunity to all public bodies in the absence of immunity being granted by statute. Like Fennelly J, McCracken J arrived at the conclusion that the tribunal's appeal must be allowed on an application of the "fair, just and reasonable" analysis common to general principles of negligence, and explained that such a threshold would be difficult to surmount in cases involving public authority defendants:

> Where a public body, such as the [Tribunal], performs a function which is in the public interest, then in many cases, and I believe this to be one of them, that body ought not to owe a duty of care to the individuals with whom it is dealing. It is in the public interest that it should perform its functions without the fear or threat of action by individuals. The fact that it is performing a function which is in the public interest may outweigh any duty of care to private individuals. Whether it does or not, of course, is a

[117] *Ibid.*, 217.

> matter for decision based on consideration of the position of any particular public body.[118]

While general public policy considerations are of importance in considering this "fair, just and reasonable" limb, McCracken J explained that other considerations also required analysis. In the instant case, these included, *inter alia*, the nature and functions of the particular body, the nature and expertise of its members, and the extent to which there is a public policy element to the nature of its decisions. In the present case, McCracken J had "no doubt it would not be fair and reasonable to impose liability, taking these considerations into account".[119]

It may be suggested that, of the two approaches posited by Geoghegan J on the one hand and Fennelly and McCracken JJ on the other, as to whether the plaintiffs had an actionable claim, that of Fennelly and McCracken JJ is to be preferred. As a matter of principle, it seems fair to state that the courts in the common law world in recent years have been slow to cleave to the upholding of blanket immunities from suit in negligence. Rather, instead of foreclosing the possibility of a duty of care *ever* arising in a given context, the courts have tended to allow of that possibility and have accepted that, in an appropriate case, a duty of care could be established between the parties even where the relationship in question or rôle of the particular defendant was one which involved special considerations of sensitive policy. As Lord Nicholls of Birkenhead memorably put it in his judgment in the case of *Phelps v Hillingdon Borough Council* – analysed

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[118] *Ibid.*, 219.
[119] *Ibid.*, 220.

below in this Chapter in the context of the causation hurdle – "'[n]ever' is an unattractive absolute in this context".[120]

A good example of this is the approach of the English courts in the context of negligence claims against barristers – which, as we have seen, was a fulcrum on which much of the movement in *Brooks* hinged. Starting from the position in the famous case of *Rondel v Worsley*[121] to the effect that barristers enjoyed an immunity from suit in negligence (at least insofar as the impugned conduct of counsel concerned court proceedings) – a case which, as noted above, was invoked by the House of Lords in Hill's case – a reappraisal of *Rondel* finally led to an abolition of that immunity from suit in the landmark case of *Hall v Simons*.[122] However, in its recent decision in *Moy v Pettmann Smith (a firm)*[123], the House of Lords has indicated that it will be difficult indeed for plaintiffs to make out a negligence claim against barristers. Thus, while English law in this context repudiates the notion that a particular class or body should enjoy an immunity from suit, a balance can be struck by the imposition of a high threshold for plaintiffs mounting negligence actions against such persons. This more nuanced approach to the question of the existence of a duty of care seems preferable to the "all or nothing" prescriptiveness of a blanket immunity – particularly in light of the right enshrined in Art 6(1) of the European Convention on Human Rights to have access to the courts, a right which, as seen in Chapter 1, comprises a strongly vindicatory emphasis. It is instructive in this regard to

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[120] [2000] UKHL 47, [2001] 2 AC 619, 667.
[121] [1969] 1 AC 191.
[122] [2002] 1 AC 615. Though see the recent divergence of approach between the High Court of Australia and the Supreme Court of New Zealand on this question: compare *D'Orta-Ekenaike* v *Victoria Legal Aid* [2005] HCA 12, (2005) 214 ALR 92 with *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.
[123] [2005] UKHL 7, [2005] 1 WLR 581.

refer to the judgment of the House of Lords, discussed above, in *Brooks v Commissioner of Police of the Metropolis*.[124] Although not referred to in the judgments in *Beatty*, the case turns upon the very same issue, that is, the propriety of perpetuating immunities from suit in negligence claims when the defendant in question is a statutory body.

**Conclusions on Vindicatory Nature of Duty Inquiry**

In the above section, the infusion of the duty of care inquiry in negligence actions with vindicatory concerns has been explored. Two distinct trends in this area have been identified. The first is one in which the duty ingredient is explicitly and directly subordinated to vindicatory concerns, such as the examples studied from the Australian jurisprudence in which the "fair, just and reasonable" stage of the duty inquiry was refashioned to accommodate concerns about vindicating the rights of vulnerable plaintiffs. In contrast to such an approach is the manner in which the courts have approached the duty inquiry in such a way as to demonstrate a heightened awareness of vindicatory concerns, as exemplified in the shift in emphasis from the duty and breach stage seen in the English and Irish case law. Before commenting on the implications of such approaches, it is necessary now to proceed to consider the influence of vindicatory concerns on the remaining constituent ingredients of the negligence action. For, in the same way that judicial focus is at present shifting from duty to breach analysis as explored above, so too are other changes discernible in the courts' approaches to other separate and distinct ingredients in the negligence inquiry. Following on from duty and breach, there remain the hurdles of causation and damage that must be met by plaintiffs in order to succeed in the negligence action. In this next section, it is argued that the

[124] [2005] UKHL 24, [2005] 1 WLR 1495.

striking shifts in recent years in tort jurisprudence in relation to both constituent ingredients lends further weight to the argument that the constituent ingredients of the negligence action are undergoing a process of recalibration owing to the pressure of vindication concerns.

## E. VINDICATING RIGHTS THROUGH THE CAUSATION INQUIRY

### Inherent Difficulties Involved in Causation Hurdle

The focus of this Chapter now turns to the next discrete constituent ingredient that must be made out in the negligence action: the "abracadabra of causation"[125], that extremely complex and elusive hurdle in the negligence inquiry that has been aptly described as "a tangle and a jungle, a palace of mirrors and a maze".[126] At the outset, some preliminary points about causation should be noted. The first is that, unlike many of the other key constituent ingredients of the negligence action, such as, for example, the duty of care, causation is primarily a matter of fact and for this reason has given rise to relatively little judicial analysis at superior court level. As Professor Jane Stapleton has said, the "question rarely gives rise to appellate case law because the question is one of *fact*".[127] Notwithstanding this, there have in recent years emerged a number of significant indications from senior appellate courts that the causation hurdle can be influenced by vindicatory pressures in tort law. Two such examples are analysed in this section.

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[125] J.G. Fleming, *The Law of Torts* (9th ed, 1998, Sydney: LBC Information Services), 305.
[126] W.L. Prosser, "Proximate Cause in California" (1950) 38 *California Law Review* 369, 369.
[127] Jane Stapleton, "Lords a'leaping evidentiary gaps" (2002) 10 *TLJ* 276, 279.

A second point relates to the developments that have taken place in causation analysis in tort law generally in recent years. Writing on the subject of moral luck in tort law just over a decade ago, Professor Peter Cane commented that "it could be argued that responsibility for conduct underpins all of the plaintiff-oriented functions of tort law"[128], in the sense that there can be no liability in tort without a judgment that the defendant was responsible in some relevant way. It is, however, important to acknowledge the very considerable developments that have taken place in causation in negligence generally (quite outside the sphere of public authority liability).[129] Detailed discussion of this trend is outside the scope of this part of the Chapter, but has been considered by the author elsewhere.[130] Instead, the more focused concern of this Chapter is with charting the adoption of a modified approach to the causation hurdle in negligence that is specifically triggered out of a concern to vindicate plaintiffs' rights. In order to explore this theme, it is necessary to analyse in detail two prominent recent United Kingdom authorities, *Phelps v Hillingdon Borough Council*[131] *and Chester v Afshar.*[132]

**The Approach to Causation in *Phelps*: Evidence of Vindicatory Influence**

*Phelps* comprised appeals in four cases that were heard together. Each case raised questions as to the liability of a local education authority for what was said to have been a

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[128] Peter Cane, "Retribution, Proportionality, and Moral Luck in Tort Law", Chapter 6 in Jane Stapleton and Peter Cane, eds, *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998), 2.
[129] Jane Stapleton, "Cause-In-Fact and the Scope of Liability for Consequences" (2003) 119 *LQR* 388. For valuable analysis from a Canadian perspective, see Vaughan Black, "The Transformation of Causation in the Supreme Court: Dilution and 'Policyization'" in T. Archibald and M. Cochrane (eds.), *Annual Review of Civil Litigation 2002* (Carswell, Toronto, 2003).
[130] See Ray Ryan and Des Ryan, ""A Lost Cause?" Causation in Negligence Cases: Recent Developments" (2006) 24 *ILT* 91 (Part I) and (2006) 24 *ILT* 107 (Part II).
[131] [2000] UKHL 47, [2001] 2 AC 619.
[132] [2004] UKHL 41, [2005] 1 AC 134.

failure, either by the local authority or by employees for whom the local authority was vicariously liable, in the provision of appropriate educational services for children at school.

As Stuart-Smith LJ observed in the judgment of the Court of Appeal in *Phelps*[133], in cases such as this "the question of causation presents enormous difficulties", due to the "host of factors which affect pupils subjectively".[134] Accordingly, even where breach of duty can be established, the causal hurdle presents a formidable difficulty for plaintiffs. This is well captured in the following passage of the judgment of Stuart-Smith LJ:

> The real difficulty however on causation, was for the plaintiff to show that if such an approach had been adopted it would have made a real difference to her. [T]he...extent of such progress is a matter of speculation. That is not sufficient for the plaintiff to discharge the burden of proof upon her. It seems to me to be impossible to say that on the balance of probability, if the teaching had been more structured than it was, it would have made a measurable difference. It is impossible to know what effect the emotional factors may have been having on the plaintiff.[135]

The seriousness of the task facing plaintiffs who must satisfy an orthodox causation test is memorably highlighted by Otton LJ in his judgment in *Phelps*, who prefaced his

[133] [1998] EWCA Civ 1686, [65].
[134] Citing *Peter W. v San Francisco Unified School District*, 131 Cal Rptr 854, 861.
[135] [1998] EWCA Civ 1686, [80].

comments – which were chiefly on the issue of causation – with the following stark warning:

> It would be wise for those who contemplate instituting or pursuing such claims to be aware of the formidable obstacles which they face in order to avoid or reduce the chances of ultimate disappointment.[136]

Otton LJ's judgment strongly emphasises how difficult the causation issue is in cases such as these, going as far as to observe that "[a]ny plaintiff with a congenital condition faces formidable difficulties in proving a causal link between failure to diagnose and/or to treat appropriately and outcome, particularly in relation to future earning capacity".[137] In light of this approach, it is striking that the issue of causation received comparatively little analysis in the judgment of the House of Lords when the decision of the Court of Appeal was appealed. Thus, one searches in vain through the House of Lords judgments for any treatment of the causal hurdle in this case. The closest the members of the Appellate Committee come to dealing with the causation hurdle is simply in acknowledging that it may be problematic for the claimant. Lord Slynn, for example, refers to causation as "a very difficult issue"[138], yet provides no elaboration of the complexity of this hurdle in *Phelps*. Similarly in the judgment of Lord Clyde we find a statement to the effect that "[t]here may… be severe difficulty in establishing a causal connection between the alleged negligence and the alleged loss and in the assessment of any damages", which is, with respect, only mentioned insofar as Lord Clyde wishes to

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[136] *Per* Otton LJ, [1].
[137] *Ibid.*, [14].
[138] [2000] UKHL 47, [2001] 2 AC 619, 657.

emphasise the rather tautologous point that such possible difficulties "should not be allowed to stand in the way of the presentation of a proper claim, nor should justice be altogether denied on the ground that a claim is of a complex nature."[139]

Given the strong emphasis placed in the judgments of the House of Lords on the fall-out of *Osman v United Kingdom*[140] and the subsequent case law including *Barrett v Enfield London Borough Council*[141], it is submitted that this conspicuous absence of an analysis of causation marks a softened approach to this constituent ingredient of negligence that is clearly triggered by vindicatory concerns.[142]

More recently, evidence of the causation ingredient in negligence being shaped according to vindicatory principles is to be found in the judgment of the House of Lords in *Chester v Afshar*.[143] Although a medical negligence action against a surgeon, the case has significant implications for public authority defendants, in general, and in the context of the provision of health services, in particular.[144]

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[139] [2000] UKHL 47, [2001] 2 AC 619, 673.
[140] [1998] ECHR 101, (1998) 29 EHRR 245, analysed in detail in Chapter 5 herein.
[141] [2001] 2 AC 550.
[142] Writing extra-judicially, Lord Hoffmann has described the decision in *Phelps* as "a disaster", one of a number of "melancholy illustrations" of "bad mistakes". Lord Hoffmann notes that, following *Phelps*, "[m]any expensive actions have been brought; virtually none have succeeded and of the one or two which have found a sympathetic tribunal, the compensation awarded has been tiny in proportion to the costs". (Lord Hoffmann, "Foreword" to John Morrell and HH.J. Richard Foster, *Local Authority Liability* (4th ed, Jordans, 2009), ix-x).
[143] [2004] UKHL 41, [2005] 1 AC 134. See Lara Khoury, "Stepping Further Away from Causation" [2005] *Sing JLS* 256; Jenny Steele, "'Breach of Duty Causing Harm?' Recent Encounters between Negligence and Risk" (2007) 60 *CLP* 296; Ray Ryan and Des Ryan, "A Cause Wrapped up in a Duty: Causation and Informed Consent to Medical Treatment" (2005) 27 *DULJ* 260.
[144] This is illustrated by the fact that, in the wake of the majority ruling in *Afshar*, the National Health Service Litigation Authority, which manages all medical negligence claims arising out of incidents in NHS hospitals in England, issued a "Risk Alert" to the NHS which describes the decision in *Afshar* as having "serious implications for clinicians in the NHS as well as in private practice" and which warns that failure to ensure adequate consent "now over-rides any argument that such failure did not cause the adverse outcome, provided that the warning ought to have been given and the condition or consequence which

This case serves as a striking example of the impact upon causation – as a core constituent ingredient of the negligence inquiry – being exerted by the growing vindicatory pressures of respecting plaintiffs' rights of autonomy. Autonomy can thus be viewed as a concomitant value of a vindicatory approach to recovery in tort law: as emphasis on autonomy emerges into the ascendancy, so too will vindicatory pressures increase.[145] It is indubitable that "[a]utonomy is seen as a central value in the liberal western legal tradition".[146] Increasingly, courts across the common law world are laying greater emphasis on personal autonomy in tort law.[147] A good example of this is a leading Australian case of *Perre v Apand*[148], where McHugh J observed:

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ought to have been mentioned actually develops". The Litigation Authority concludes that post-*Afshar*, "extreme care in the taking of consent is even more crucial than ever" (National Health Service Litigation Authority, Risk Alert 4 (November 2004) available at www.nhsla.com) (last visited 16 August 2009). For further comment see Michael A Jones, "A Risky Business" (2005) 13 *Tort L Rev* 40, 50.

[145] For discussion of the rôle of autonomy in vindication see Chapter 3 and the analysis therein of the rôle of autonomy in the "reinvigoration" of the tort of misfeasance in public office.

[146] Christian Witting, "The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence" (2008) 71 *MLR* 621, 634. In support of this proposition Witting refers to, *inter alia*, J. Goldberg, "Rights and Wrongs" (1999) 97 *Mich L R* 1828.

[147] The emphasis is not limited to cases involving public authority defendants. A striking example of the promotion of the value of autonomy being used in a manner so as to prevent a plaintiff from successfully suing in tort law is the decision of the Supreme Court of Canada in *Childs v Desormeaux* 2006 SCC 18, [2006] 1 SCR 643, refusing to impose liability in negligence upon a social host for excessive alcohol consumption by a guest. Declining to even recognise the duty of care contended for in that case – a duty upon a social host to monitor the consumption of alcohol by its party guests – the Supreme Court of Canada offered among its reasons for denying such liability that "the common law is a jealous guardian of individual autonomy" (*per* McLachlin CJ, [31]). The Court held that a party guest was no less responsible for his or her conduct simply by accepting, without more, an invitation from a host. Moreover, the consumption of alcohol – coupled with the attendant assumption of risks of inebriation – was "a personal choice and an inherently personal activity" (at [45]). Accordingly, an adult who voluntarily decided to consume alcohol in a social context must bear responsibility for the outcomes of that decision. The individualist philosophy on which this aspect of the judgment was based was memorably captured by McLachlin CJ when she commented that " [a] person who accepts an invitation to attend a private party does not park his autonomy at the door" (at [45]). For discussion see Ray Ryan and Des Ryan, "Party Hosts, Intoxicated Guests and the Law of Negligence" (2007) 58 *NILQ* 108.

[148] (1999) 198 CLR 180. For detailed discussion of this case and other recent developments in Australia, see for example The Honourable JJ Spigelman AC, Chief Justice of New South Wales, "Negligence: The Last Outpost of the Welfare State" (address given to the Judicial Conference of Australia: Colloquium 2002, 27 April 2002) available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court; Justice Terry Connolly, Supreme Court of the Australian Capital Territory, "Tort Law: What is the Point?", paper

> One of the central tenets of the common law is that a person is legally responsible for his or her choices. It is a corollary of that responsibility that a person is entitled to make those choices for him or her self without unjustifiable interference from others.[149]

The influence of the principle of respect for autonomy upon the causation ingredient of negligence manifests the strong pull of this principle towards the promotion of a vindicatory function within the imposition of negligence liability. It is this process that is now analysed through the prism of the House of Lords judgment in *Chester v Afshar*.

**The Rights-Based approach to Causation in *Chester***

The claimant, Miss Chester, suffered repeated episodes of lower back pain. After conservative treatment which proved ineffective, she was referred to Dr Afshar, a distinguished consultant neurosurgeon with much experience of disc surgery. Dr Afshar advised her to undergo an elective lumbar surgical procedure. This procedure entails a 1%-2% risk of serious neurological damage, a condition known as *cauda equina* syndrome (CES). In breach of the common law duty of care, Dr Afshar failed to inform the claimant of the risk. The claimant reluctantly agreed to undergo the operation, which was carried out three days later. Unfortunately, the risk, about which Miss Chester should have been warned, eventuated and she sustained CES. At first instance, Taylor J was satisfied that if the claimant had been warned, she would not have agreed to undergo the

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delivered at Australian Lawyers' Alliance Conference, Canberra, 24 June 2005 (paper available at www.courts.act.gov.au) (last visited 22 August 2009).

[149] *Perre v Apand* (1999) 198 CLR 180, 223.

operation three days after the consultation.[150] Instead she would have sought further advice on the alternatives open to her. If she had agreed to surgery on a subsequent date, the risk attendant upon it would have been exactly the same, that is, 1%-2%. It was thus highly improbable that she would have sustained CES on the later occasion. Taylor J found that the claimant had established a causal link between the breach and the injury she had sustained and held the defendant liable in damages. The Court of Appeal upheld the conclusion of the judge.

**Conflicting Approaches in House of Lords in *Chester***

A majority of the House of Lords held that Miss Chester was entitled to recover damages in respect of the worsening of her situation by the adverse outcome. The majority did, however, feel obliged to say that this involved a modification of the standard principles of causation, albeit in a "narrow and modest" way.[151] The reason why the "but for" test was deemed to fail to meet the facts of *Chester* was because the court regarded Dr Afshar's breach of duty as exposing the claimant to the risk of injury, which risk was in no way increased on the later occasion when she did submit to the treatment. The modification to the causation analysis was required so as to vindicate and properly respect the patient's autonomy and freedom to issue an informed consent to the proposed course of treatment. The emphasis on autonomy and rights vindication is one of the most significant thrusts of the majority approach. Thus Lord Steyn observed that the claimant's "right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles".[152] Explicitly signalling recourse to the

[150] [2000] WL 33201379.
[151] *Per* Lord Steyn, [24].
[152] *Ibid.*

vindicatory objective, Lord Steyn concluded that "policy and corrective justice pull powerfully in favour of vindicating the patient's right to know".[153]

But perhaps the most striking reliance on vindication is given in the judgment of Lord Hope of Craighead who remarked that "[t]he function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached" and that unless an infringed right were met with an adequate remedy, the duty would become "a hollow one, stripped of all practical force and devoid of all content".[154]

Lords Bingham and Hoffmann dissented, essentially on the grounds that the claimant could not cross the causation hurdle. Lord Bingham explained:

> [I]n the ordinary run of cases, satisfying the 'but for' test is a necessary if not a sufficient condition of establishing causation. Here, in my opinion, it is not satisfied. Miss Chester has not established that but for the failure to warn she would not have undergone surgery. She has shown that but for the failure to warn she would not have consented to surgery on Monday 21 November 1994. But the timing of the operation is irrelevant to the injury she suffered, for which she claims to be compensated. That injury would have been as liable to occur whenever the surgery was performed and whoever performed it.[155]

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[153] *Per* Lord Steyn, [22].

[154] Significantly, this passage has been relied upon in public authority tort contexts: see for example *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, discussed in detail in Chapter 1, *per* Lord Scott, [22].

[155] [2004] UKHL 41, [2005] 1 AC 134, [8].

Lord Hoffmann dismissed Miss Chester's claim, stating:

> In my opinion this argument [that the plaintiff would not have undergone the operation at the particular time at which she did] is about as logical as saying that if one had been told, on entering a casino, that the odds on the number 7 coming up at roulette were only 1 in 37, one would have gone away and come back next week or gone to a different casino. The question is whether one would have taken the opportunity to avoid or reduce the risk, not whether one would have changed the scenario in some irrelevant detail. The judge found as a fact that the risk would have been precisely the same whether it was done then or later or by that competent surgeon or by another.[156]

It followed, according to Lord Hoffmann, that the claimant failed to prove that the defendant's breach of duty caused her loss, at least "on ordinary principles of tort law".[157] This comment highlights the key tension in the law of negligence being explored in this Chapter: the tension between the need to observe "ordinary principles" of tort law on the one hand, and the need to modify such "ordinary principles" so as to vindicate rights such as autonomy, on the other. In this regard, it should be stressed that Lord Hoffmann in his dissent accepted that the majority's approach of imposing liability could serve to "vindicate the patient's right to choose for herself".[158] This was not sufficient, however, to justify such a departure from the conventional rules of causation. Lord Hoffmann further accepted that the breach of duty by the defendant to the claimant was an "affront

[156] *Ibid.*, [31].
[157] *Ibid.*, [32].
[158] *Ibid.*, [33].

to her personality and this leaves her feeling aggrieved".[159] As a potential response, Lord Hoffmann referred to the possibility of awarding "a modest solatium in such cases",[160] but declined to pursue such a suggestion due to the inherent difficulties of arriving at an appropriate quantification, as well as the cost of litigation that would be necessary to enforce such claims. As we shall see, the significance of this point will become clearer in the context of the analysis below of alterations being made to the damage requirement in the negligence action.

The decision in *Chester v Afshar* has yet, at the time of writing, to be afforded detailed consideration by the Irish courts.[161]

**Conclusions on Infusion of Causation Inquiry with Vindicatory Concerns**

In the above section, it has been argued that an assessment of prominent public authority and other negligence claims in recent years discloses a subtle but highly important trend in relation to how courts are approaching the causation inquiry. As with the elements of duty and breach, the courts are approaching the causation element in the negligence inquiry in a manner that seeks to ventilate and promote vindicatory concerns. Whilst one crucial result of this is undoubtedly to bolster and vindicate the rights of plaintiffs – as

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[159] *Ibid.*

[160] *Ibid.*, [34].

[161] *Chester v Afshar* was considered by the High Court in this jurisdiction *Winston v O'Leary* [2006] IEHC 440. Unreported, High Court, 19 December 2006, MacMenamin J. There, the plaintiff had undergone a vasectomy operation. He claimed that his life was a misery due to constant pain, and alleged negligence in failure to warn of the risks associated with a vasectomy operation. He alleged that the defendant had failed to warn him that there was a risk of contracting post vasectomy pain syndrome. MacMenamin J dismissed the plaintiff's claim. MacMenamin J concluded that the claim failed on the basis of causation also, even if he was wrong in holding that there had been no breach of the duty to disclose risks. As such it was "unnecessary to give consideration to the application of the persuasive authorities of *Chester v Afshar* or *Thompson v Bradford* or whether the principles decided therein should be followed or applied." In the subsequent Supreme Court decision in *Fitzpatrick v White* [2007] IESC 51, [2008] 3 IR 551, [2008] 2 ILRM 99, Kearns J delivering the judgment of the Supreme Court expressly referred to *Chester* and to the "patient centred" approach to the duty to disclose risks articulated by Lords Bingham and Hoffmann (albeit in dissenting judgments in *Chester*).

exemplified in the *Chester* case analysed above – this trend reveals a tension between engaging in such vindication, on the one hand, and ensuring that proper respect is maintained for the integrity of the causation inquiry. This tension will be returned to in the context of the inquiry as to the "gist" or damage requirement considered below.

Notwithstanding this, the above developments in *Phelps* and *Chester* both indicate a recharacterisation of the hurdle of causation as a direct (if not always expressly acknowledged) response to the pressures of rights vindication. A similar trend is also in evidence concerning the "gist" or damage requirement of the negligence action, to which the focus of this Chapter now turns.

## F. VINDICATING RIGHTS THROUGH THE DAMAGE INQUIRY: IS VINDICATION RECASTING THE "GIST" OF THE CAUSE OF ACTION?

In the same way that the key constituent ingredients in the negligence action of duty, breach and causation have undergone significant refashioning in recent years, so too can the rapid relaxation of the notion of damage – the "gist" of the negligence action – be seen as a response to pressures from litigants seeking to vindicate rights through the negligence action in tort litigation against public authorities. The last decade has witnessed an extraordinary pace of development in relation to what the courts will accept as comprising sufficient damage for the purposes of meeting the minimum actionable damage requirement of negligence. While it should be stressed that these developments affect the law of negligence generally, it is in the context of negligence actions against public authorities that the shifts have been most pronounced.

Here again, the renewed focus on the damage requirement or "gist" of the negligence action springs from an acknowledgment of competing tensions within tort law. In one of the leading authorities on the damage requirement to be examined below, for example, *McFarlane v Tayside Area Health Board*[162], Lord Steyn explicitly acknowledged the tensions between distributive and corrective justice[163], which he referred to as a "mosaic".[164] It is clear, then, that in analysing the courts' approaches to the "gist" requirement in negligence, the objectives and goals of tort law must be kept firmly in view.

**The Gist of Negligence**

It is trite textbook law to say that damage is the gist of the negligence action. In order to sustain a negligence claim, the plaintiff must show that he or she has suffered damage that is not insubstantial or trivial. The damage must be sufficient to be regarded as "minimum actionable damage". Indeed, breach of duty without consequent damage does not "assume the legal quality of negligence" at all, according to Lord MacMillan in *Donoghue v Stevenson*:[165]

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such

[162] [2000] 2 AC 59. Lord Steyn, "Perspectives of Corrective and Distributive Justice in Tort Law" (2002) XXXVII *Ir Jur* 1.
[163] For detailed discussion, see Chapter 1 above.
[164] [2000] 2 AC 59, 83.
[165] [1932] AC 562, 618-619.

> circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.

As Baroness Hale said in a recent landmark judgment:

> But damage is the gist of negligence. So it can never be enough to show that the defendant has been negligent. The question is still whether his negligence has caused actionable damage....[166]

This point has been surprisingly neglected in the case law; as Nolan observes, "it seems strange... that this essential component of negligence liability should be so widely ignored".[167] Perhaps one of the key reasons for this trend has been a tendency to conflate the ingredient of damage with other ingredients in the negligence inquiry, such as the duty of care and causation. The paradigmatic examples of such an approach in relation to the duty of care are arguably in the case law concerning negligently inflicted psychiatric damage and the recovery in negligence of pure economic loss. Increasingly, however, the stand-alone importance of the damage requirement as the gist of the negligence action is coming to be accepted. As Hayne J recently observed in the High Court of Australia, the question of what is regarded as actionable damage in negligence is "separate and distinct from questions of duty or causation".[168]

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[166] *Gregg (FC) v Scott* [2005] UKHL 2, [2005] 2 AC 176, *per* Baroness Hale, [217].
[167] Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 (1) *MLR* 59, 59.
[168] *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52, (2006) 226 ALR 391, (2006) 80 ALJR 791, *per* Hayne J, [161].

Attention was focused on the question after an influential article by Professor Jane Stapleton just over twenty years ago in the *Law Quarterly Review*[169], discussing the case of *Hotson v East Berkshire Area Health Authority.*[170] Academic attention has increasingly started to focus on this question.[171]

In terms of the inquiry of this Chapter into the reshaping of the core constituent ingredients of the negligence action as a response to the vindicatory tensions underscoring the tortious liability of public authorities, a series of recent cases across the common law world including Ireland illustrates an emerging approach to the damage requirement that sets such tensions in sharp relief. The starting point in the line of recent case law in England is *McFarlane v Tayside Health Board.*[172] Mr and Mrs McFarlane claimed the costs of rearing an unplanned child whom they conceived after receiving negligent medical advice that Mr McFarlane had been rendered irreversibly infertile after a vasectomy operation. Although ordinary negligence principles would have suggested allowing recovery, the Law Lords viewed the case as essentially one to be analysed through the prism of distributive justice. Allowing parents to successfully sue for the costs of raising a healthy child ran contrary to the judges' notion of what was just and appropriate; moreover the court felt that an overwhelming majority of the public at large would be hostile to the idea that such a claim could succeed. A number of reasons were

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[169] Jane Stapleton, "The Gist of Negligence" (1988) 104 *LQR* 213 (Part I); (1988) 104 *LQR* 389 (Part II); Christian Witting, "Physical Damage in Negligence" [2002] *CLJ* 189; and (in a comparative law context) Christian von Bar, "Damage Without Loss" in William Swadling and Gareth Jones (eds), *The Search for Principle* (Oxford: Oxford University Press, 1999).
[170] [1987] AC 750.
[171] For two important recent examples see Jenny Steele, "'Breach of Duty Causing Harm?' Recent Encounters between Negligence and Risk" (2007) 60 *CLP* 296; Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 *MLR* 59.
[172] [2000] 2 AC 59.

advanced for this position. First, the Law Lords held that it would be wrong, in assessing the damages payable to the plaintiff for the fact that she had given birth to an unwanted child, not to take account of the benefits that the plaintiff would reap in raising the child. It would be morally offensive for a court to deem those benefits to be outweighed by the costs of rearing the child. Accordingly, it was held that it must be taken as a given that the benefits which flow from bringing up a child – which are in nature intangible and incalculable – outweigh the costs involved and therefore no claim could be made for the costs of bringing up the child.[173]

A further argument against recovery of the costs of upbringing was that to impose liability on the defendant for those costs would be out of all proportion to the fault of the

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[173] See *McFarlane* at 82, *per* Lord Steyn, 97 *per* Lord Hope and at 111 *per* Lord Millett; *Rees* at [28] *per* Lord Steyn, at [51] *per* Lord Hope and at [112] *per* Lord Millett. The High Court of Australia has arrived at a different view to the House of Lords in *McFarlane* in its much-discussed judgment in the case of *Cattanach v Melchior* [2003] HCA 38, 215 CLR 1, 199 ALR 131, 77 ALJR 1312. Rejecting the approach in *McFarlane*, the High Court held, by a 4-3 majority, that claims for recovery of the cost of upkeep of the child born after a negligently performed sterilization were sustainable. It was noted that since the reasoning in *McFarlane* had been based on the three stage test for the duty of care set out in *Caparo Industries plc v Dickman* [1990] 2 AC 605 it was unsurprising that the High Court of Australia might take a different view since the *Caparo* test has been rejected in Australia. (Indeed it is significant that just three months after the Irish Supreme Court's judgment in *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 IR 84, endorsing *Caparo*, the Australian High Court – confirming its approach in *Perre v Apand Pty Ltd* [1999] HCA 36, (1999) 198 CLR 180 and *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61, (2000) 75 ALJR 164 to the effect that *Caparo* does not represent the law in Australia – again questioned the utility of this incremental approach in *Sullivan v Moody* [2001] HCA 59, 207 CLR 562, 75 ALJR 1570, where the Court observed as follows:

> "There is a danger that practitioners and judges, confronted by a novel problem, will seek to give the Caparo approach a utility beyond that claimed for it by its original author. There is also a danger that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, just and reasonable as an outcome in the particular case. The question of what is fair, just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle". (*Per* Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ at [49]).

See further *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, 194 ALR 337).

defendant in causing the conception in the first place.[174]

Another argument against recovery was that such awards would in all likelihood drain further the scarce resources of the health services, a situation which the majority of people would deprecate.[175] Finally, it would be "unseemly" for the award of upbringing costs to depend on how rich or poor the particular plaintiff was.[176]

It is to be noted that the House of Lords in *McFarlane* distinguished between a claim for damages arising from the birth of the healthy child (which damages were irrecoverable) and damages arising out the pregnancy itself (which damages were recoverable).

**Loss of Autonomy Argument affecting approach to the Damage Requirement**

*McFarlane* was upheld by a seven-judge Appellate Committee in *Rees v Darlington Memorial Hospital NHS Trust*[177], but the House of Lords placed something of a gloss on the earlier ruling when it held, by a majority of four to two[178], that while recovery could not lie for the costs of bringing up the child, a fixed sum – set at £15,000 – could be awarded as compensation for the disruption caused to the plaintiff's life as a result of having the child. The majority held that it would be wrong if the law provided no remedy to reflect the "loss of autonomy" brought about by the negligence of the defendants. The

[174] *McFarlane, per* Lord Hope, [91] and *Rees, per* Lord Nicholls, [16].
[175] *Rees, per* Lord Bingham, [6].
[176] *McFarlane per* Lord Steyn, [82].
[177] [2003] UKHL 52, [2004] 1 AC 309.
[178] Lord Hutton, who dissented from the majority on the question of whether the appeal should be allowed, expressed no view as to the propriety of making the award of a conventional sum.

majority took the view that this loss of autonomy would be reflected in an award of £15,000.

One somewhat confusing aspect of the majority approach in this respect is that it is not entirely clear whether the award can be said to play a compensatory rôle, or whether it is better viewed as a mark of the law's disapprobation of the conduct of the defendants. Thus Lord Bingham in *Rees* took the view that the award of £15,000 was not strictly designed to *compensate* the plaintiff.[179] He said:

> The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done.[180]

It is submitted that this is correct, since to accord a compensatory function to the award would be inconsistent with the notion that the costs of upbringing were irrecoverable on the grounds that same would offend public policy. However, this does raise the difficulty of striving to explain the rationale for the award of the monetary sum. As Lord Hope in his dissent in *Rees* put it: "if the award is not compensatory in nature, what is it?"[181]. Crucially for present purposes, it is submitted that the majority judgments in *Rees* reveal a concern with rights vindication to be at the root of the award. Lord Millett, for example, (with whom the idea of a conventional award, albeit with significant differences, had

[179] *Rees*, [8].
[180] *Ibid.*
[181] *Ibid.*, [74].

originated in *McFarlane*[182]) spoke explicitly in the language of rights in explaining the basis for awarding the conventional sum, referring to the interference with the parents' "right to limit the size of their family" as "a proper subject for compensation".[183] He observed that the "loss of this opportunity [to determine the size of one's family], whether characterised as a right or a freedom, is a proper subject for compensation by way of damages".[184]

So too did Lord Nicholls appear expressly to be concerned with vindication when he explained that the award was designed "to recognise that in respect of the birth of the child the parent has suffered a legal wrong".[185] The language of recognition here is highly significant, it is submitted: it underlines the vindicatory nature of what the court is doing in that the emphasis is placed on the public acknowledgment of the harm suffered in a vindicatory sense.

Lords Steyn and Hope dissented in *Rees* and opposed the award of the conventional sum. Their opposition underlines the tension between rights vindication and the conventional paradigm of tort law. Lord Steyn, for example, was at pains to emphasise what he termed the "heterodox" nature of the awarding of the conventional sum, explaining that such a measure was without foundation in precedent:

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[182] *McFarlane*, 114.
[183] *Rees*, [123].
[184] *Ibid.*
[185] *Ibid.*, [17].

> No United Kingdom authority is cited for the proposition that judges have the power to create a remedy of awarding a conventional sum in cases such as the present. There is none. It is also noteworthy that in none of the decisions from many foreign jurisdictions, with varying results, is there any support for such a solution. This underlines the heterodox nature of the solution adopted.[186]

Just as precedent could not support the innovation, neither, according to Lord Steyn, could principle. He continued:

> I regard the idea of a conventional award in the present case as contrary to principle. It is a novel procedure for judges to create such a remedy. There are limits to permissible creativity for judges. In my view the majority have strayed into forbidden territory. It is also a backdoor evasion of the legal policy enunciated in *McFarlane*. If such a rule is to be created it must be done by Parliament. The fact is, however, that it would be a hugely controversial legislative measure. It may well be that the Law Commissions and Parliament ought in any event, to consider the impact of the creation of a power to make a conventional award in the cases under consideration for the coherence of the tort system.[187]

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[186] *Ibid.*, [45].
[187] *Ibid.*, [46].

Viewing the approach in *Rees* through the prism of the vindicatory function of tort law, Tony Weir describes the award of the conventional sum as "a token of the court's perception that the parents' rights...have been infringed".[188] Considering this description, Nolan agrees that "[a]spects of the reasoning of Lord Bingham and Lord Millett in *Rees* are certainly consistent with this rights-vindication analysis",[189] but favours the compensatory analysis of the conventional sum on the basis that "the rights-vindication analysis...represents a fundamental challenge to negligence principles".[190] This is because a "pure" vindication analysis could negate the damage requirement in negligence altogether.

It is thus essential to distinguish between rights vindication as *supplanting* the damage inquiry, on the one hand, and *informing* that inquiry, on the other. The former would amount to an impermissible erosion of a key constituent ingredient of negligence and, Nolan argues, "must be rebuffed".[191] He continues:

> [T]he damage requirement is central to negligence law, and it follows that, while torts such as battery can vindicate rights in the absence of harm, negligence cannot. The boundaries of actionable damage may be extended if this is thought necessary to give adequate protection to a particular interest (such as personal autonomy), but the requirement of damage cannot simply be done away with altogether. This is not a narrow,

[188] Tony Weir, *A Casebook on Tort* (London, Sweet & Maxwell, 10th ed, 2004), 17.
[189] Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 *MLR* 59, 79.
[190] *Ibid.*
[191] *Ibid.*

> conceptualist, argument. The reason why trespass-based torts are actionable per se is that they typically involve direct, intentional conduct of a very particular nature: touching, imprisoning and so forth. Negligence, on the other hand, applies paradigmatically to unintentional conduct, incorporates no requirement of directness, and encompasses a limitless variety of actions or omissions. The damage requirement – coupled with limitations on the kinds of damage which are actionable – is therefore essential if negligence law is not unduly to restrict people's freedom of action. It follows that the compensatory analysis of the conventional sum is to be preferred.[192]

The alternative construction of the vindicatory function at work in *Rees*, however – that of informing the damage inquiry, so that breach of autonomy is recognised as a form of actionable damage – is argued by Nolan as being in evidence in *Rees*.[193] Considering, for example, Lord Bingham's emphatic statement that the conventional sum is not "compensatory", Nolan suggests that this was simply an expression of the fact that the harm in question was not quantifiable in pecuniary terms. He draws attention to Lord Bingham's description of the award to the effect that it "would not be the product of calculation".[194] This, with respect, appears a somewhat strained interpretation of Lord Bingham's clear statement that the award "would not be, and *would not be intended to be*, compensatory"[195] – with the reference to intention underlining the purpose and spirit

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[192] *Ibid.*
[193] *Ibid.*
[194] *Per* Lord Bingham in *Rees*, [8].
[195] *Ibid* (emphasis added).

of the award as distinct from any process of calculating damage. The references by Lord Millett to the language of rights are, for their part, described by Nolan as "probably no more than an unfortunate rhetorical slip".[196]

It is submitted that the vision of vindication that emerges from *Rees* is ambiguous and as such the judgments cannot be regarded as being solely premised on the compensatory model. Even if one is persuaded by Nolan's account of this aspect of *Rees*, however, the significance of the case remains obvious: the vindicatory analysis exerted a powerful impact upon how damage, a constituent ingredient of the negligence inquiry, was fashioned. This coheres with the view memorably expressed by Hickman that the expansion of the categories of actionable damage can be viewed as "an unstated response to pressure from litigants wanting to vindicate rights through actions in negligence".[197]

**The Emergence of a Category of "Vindicatory" Damages**

Based on the analysis already undertaken in Chapter 1 herein, it will be recalled that in the 2008 House of Lords judgment in *Ashley v Chief Constable of Sussex Police*[198] Lord Scott suggested[199] that the deceased's family members might be able to claim "vindicatory damages". As McBride has commented, this "may mark the emergence of a

[196] Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 *MLR* 59, 80. Nolan further points out that Lord Scott of Foscote, who agreed with the awarding of a conventional sum, considered it to be compensatory; and regards the size of the award, £15,000 – a significant sum – as supporting the conclusion that the award was regarded as providing redress for substantive loss. (*Ibid.*, 80.)

[197] Tom R. Hickman, "Tort Law, Public Authorities and the Human Rights Act 1998" in Duncan Fairgrieve, Mads Andenas and John Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002), 37. The 2009 judgment of the Court of Appeal in *Yearworth & Ors v North Bristol NHS Trust* [2009] EWCA Civ 37, [2009] 3 WLR 118 further illustrates the willingness of the courts to expand the concept of "damage" in the context of the vindication of rights. For another example see *W v Essex County Council* [2000] 2 WLR 601.

[198] [2008] UKHL 25, [2008] 2 WLR 975. This judgment is discussed in more detail in Chapter 1 of the present thesis: see above, Chapter 1.

[199] *Ashley*, [22].

new category of damages".[200] As other examples of this emerging category, McBride refers to the proposal advanced by Lord Hoffmann of a "modest solatium" for the claimant in *Chester v Afshar*[201], discussed above; significantly, he also refers to the "conventional sum" of £15,000 approved in *Rees*, awards which McBride comments "may also be rationalised as being an example of this new form of damages".[202]

**"Wrongful Conception" in Ireland and an Alternative approach to Vindication**

In the course of his judgment in *Rees* Lord Millett characterised the divergence of approach taken between the House of Lords in *McFarlane v Tayside Health Board*[203] and the majority of the High Court of Australia in *Cattanach v Melchior*[204] as underlining the controversial character of the issues raised in wrongful conception cases and exemplifying the axiom "*quot judices tot sententiae*".[205] To the steady flow of pronouncements from courts across the common law world on this type of negligence case there can now be added a recent judgment of the High Court of Ireland. The judgment of the High Court (Kelly J) in *Byrne v Ryan*[206] represents the first occasion on which an Irish court has considered a "wrongful conception" claim, and certain features of the judgment prompt a number of observations that will attempt to illuminate this inquiry in a comparative context. The decision illustrates the many different rôles that can be played by vindication in judicial approaches to the tortious liability of public

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[200] Nicholas J. McBride, "Trespass to the Person: The Effect of Mistakes and Alternative Remedies on Liability" [2008] *CLJ* 461.
[201] [2004] UKHL 41, [2005] 1 AC 134, [34].
[202] McBride, above n 200, 463.
[203] [2000] 2 AC 59.
[204] [2003] HCA 38, (2003) 215 CLR 1.
[205] *Rees*, [103].
[206] [2007] IEHC 207.

authorities. For, in *Byrne*, a vindication theme was arguably utilised in such a manner as to deny, rather than award, recovery to the plaintiffs.

The claim in *Byrne* was for damages for negligence arising out of a failed sterilization which was sought to be achieved by a tubal ligation carried out in December, 1999. Subsequent to this procedure, the plaintiff bore two children. She succeeded in establishing two separate breaches of duty: the first by the consultant who negligently carried out the tubal ligation, the second in the subsequent failure of other hospital personnel to inform her properly that the sterilization had been unsuccessful and to offer appropriate treatment to rectify that position. As is typical in these cases, the plaintiff in *Byrne* sought damages under two headings. The first claim was for the physical consequences of the failure of the sterilization operation, including two pregnancies and births; the second, for the recoupment of the cost of bringing up the children until they ceased to be dependent on their parents. A separate claim was brought by the plaintiff's estranged husband for damages for the cost of maintaining the children.

A number of specific features of the case should be noted and indeed may be of particular interest to in viewing the case from a comparative perspective of jurisdictions in which the body of wrongful conception jurisprudence is more developed than it is in Ireland. In *Byrne*, for example, the defendant hospital authority conceded at trial that, in the event of a finding of negligence, Mrs. Byrne would be entitled to damages for the pain, suffering and inconvenience of pregnancy and childbirth and for having to have the sterilization procedure repeated. Special damages for extra medical expenses were also conceded.

These concessions were expressly said to have been made by reference to the views expressed by the majority of the Appellate Committee of the House of Lords in *McFarlane*. Significantly, Kelly J, having found that negligence had been made out, noted that, in the light of those concessions, the High Court was "not called upon" to determine whether, as a matter of principle, it was indeed open to the plaintiff to recover damages arising from her pregnancies and the births of the two children.

From this it seems clear that, as a matter of Irish law as it currently stands, even the recoverability in cases such as these of damages solely for the pain, distress and suffering associated with pregnancy and childbirth (and associated incidental damages) is open to question. In considering this point, Kelly J referred both to the position taken by Lord Gill at first instance in *McFarlane* (who, it will be recalled, had considered that pregnancy could not "be equiparated with" or "properly be described as" a personal injury[207]) and the opposing view subsequently taken both by the Second Division of the Inner House of the Court of Session and by the House of Lords – and expressly left open, as a matter of Irish law, the question of "whether Lord Gill's view is to be preferred to that of the other judges". This is significant in a comparative context, since it may mean that Irish negligence law, in contradistinction with the position adopted at almost every level of court in those other common law jurisdictions in which the question has arisen for determination, does not accept the proposition that the resulting pregnancy in a case of a negligent failed sterilization amounts to damage for the purposes of satisfying the "gist" requirement of the negligence action. The significance of this point for present purposes is that the ambivalence of approach here demonstrates how the characterisation

[207] (1997) SLT 211, 214.

of a constituent ingredient of the negligence action (damage) can turn upon separate rights-based analysis. The key difference between *Byrne* and the other authorities already considered is that the "vindication" concern, which had operated as a force for developing or expanding the particular ingredient of negligence in the other jurisdictions, here acts as a barrier to such "expansion" – since the "vindication" concerns appear primarily to be focused on the child.

Noteworthy in this regard is a passage in Donal Nolan's recent article already referred to above.[208] Nolan refers[209] to the "broad acceptance that the mother in a wrongful conception case is the victim of a legal wrong", observing that "almost all the judges who have looked at the issue have agreed that she is entitled to damages at least in respect of the pregnancy and birth".[210] He emphasises that, whilst the dissenting approach of Lord Millett in *McFarlane* is a notable exception, his Lordship's conclusion on this point was based on policy arguments and not on a denial of the existence of damage.[211] As a matter of Irish negligence law, by contrast, owing to the concessions made by the defendants in *Byrne*, the fundamental questions remain unresolved as to whether pregnancy constitutes "damage" and, moreover, whether this question can be disentangled from broader issues of policy. As Kelly J stressed:

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[208] Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 *MLR* 59.
[209] *Ibid.*, 71-72.
[210] Citing Christian von Bar, *The Common European Law of Torts vol. 1* (1998), para. 583.
[211] See the judgment of Lord Millett in *McFarlane* [2000] 2 AC 59 at 107-108 and 114 (where pregnancy is characterised as "the price of parenthood"), and Donal Nolan, "New Forms of Damage in Negligence" (2007) 70 *MLR* 59.

> The question of principle as to whether there is in law an entitlement to such damages will have to await another case where a concession such as the one made in this case is not forthcoming. It is sufficient to record that there is no unanimity of judicial opinion throughout the common law world on the topic.

As to the second claim of both Mrs Byrne and her estranged husband for the costs of the children's upbringing, the High Court characterised the determination of this novel question as one that entitled the court "to have regard to concepts of reasonableness and distributive justice." The High Court denied recovery for a number of reasons, most of which will by now be very familiar to those who have followed English and Commonwealth developments in this area in recent years. Indeed, Kelly J noted that in adopting the "no-recovery-for-upbringing-costs" approach the Irish High Court was "in harmony with the majority of decisions in the common law world." Kelly J was of the view that it would not be fair or reasonable to impose liability upon a doctor who negligently performs a sterilization procedure for the costs of raising a healthy child. Permitting recovery would potentially "open the door to a limitless range of claims related to every aspect of family life". Kelly J also took the view, as had Lord Steyn in *McFarlane*, that a refusal to award damages in circumstances such as these could be "equally justified by considerations of distributive justice". So too did the High Court expressly endorse the view of Lord Millett in the same case to the effect that the benefits of a healthy child outweighed any loss incurred in raising the child. Expressly approving both *McFarlane* and *Rees*, Kelly J observed that the approaches taken in those cases were

to be preferred to the position taken by the majority of the Australian High Court in *Cattanach*, although the latter case was not analysed in any detail in light of Kelly J's agreement with the statement of Lord Millett in *Rees* to the effect that *Cattanach*, whilst illustrating the complexity of these cases, had contributed no new insight.

Thus *Byrne* represents the disposal of a wrongful conception claim on the basis of, amongst others, the familiar "blessing argument" and on distributive justice arguments that featured prominently in *McFarlane*. Despite their familiarity, these two bases for denying recovery in wrongful conception cases bear out the conviction expressed recently that in this type of case "strong answers are available to all of the arguments in both directions".[212] That strong answers to the arguments which persuaded the High Court in *Byrne* are available is, of course, to be seen in the diametrically opposed approaches of, for example, other courts (such as the majority approach in *Cattanach*) and academic argument.[213]

In considering the array of competing arguments prompted by cases of this nature, however, one final observation should be made about the judgment of the High Court of Ireland in *Byrne*. It is of special interest in the present context in that it brings to the High Court's first foray into this area of negligence – and to the debate generally amongst both judges and academics in a comparative context – a factor that is uniquely Irish: the Constitution of 1937. Having concluded that recovery ought to be denied for the familiar

[212] Peter Cane, "The Doctor, the Stork and the Court: A Modern Morality Play" (2004) 120 *LQR* 23, 23.
[213] See, for one recent example, Elizabeth Adjin-Tettey, "Claims of Involuntary Parenthood: Why the Resistance?" in Jason W. Neyers, Erika Chamberlain, Stephen G.A. Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007), 85, where the author is particularly critical, at 94-97, of recourse to distributive justice arguments in order to support the denial of recovery in wrongful conception cases.

reasons set out above, Kelly J in a significant passage of his judgment observed that he was "also of opinion that the conclusion which I have arrived at blends more harmoniously with the constitutional order which obtains in this jurisdiction than would a decision to the contrary". In particular, Kelly J referred to "[t]he value which the Constitution places upon the family"[214], and "the dignity and protection which it affords to human life" as militating against the awarding of damages. One of the many interesting potential ramifications of this approach is that it lays out for resolution, here on the constitutional anvil, the proper balance to be struck between the aforementioned values and protections, on the one hand, and distinct and potentially conflicting interests in autonomy and self-determination, on the other – a question of balance which, perhaps more than any other, classically lends support to Lord Millett's maxim, "*quot judices tot sententiae*".

**Conclusions on Infusion of Damage Inquiry with Vindicatory Concerns**

The analysis above of the line of case law concerning the damage requirement demonstrates not only that this requirement has very clearly undergone significant development owing to vindicatory concerns, but also the tensions which arise as a result of that pressure. Pervading these cases is a considerable degree of uncertainty about the effects of the availability of recovery upon the corrective justice paradigm of tort law; particularly pronounced in this regard is the confusion that hovers over the rôle of the solatium in such cases. A separate tension emerges from the comparison undertaken between the English and the Irish case law in this section: indeed, the approach of the Irish High Court in *Byrne* illustrates how vindicatory pressures – here, the pressures of

[214] For discussion of the Constitutional provisions in relation to the Family see Chapter 4 herein.

unsolicited vindication flowing from Article 41 of the Constitution of Ireland – can lead to starkly divergent approaches being taken. The many tensions and inconsistencies in this area reveal the problematic nature of accommodating vindicatory objectives within the framework of the law of negligence; that having been said, they also establish the clear rôle that vindication now plays in the "gist" or "damage" inquiry, just as it plays an important rôle in the other distinct stages of the negligence analysis discussed above in this Chapter.

## G. CONCLUSIONS

In this Chapter, the increasing influence of vindicatory pressures upon the constituent ingredients of the tort of negligence has been analysed. As seen throughout the Chapter, one of the most significant features of the law of negligence is its capacity to grow and develop. Its history displays "a sturdy refusal to be confined by arbitrary forms and rules where justice indicates otherwise."[215] Because of this, it has been able to accommodate the increasingly vindicatory-oriented pressures that have been brought to bear on the tort.

It has recently been said that this area of public authority tort litigation involves a "closely fought battle in the courts between those who could be described as restrictive conservatives and pragmatic modernisers".[216] The tensions evident in the jurisprudence analysed in this Chapter vividly bear out this idea of a lack of unity as to how, if at all, vindicatory concerns should be accommodated within the structure of the tort of

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[215] *Per* McLachlin J (as she then was) in *Canadian National Railway Co. v Norsk Pacific Steamship Co. Ltd.* (1992) 91 DLR (4th) 289, 365.

[216] Basil Markesinis and Jörg Fedtke, "Damages for the Negligence of Statutory Bodies: The Empirical and Comparative Dimension to an Unending Debate" [2007] *PL* 299, 299.

negligence. Thus in each of the separate analyses conducted of the duty and breach, causation and damage stages of the negligence inquiry, the above analysis has revealed strong levels of judicial disagreement about the extent to which (if at all) the contemporary tort of negligence can be expanded so as to further give effect to the vindication of rights.

A key theme emerging from the analysis in this Chapter is the many different models of "vindication" at present being utilised by the courts in the fashioning (and re-fashioning) of the constituent ingredients of the tort of negligence. This is perhaps exemplified in the case law on wrongful conception analysed above, in a number of distinct ways. First, as we have seen, the approach to the "conventional sum" award in the English case law identifies at least two models of vindication analysis: first, the need to vindicate the plaintiff's autonomy right as *in and of itself* justifying the award of damages; secondly, that need being a basis for the *inclusion of the loss of autonomy within* the constituent ingredient of damage in negligence. This distinction indicates the varying degree of power that the vindication model can exert on judicial approaches to the constituent ingredients of the negligence action. A yet more divergent approach to vindication is evident in the approach of the Irish High Court in *Byrne v Ryan*, with the vindication argument there being adopted as a basis on which recovery could be denied.

It is submitted that much of the conceptual complexity created by the inconsistencies in the case law studied in the Chapter flows from the fact that frequently the vindicatory influences exerting such a powerful force over how negligence claims are approached,

are themselves frequently unacknowledged by the courts. As such, although these unstated pressures can potentially exert a serious influence over how the constituent ingredients are interpreted and developed, doctrinal clarity is impeded because of a failure clearly to identify the vindicatory concerns in question and the proper scope and extent of their reach.

One unintended, but highly significant, consequence of this largely unstated pressure to vindicate rights is that significant, substantial changes may be made – *are* being made, in some instances discussed above – to the constituent ingredients of the tort of negligence. As such, a largely unarticulated pressure may potentially be responsible for the recalibration of the key touchstones of the negligence inquiry, with all the implications this entails for negligence law generally. It is salutary to recall at this juncture, for example, the note of caution recently sounded by Professor Honoré in the context of infusing the causation inquiry with a rights-based analysis, when he observed:

> That we are responsible for the harm we cause by our wrongful conduct is not some ancient shibboleth that the law has now outgrown.[217]

The above statement provides a stark reminder of the potential for doctrinal uncertainty and confusion to be generated by the infusion of the key constituent ingredients of the negligence inquiry with a rights-based analysis. The same, it has been argued above, is

[217] Tony Honoré, "Medical Non-Disclosure, Causation and Risk: *Chappel v Hart*" (1999) 7 *Torts LJ* 1, 2-3 commenting on the approach of the High Court of Australia in *Chappel v Hart* [1998] HCA 55, 195 CLR 232, 156 ALR 517, 72 ALJR 1344 (a case allowing recovery on similar facts to those in *Chester v Afshar*, analysed above).

applicable in the context of the other discrete ingredients analysed in this Chapter. One important point to be made in this regard is that the tort of negligence traditionally has not been approached from a rights perspective. What the foregoing analysis has sought to demonstrate is the way in which negligence actions against public authorities are increasingly being permeated by a vindicatory analysis. In assessing just how significant that change has been, it is instructive to consider the manner in which the House of Lords disposed of the claim in *Hill*, analysed in detail above, when compared with its approach almost two decades later in *Brooks*. It is, further, illuminating to recall in this context the dictum of Browne-Wilkinson LJ (as he then was) in the Court of Appeal in *Sidaway*'s case, with which this Chapter began, when his Lordship observed:

> Liability in negligence depends on the duty of care to be observed by the defendant: it does not depend on the "rights" of the plaintiff, other than the plaintiff's right not to be negligently injured.[218]

In light of the developments analysed in this Chapter, it is submitted that this proposition can no longer be made with anything like the same force today, as it was just over 25 years ago.

Having analysed the influence of vindication concerns upon the tort of negligence, attention now turns in Chapter 3 to a tort that is not only truly public in nature, but which also has its historical roots in the protection of rights: misfeasance in public office. Due to these differences between the two causes of action, it is possible to consider the capacity

[218] [1984] 1 QB 493, 519-520.

of public authority tort litigation to vindicate rights from a distinctive perspective to that of negligence analysed in this Chapter. It is to that distinctive inquiry that focus now turns.

# Chapter 3

# MISFEASANCE IN PUBLIC OFFICE: VINDICATING RIGHTS THROUGH THE ONLY "PUBLIC" TORT

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment to it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[1]

### Chapter Overview

*This Chapter is concerned with the only truly public tort: misfeasance in public office, currently undergoing a significant degree of development and reappraisal throughout the common law world. The Chapter advances the argument that the contemporary development of the tort of misfeasance in public office has been characterised by a recalibration of the core constituent elements of the tort under the pressure of the need to allow this cause of action to act as a vehicle for the vindication of rights. The Chapter traces the historical development of misfeasance as a rights-based tort up to the present day, synthesising the tort's historical and modern objectives through a vindicatory lens, and considering the relationship between misfeasance and other causes of action against public authorities. Detailed comparative studies are undertaken of key decisions from the courts in Australia, Canada and the United Kingdom; the Chapter also focuses in detail on the recent leading case law in this jurisdiction.*

## A. INTRODUCTION TO THE RELEVANCE OF MISFEASANCE IN PUBLIC OFFICE FOR THE PRESENT INQUIRY

### Significance of the tort of misfeasance in vindicating rights

In any legal system rooted in the rule of law, executive or administrative power must be exercised in good faith. Where that power is wilfully manipulated so as to promote the furtherance of ulterior motives or to pursue improper purposes, an action may lie in the tort of misfeasance in public office. The tort of misfeasance – "that rare and unusual civil

[1] *Ashby v White* (1703) 2 Raym 938, I Smith's LC 13th ed 253, 99 ER 126, 136 *per* Holt CJ (dissenting).

wrong"[2] – is of special significance in an examination of the increasing influence of vindication on the liability in tort of public authorities, for a number of reasons. Of all the common law torts, it is the only tort which is truly of a public nature, and yet it was certainly the case until very recently that "its significance for the remaining corpus of the law concerning public bodies perhaps ha[d] been somewhat neglected".[3] Jurisprudence in recent years in a number of common law jurisdictions including Ireland has done much, however, to cast new light upon the contours of the tort – not long ago variously described as "a developing tort…the precise scope of which is not yet settled" [4], and as a tort of which the "precise contours remain uncertain"[5] – and upon its place within the broader schema of tort actions against public authorities.

In particular, it will be argued in this Chapter that, while it "goes without saying that the [tort of misfeasance] ha[s] a compensatory purpose"[6], the tort is of particular relevance to the inquiry in this thesis about the vindication-based nature of tort actions against public bodies. This is because, it will be argued, the significant body of emerging jurisprudence in common law jurisdictions concerning the constituent ingredients of the tort of misfeasance consistently involves the courts in scrutinising the ingredients of the tort, often culminating in the courts being driven to characterise those ingredients in such a

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[2] *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 IR 84, *per* Fennelly J, 148.
[3] Stephen Todd, "Liability in Tort of Public Bodies", Chapter 3 in Nicholas Mullany and Justice Allen Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, 1998) 36, 36.
[4] Andrew Le Sueur, (ed.), *De Smith, Woolf and Jowell's Judicial Review of Administrative Action* (5th ed, Sweet and Maxwell, London, 1995), 784. Interestingly, in the subsequent edition of this text, the authors observe of the tort of misfeasance that "its elements were crystallised only in recent years" (Andrew Le Sueur, Harry Woolf, Jeffrey Jowell, eds, and Catherine M. Donnelly, Assistant ed, *De Smith's Judicial Review* (6th ed, Sweet and Maxwell, London, 2007), 937).
[5] Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (3rd ed, Round Hall: Sweet & Maxwell, 1998), 813.
[6] *Clifford v The Chief Constable of the Hertfordshire Constabulary* [2008] EWHC 3154 (QB) (18 December 2008) *per* Cranston J, [1].

manner as to give fuller effect to the vindicatory function of tort law.[7] Because of the striking growth in these judicial analyses in very recent years, the tort of misfeasance is the second, after negligence, of the two distinct causes of action in tort under analysis in this thesis.

**Renaissance in Recent Years**

The renaissance enjoyed by the tort in common law jurisdictions has been attributed to "the upsurge in litigation against public authorities over the last two decades".[8] Since it is free of many of the restrictions[9] which operate to defeat, *inter alia*, negligence claims and claims of breach of statutory duty against public authorities, the tort of misfeasance in public office has the potential to provide an alternative avenue to plaintiffs aggrieved by unlawful acts[10] of public bodies and it is therefore unsurprising that it has developed so

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[7] In the context of India, for example, Justice R.K. Abichandani, Judge of the High Court of Gujarat, has expressly referred to the evolving tort of misfeasance as a tool for the protection of the rights of the underprivileged: see Abichandani, "Judicial Mechanisms for the Underprivileged to detect and undo injustice", unpublished paper available at http://gujarathighcourt.nic.in/Articles/judlmech.htm (last visited 20 August 2009).

[8] Andrew Grubb (ed.), *Butterworths Law of Tort* (Butterworths, London, 2002) 17.48.

[9] Such as, for example, the requirement that a plaintiff in a negligence action must establish the existence of a duty of care: for detailed discussion, see Chapter 2. In the context of public authority negligence cases in particular, however, the courts have imposed restrictions on the imposition of a duty of care on the grounds of public policy, now greatly amplified in this jurisdiction by the decision of the Supreme Court in *Glencar Explorations plc and Andaman Resources plc v Mayo County Council (No. 2)* [2002] 1 IR 84; so too must proximity be made out. Furthermore, special restrictions apply where the plaintiff suffers purely economic loss. None of these restrictions operates in the tort of misfeasance in public office. Chamberlain has observed that the development of the tort of misfeasance in public office may ultimately mean that it is a more attractive avenue of redress for plaintiffs instituting tort litigation against public authorities than negligence: Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 216.

[10] It would appear, however, that there is some limited scope for permitting claims for misfeasance in public office to be brought arising from an omission to act. In the course of his opinion in *Three Rivers District Council v Bank of England (No.3)* [2003] 2 AC 1, Lord Hutton concluded that "the tort can be constituted by an omission by a public officer as well as by acts on his part" (at 227). This proposition must not, however, be construed too widely. Since the tort is one of misfeasance and not one of non-feasance, liability for omissions must too be premised upon a finding of bad faith. Lord Millett in his opinion in *Three Rivers* set out (at 237) three restrictions governing the imposition of liability in misfeasance in public office for omissions:

markedly in recent years. A leading example of the consideration being afforded to the tort is the decision of the House of Lords in *Three Rivers District Council v Bank of England (No. 3)*.[11] In that case the Appellate Committee of the House of Lords, in articulating the mental element required for the tort to be made out, adumbrated a distinction between "targeted malice" and "knowing unlawfulness", and explored the meaning of recklessness as it applies to the latter mental element. The *Three Rivers* restatement has been met with approval in this jurisdiction in two recent judgments of the Supreme Court, which are analysed in detail below. In this Chapter, then, the ingredients of the tort are examined and attention given to these recent restatements of the tort of misfeasance so as to pursue an inquiry as to the potential for this cause of action in tort law to vindicate rights. It will be seen that, though the elements of the tort are not easy for plaintiffs to prove, the tort of misfeasance in public office potentially offers significant advantages to plaintiffs to the extent[12] that it is not subject to the constraints which have

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> In my opinion, a failure to act can amount to misfeasance in public office only where (i) the circumstances are such that the decision whether to act can only be exercised in one way so that there is effectively a duty to act; (ii) the official appreciates this but nevertheless makes a conscious decision not to act and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury will be the natural and probable consequence of his failure to act.

More recently in the case of *Ashley and others v Chief Constable of Sussex Police* [2005] EWHC 415, [2005] Po L R 48 Dobbs J set out in her judgment the very narrow ambit of liability for omissions in this context (at [50]):

> Failure to act can only amount to misfeasance when an officer is under a legal obligation to act. The tort is not directed at the officer who inadvertently or negligently fails adequately to discharge the obligations of his office. It has to be deliberate breach or disregard of his duty coupled with a reckless disregard for the interests of those who might be affected by his acts.

It should be noted that the subsequent appeals in *Ashley* to the Court of Appeal [2006] EWCA Civ 1085, [2007] 1 WLR 398 and the House of Lords [2008] UKHL 25, [2008] 1 AC 962 – the latter of which is treated in detail in Chapter 1 herein – did not affect this aspect of the High Court judgment.

[11] [2003] 2 AC 1. Hereafter "*Three Rivers*".

[12] It should be noted, however, that the underlying policy considerations which operate to limit the contours of the torts of negligence and breach of statutory duty are also present in the tort of misfeasance. This point is demonstrated in this jurisdiction by the judgments in the Supreme Court in *Beatty v The Rent Tribunal* [2005] IESC 66, [2006] 2 IR 191.

been placed upon, *inter alia*, the torts of negligence and breach of statutory duty when these claims are brought against public bodies. As with the approach taken to negligence in Chapter 2, in-depth case study analysis will seek to build on the analysis of the constituent ingredients of the tort under scrutiny in this Chapter.

## B. VINDICATORY RATIONALES OF MISFEASANCE IN PUBLIC OFFICE

### Prevention of deliberate disregard of official duty

The rationale behind the tort of misfeasance in public office can most readily be understood from a comparative sampling of leading judicial descriptions across the common law world. It was, for example, well captured in the judgment of Lord Steyn in *Three Rivers*, where his Lordship explained that in a legal system based on the rule of law, executive or administrative power "may be exercised only for the public good and not for ulterior and improper purposes".[13] In the New Zealand case of *Garrett v Attorney General*[14], Blanchard J explained[15] that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." The authorities, including all recent restatements in the common law world, make it plain that the tort is not directed at a public officer who fails adequately to discharge the obligations of his or her office as a consequence of budgetary constraints or other factors beyond his or her control. This proposition has recently been accepted in the Supreme Court of Canada on the grounds that

[13] [2003] 2 AC 1, 190.
[14] [1997] 2 NZLR 332.
[15] *Ibid.*, 350.

> [a] public officer who cannot adequately discharge his or her duties because of budgetary constraints has not deliberately disregarded his or her official duties. The tort is not directed at a public officer who is *unable* to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who *could* have discharged his or her public obligations, yet wilfully chose to do otherwise.[16]

**Vindicating autonomy interests now a "driving force" behind misfeasance**

In addition, recent scholarship identifies vindicatory concerns as being one of the "driving forces"[17] behind the tort to have come to the fore in recent years, one which grounds the tort in the principle of autonomy.[18] On this rationale, a heightened awareness of the importance of vindicating individual autonomy rights is necessarily bound up with an increased readiness to entertain challenges to authority. Although hitherto not referred to in the Irish jurisprudence, it is submitted that this autonomy rationale is likely only to gain further momentum in view of, *inter alia*, the incorporation of the European Convention on Human Rights into Irish law, considered in detail in Chapter 5, and the potential for a heightened concern that plaintiffs whose rights are infringed by those acting in *colore officii* not be left without a remedy. As Mason and Laurie observe:

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[16] *Per* Iacobucci J in *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263, [26] (emphasis in original). For comment on *Odhavji* see Nicholas Rafferty, "Breach of statutory duty and the tort of misfeasance in public office: the decision of the Supreme Court of Canada in *Odhavji Estate v Woodhouse*" (2004) 20 *PN* 74; Michael Bodner, "The *Odhavji* Decision: Old Ghosts and New Confusion in Canadian Courts" (2005) 42 *Alberta Law Rev* 1061; K. Horsman and G. Morley eds, *Government Liability: Law and Practice* (Aurora: Canada Law Book, 2007), Chapter 7.

[17] J.K. Mason and G.T. Laurie, "Misfeasance in Public Office: An Emerging Medical Law Tort?" (2003) 11 *Med Law Rev* 194, 197.

[18] For discussion of the effects of the pressures being exerted by the autonomy principle in vindicating rights through the negligence action, see the analysis of the causation hurdle in the tort of negligence contained in Chapter 2 herein. For valuable comment on the emerging role of autonomy in grounding a rationale for the tort of misfeasance in public office see J.K. Mason and G.T. Laurie, "Misfeasance in Public Office: An Emerging Medical Law Tort?" (2003) 11 *Med Law Rev* 194, 197-198.

> Fundamentally, we have the sudden and almost exponential growth in the acceptance of the principle of respect of personal autonomy which, although perhaps expressed most vividly in the context of medical law and ethics, is a phenomenon that extends across the whole social spectrum. Autonomy is seen, at its simplest, as the power, and the desire, to control one's own being, to be able to make decisions free from coercion and, so far as is possible, to seek self-fulfilment unhindered by unnecessary authority. Consequentially, the ability to question authority goes hand in hand with this...The practical significance of this analysis is that actions in misfeasance in public office are likely to be brought as authority is increasingly challenged...[19]

## C. A "RARE AND UNUSUAL CIVIL WRONG": THE DISTINCTIVE FEATURES OF MISFEASANCE THAT PURSUE VINDICATORY OBJECTIVES

It has been observed that the tort of misfeasance in public office is unusual among the canon of tort actions. In view of the "apparent uncertainty as to the precise ambit of the tort"[20], and in order to appreciate the contrast between the tort of misfeasance and other causes of action, it is necessary at this point to consider the salient distinguishing features of the tort. In so doing, an attempt can be made to identify those ingredients of this cause of action that illuminate the inquiry in this thesis about the balance struck by this cause of action between the vindicatory objective and other objectives of contemporary tort law.

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[19] Mason and Laurie, *loc cit*, 197-198.
[20] *Racz v Home Office* [1994] 2 AC 45, *per* Lord Jauncey of Tulichettle, 55.

**Ingredients of Misfeasance Highly Distinctive**

A preliminary point to be made is that the ingredients of the tort differ considerably from the framework that applies to other torts. As Brennan J noted in a leading Australian decision, the tort

> is not concerned with the imposition of duties of care. It is concerned with conduct which is properly to be characterised as an abuse of office and with the results of that conduct. Causation of damage is relevant; foreseeability of damage is not.[21]

Earlier in his judgment in the same case Brennan J had provided a memorable definition of the tort:

> Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete.[22]

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[21] *Northern Territory v Mengel* (1996) 185 CLR 307, 358.
[22] *Ibid.*, 357.

The immediate significance of these formulations for present purpose is contained in the emphasis that they place on the fact that in a misfeasance claim, the plaintiff is not required to clear the hurdles familiar to other causes of action in tort, such as the breach of a duty of care in negligence, for example. This very significant distinction between misfeasance and other torts provides a further basis for viewing the former as possessing a special vindicatory power, since the plaintiff is free from the shackles of the various constituent ingredients of liability that pervade the other causes of action. Indeed, one commentator has recently observed that the tort "has risen to prominence in part because many of the restrictive rules which apply to negligence claims against public bodies do not apply in misfeasance claims".[23]

**Requirement of bad faith**

In the first instance, its requirements of dishonesty and deliberateness (both of which may be actual or constructive) mark the tort out as occupying territory that is conceptually distinct from other causes of action in tort law, since it is primarily concerned with motive. The act or conduct complained of must have been committed either maliciously or knowing that the impugned act or conduct is invalid/unauthorised and knowing that it will probably injure the plaintiff. The significance of this for present purposes lies in the fact that, as was noted in Chapter 1, it is trite to observe that tort law generally is not overly concerned with motivations on the part of the defendant. The tort thus provides a notable exception to the "general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant and that, if conduct is lawful apart from motive, a

[23] Richard Moules, *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Thomson Reuters: Sweet & Maxwell, 2009), 236.

bad motive will not make him liable".[24] In this way, the motive-oriented conceptions of vindication explored in Chapter 1 are here clearly engaged, with the tort having a rôle in providing redress against an ill-willed defendant.

**The Exercise of Public Power**

Further, the tort of misfeasance in public office is to be distinguished on the ground that it is confined to acts of conduct arising out of the discharge of duties by a public officer – one "who is appointed to discharge a public duty, and receives compensation in whatever shape"[25] – amounting to a deliberate misuse of that power. The plaintiff in a misfeasance claim must establish that the act or omission causing the harm[26] constituted the exercise of a public power. The latitude enjoyed by plaintiffs within the parameters of the tort is, it is submitted, evidenced in relation to this public power requirement, which has been very broadly construed. The classic judicial definition of the exercise of such power is the 1828 description of Best CJ in *Henly v Mayor and Burgesses of Lyme*[27] to the effect that "every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer". Although Irish authority on the point is scant, it is significant that the notion of power for the purposes of bringing a claim for misfeasance in public office has been afforded a broad definition in other jurisdictions.[28] Lord Steyn in the course of his judgment in the

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[24] W.V.H. Rogers, *Winfield and Jolowicz on Tort* (17th ed, Sweet & Maxwell, London, 2006), 78.
[25] *Henley v Mayor and Burgesses of Lyme* (1828) 5 Bing 91, 107.
[26] The notion of "harm" is considered separately in this Chapter as an example of judicial analysis being given to the constituent ingredients of the tort that has significant implications for the potential of this cause of action to secure rights vindication.
[27] (1828) 5 Bing 91, 107-108.
[28] In the Canadian context, for example, see Michael Bodner, "The *Odhavji* Decision: Old Ghosts and New Confusion in Canadian Courts" (2005) 42 *Alberta Law Rev* 1061. *Cf* the approach of the English Court of Appeal in *Stockwell v Society of Lloyd's* [2007] EWCA Civ 930, [2008] 1 WLR 2225 where the Court of

landmark *Three Rivers* case in the House of Lords, for example, stated that the "holder of a public office...is a broad concept".[29] Powers which could be the subject of judicial review[30] can give rise to an action in misfeasance in public office; yet it appears that the definition of "public power" is significantly broader than that applied to judicial review proceedings, with courts accepting that the tort can be committed by public officers and bodies exercising private powers such as those derived from a contract, as long as those powers are exercised as part of the public office in question.[31]

One of the clearest example of the courts' willingness to accord a wide latitude to claimants – and hence to augment the vindicatory potential of the tort – in terms of the definition they will ascribe to this "public power" requirement is perhaps that taken recently by Ontario Court of Appeal in the Canadian case of *Freeman–Maloy v York*

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Appeal concluded that Lloyds was not a public officer for the purposes of the tort of misfeasance in public office.

[29] [2003] 2 AC 1, 230.

[30] Indeed, the test for unlawfulness in the context of the tort of misfeasance in public office has been said to be "the same as or similar to that used in judicial review": *per* Lord Hobhouse in *Three Rivers*, 230. Lord Hobhouse took care, however, to emphasise that the meaning of "unlawful" could be extended to embrace any act contrary to law such as, for example, a tort or breach of contract. See further Robert J. Sadler, "Intentional Abuse of Public Authority: A Tale of Three Rivers" (2001) *Australian Bar Rev* 151, 169.

[31] An example of such a broader approach is evidenced in the decision of the Court of Appeal in *Jones v Swansea City Council* [1989] 3 All ER 162. In *Jones*, the Court of Appeal accepted that the decision by the defendant local authority to refuse to allow the plaintiff to change the use of rented commercial premises was exercised on foot of a power deriving to it from the plaintiff's lease and, as such, was not a public power. Accordingly, the decision would not be amenable to judicial review proceedings. Nevertheless, the Court of Appeal was satisfied that the power could qualify as a "public power" for the purposes of a claim in misfeasance in public office. The rationale for this approach is to be found in the statement of Slade LJ that "it is not the juridical nature of the relevant power but the nature of the council's office which is the important consideration. It is the abuse of a public office which gives rise to the tort" (at 175). It should be noted that the decision of the Court of Appeal was ultimately reversed by the House of Lords on the ground that the trial judge was not entitled to find that malice had been established, but this did not affect the approach taken in the Court of Appeal to the question of whether the defendant was exercising a public power. A similarly expansive approach to the concept of public power was displayed by the House of Lords in the case of *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228. In *Calveley*, the decision of a senior police official to suspend a subordinate in an internal disciplinary matter was sufficiently public in nature for the purposes of misfeasance in public office; however, the writing of a report by an investigating officer, as part of the same disciplinary procedures, did not constitute the "relevant exercise of power" for the purposes of misfeasance in public office. See further the approach of the Court of Appeal in *Cornelius v Hackney London Borough Council* [2002] EWCA Civ 1973.

*University*.[32] There, on an appeal from the granting of the defendant's preliminary motion to have the plaintiff's claim struck out, the Ontario Court of Appeal was required to determine whether the president of York University occupied a public office for the purposes of the tort of misfeasance. In the plaintiff's statement of claim it was alleged that the president was maliciously abusing her statutory power, conferred by legislation. The question before the court was whether the tort of misfeasance must be restricted to public officers who were subject to some governmental control. The Court held that it was not relevant that the president was not subject to governmental control: she was still subject to the general regime of public law in that her decision to discipline students could be the subject of judicial review since it involved the exercise of a statutory power. Delivering the judgment of the Court, Sharpe JA pointed out that, although universities operate at a degree of distance from government in the interests of academic freedom, they do operate pursuant to and within a statutory framework and perform functions of a public nature for which they receive considerable public funding. The Court therefore concluded that the plaintiff's action should be allowed to proceed so that the merits of the case could be determined.

**Whether abuse of power necessary or sufficient ingredient: implications for vindication**

Further distinguishing features of the tort that affect its capacity to secure vindication may also be identified. The notion of abuse of a public office is said to be central to the

[32] (2006) 79 OR (3d) 401(sub nom *Freeman-Maloy v Marsden*) 267 DLR (4th) 37, 31 March 2006 (leave to appeal to Supreme Court of Canada was refused: see (2006) 267 DLR (4th) *ix*). For detailed background analysis and commentary see Greg M. Dickinson, "University President Can Be Sued as Public Office Holder: Is the Sky Falling in Academe?" (2006) 16 *Educ & L J* 113.

tort; this distinguishes the tort of misfeasance in public office from, for example, the tort of breach of statutory duty, but in turn raises the question of whether a finding of abuse of position is *sufficient* to make out the tort, or whether it is merely necessary but not always sufficient. In this context it is important to have regard to that passage in the speech of Lord Millett in *Three Rivers* where his Lordship contended that a deliberate excess of power was not necessarily to be equated with an abuse of power.[33] Characteristically, Lord Millett drew an analogy with the law of trusts, comparing an abuse of a public position with a deliberate breach of trust committed in good faith and in the honest belief that the breach is in the interests of the beneficiaries of the trust. The analogy thus suggests that there may be cases in which a deliberate act on the part of a public official in excess of powers and known to be likely to result in damage to particular individuals can be justified and will not give rise to liability for misfeasance in public office.

With respect, this approach, which was shared by a majority[34] of the English Court of Appeal in the *Three Rivers* case, can be criticised. It has been pointed out that the approach appears to conflict with that taken by the English Court of Appeal in an earlier case[35], discussed below. In the Court of Appeal in *Three Rivers*, Auld LJ, dissenting, had directly challenged the approach of the majority on this point, arguing that knowingly breaching a duty in the expectation that this will be in the best of interests of certain persons ought still to be classified as "dishonest".[36] Auld LJ opined that to develop a test on other lines would give rise to an unworkable and uncertain exercise. With respect, this

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[33] *Per* Lord Millett, 235.
[34] Hirst and Robert Walker LJJ, Auld LJ dissenting.
[35] *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716.
[36] [2003] 2 AC 1, 54.

approach seems compelling for a number of reasons. In the first instance, the stringent requirements laid down in the jurisprudence as to the criteria of malice and knowledge are such as to already demarcate strict boundaries in which the tort of misfeasance in public office exists so that it seems unnecessary to introduce such a restriction so as to ensure that the tort of misfeasance does not "overflow its banks".[37] There thus appears no convincing reason why the courts should have recourse to further attempts to narrow the scope of liability and, in so doing, to dilute the vindicatory potential of the tort.

Secondly, and more fundamentally from the standpoint of the herein thesis, it is salutary to recall that the essence of the tort of misfeasance in public office is that it operates so as to vindicate and uphold the rule of law and to ensure that powers are exercised appropriately. A breach of powers committed with the best intention in the world is no less a breach of power for being conducted without animus or even in a spirit of good will. Since it is the duty of public officials to comply with the legislation that confers – and indeed controls – their conduct, it is difficult to refute the argument that "[t]here should be no encouragement given to such persons to dream up arguments as to why it was a good idea to deliberately choose not to comply".[38] To introduce such encouragement into the tort of misfeasance in public office would be to emasculate the rights-centred focus of the tort; that such encouragement is absent confirms and promotes the vindicatory power of the tort.

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[37] *Garrett v Attorney General* [1997] 2 NZLR 332, 350.
[38] Keith Stanton, Paul Skidmore, Michael Harris and Jane Wright, *Statutory Torts* (London, Sweet and Maxwell, 2003), 134.

**Role of Proximity**

A further key distinguishing feature of the tort as it has developed concerns the question of proximity, the precise rôle of which has been much debated. At first instance in *Three Rivers*,[39] Clarke J (as he then was) had concluded that it was unnecessary for the claimant to show more than a right not to be injured by a deliberate abuse of power by a public officer. However, on appeal to the Court of Appeal, the majority[40] held that "the notion of proximity should have a significant part to play in the tort of misfeasance, as it undoubtedly has in the tort of negligence".[41] Hirst LJ explained:

> With the possible exception of [*Bourgoin* and *Henly v Lyme*], all the successful claims for misfeasance in public office... were concerned with a direct and proximate relationship between the plaintiff and the public officer responsible for the acts or omissions complained of. The directness and proximity of the relationship was mirrored in the directness and inevitability, or near-inevitability, of the loss suffered. In the old election cases there was often... a physical confrontation at the hustings, and when the returning officer... prevailed the plaintiff's loss of his vote was the immediate and inevitable consequence.[42]

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[39] [1996] 3 All ER 558.
[40] Hirst and Robert Walker LJJ; Auld LJ dissenting.
[41] [2003] 2 AC 1, 57.
[42] *Ibid.*, 55 *per* Hirst LJ.

In the House of Lords, their Lordships unanimously rejected this attempt to secure the "introduction of proximity as a controlling mechanism",[43] explaining that the "state of mind required to establish the tort" as well as "the special rule of remoteness" were sufficient to keep the tort within reasonable bounds.[44] This is clearly of considerable significance for the present analysis, since it involves consideration of what the appropriate constituent ingredients of the misfeasance cause of action in fact are. It is submitted that this express rejection of a requirement of proximity in the tort of misfeasance in public office is to be welcomed. Recourse is had to general control mechanisms in the law of tort in order to achieve policy objectives and to "limit liability to those areas where policy and principle support liability".[45]

Accordingly, the interests of doctrinal clarity appear to militate against the introduction into the discrete tort of misfeasance in public office – a tort which itself contains unique hurdles for plaintiffs to clear before liability will be imposed[46] – of the standard control

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[43] *Ibid.*, 193, *per* Lord Steyn.

[44] *Ibid.* On this point, Chamberlain has argued that Lord Steyn's observation to the effect that "any plaintiff must have sufficient interest to found a legal standing to sue" (*per* Lord Steyn, 193) is ambiguous, since it is unclear how such an interest is to be measured. (Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 226). She goes on to observe that standing is now being equated with material damage, drawing not only on *Three Rivers* but also on the later House of Lords judgment in *Watkins v The Home Office* [2006] UKHL 17, [2006] 2 AC 395, discussed in detail below in this Chapter.

[45] Tina Cockburn and Mark Thomas, "Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 2" (2001) 9 *Torts L J* 245, 248.

[46] A point that emerges strongly in the judgment of Simon Brown LJ (as he then was) in *Akenzua v Secretary of State for Home Department* [2002] EWCA Civ 1470, [2002] 1 All ER 35, in which, as regards proximity, Simon Brown LJ held (at [35]) that:

> As for the respondents' argument that it would be very strange if the claim could proceed on the basis of misfeasance in public office (which requires that the harm should be foreseen) in circumstances where it would fail in negligence (which only requires that the harm should be reasonably foreseeable), I see nothing strange in this at all: a claim in misfeasance postulates that the claimant can prove altogether more blameworthy conduct that in a negligence action; it is unsurprising that the law should decline to impose a further limiting requirement akin to proximity.

mechanisms which operate more generally across the law of tort. After *Three Rivers* – which, as we shall see presently, has now been endorsed in this jurisdiction by the Supreme Court in a number of recent judgments – it appears correct to state that all that a plaintiff must prove as regards proximity is that he or she was a member of an identifiable class of persons which would probably be injured by the knowing or reckless breach of duty.[47] It is submitted that this position is the preferred approach from the perspective of the vindicatory function of the tort.

**Exemplary Damages in Misfeasance Cases**

Yet another salient vindicatory feature of the tort of misfeasance in public office is that the courts have been ready to disapply the strictures of the *Rookes v Barnard*[48] principles, governing the permissibility of awarding exemplary damages in tort cases, to this tort.

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[47] It appears that the courts will construe this requirement in a manner that is generous to plaintiffs, at least in the context of personal injury claims. Consider, for example, the approach of the Court of Appeal in *Akenzua v Secretary of State for the Home Department* [2002] EWCA Civ 1470, [2003] 1 WLR 741, where the Court was obliged to consider whether the judgment of the House of Lords in *Three Rivers* excludes an action for misfeasance in public office where the predictable victim is neither an identifiable individual nor a member of an identifiable class of individuals. The case concerned an action brought by the estate of a murdered woman against the Home Office for misfeasance in having released the murderer from custody so as to permit him to continue to act as a police informer. The defendant contended that misfeasance, as a tort of intention, required the identification of a closely defined class. Simon Brown LJ rejected this argument as "an impossible one" which would be apt to lead to "absurd and unacceptable consequences" (at [32]); Sir Stephen Sedley, giving the leading judgment of the Court of Appeal, agreed with this reasoning and described the approach in *Three Rivers* to this aspect of the tort as being "an expansive rather than a restrictive element of the tort" (at [19]). Sedley LJ further held (at [20] – [21]) that:

> [I]t will be a sufficient pleading in a case where the consequence of misfeasance in public office is alleged to have been personal injury or death that the harm in contemplation was either to a known victim (case A) or to one or more victims who would be unknown unless or until the expected harm eventuated (case B). In both cases the distinction between individual and class is purely numerical…What matters is not the predictability of his killing the deceased, but the predictability of his killing someone…

References in the above passage to "case A" and "case B" are concerned with two paradigmatic examples provided by Sedley LJ at [16] of his judgment and which highlight the insupportability of the argument contended for on behalf of the defendants in *Akenzua*.

[48] [1964] AC 1129.

This significant feature of misfeasance in public office is the subject of discussion in a separate Chapter of the present work and will not be expanded upon here, but the point is an important one to note at this stage when identifying those many elements of the tort that confer upon it the status one of the most powerful causes of action against public authorities.[49]

**Controversy over Damage or "Gist" Requirement**

In terms of the distinctively vindicatory features of the tort of misfeasance, attention should be afforded to the decision of the House of Lords in *Watkins v The Home Office* in the context of whether there is a separate constituent ingredient in this tort of minimum actionable damage.[50] In light of the detailed treatment accorded to the damage or "gist" requirement in the treatment of Negligence in Chapter 2, *Watkins* is thus a case of special importance for the herein thesis and as such it has been selected for inclusion in the Case Study focus in the final section of this Chapter. Suffice it to note here that the House of Lords disagreed with the position adopted by the Court of Appeal, which had held that the tort of misfeasance in public office was actionable *per se* without any proof of damage. Accordingly, as the law in England and Wales now stands after the House of Lords' reversal of this ruling, a claimant must establish minimum actionable damage in

[49] The leading House of Lords decision in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 – where the House ruled that *Rookes* could have no application in cases of misfeasance in public office – has clarified the position in English law on this point. Although the question of exemplary damages did not fall to be considered by the Supreme Court when it delivered its restatement of the tort in 2005 in *Kennedy v The Law Society of Ireland* [2005] IESC 23, [2005] 3 IR 228, discussed at length below in this Chapter, the *ratio* of *Kuddus* would presumably apply *a fortiori* in Ireland, particularly in view of the readiness with which the Irish courts have traditionally recoiled from the strictures of *Rookes v Barnard*, often not applying them altogether. These cases are discussed in detail in Chapter 6 below. On the status of *Rookes* in Ireland, see the Law Reform Commission's *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000) [2000] IELRC 1, 2.004 *et seq*. See generally Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, Dublin, 2000) 1124-1135.

[50] [2006] UKHL 17, [2006] 2 AC 395, reversing the decision of the Court of Appeal reported at [2004] All ER 1158.

misfeasance in public office, just like in negligence, in order to recover. The author will argue later in this Chapter that this decision of the House of Lords is a regrettable development in the developing jurisprudence on misfeasance in public office from a vindicatory perspective, and one that ought not to be followed in this jurisdiction; a proposition which is supported both by having regard to contrary developments in other jurisdictions such as Canada, and to vindicatory principles discernible within the contours of this tort.

**Vicarious Liability in Misfeasance Cases**

Finally, another notable distinguishing feature of the tort of misfeasance in public office concerns the attitude adopted by the courts to the issue of vicarious liability. Vicarious liability is the subject of a separate Chapter in the present thesis[51] and thus only brief comment is accorded to it at this point. Suffice it to state that the courts have espoused a relatively liberal interpretation regarding the meaning of "authorised acts" in misfeasance in public office claims. A leading example is the decision of the House of Lords in *Racz v Home Office*[52] that vicarious liability could be established provided that the defendant's torts were not so unconnected from their authorised duties as to be independent of them. It would only be if the officers' acts were "tantamount to an unlawful frolic of their own"[53] that vicarious liability could not be established. For present purposes, it is sufficient to note the trend to adopt a generous approach to claims of vicarious liability in

[51] See below, Chapter 7.
[52] [1994] 2 AC 45, noted Stephen Simbelt, "Abuse of Power and Vicarious Liability" [1994] *CLJ* 430; Jo Bridgeman, "Writs from within the Prison Walls" (1994) 2 *Tort L R* 139.
[53] *Ibid.*, 53 *per* Lord Jauncey of Tulichettle, with whom the other judges agreed.

cases of misfeasance in public office, a trend which further enhances the vindicatory capacity of the tort.

It can be seen from the foregoing that the tort of misfeasance in public office is both sufficiently distinct from other tort claims and sufficiently accommodating to plaintiffs in its own right as to potentially not only provide an attractive alternative avenue to plaintiffs in public authority liability cases, but to secure and safeguard the vindication of rights within tort law. Having reflected on these key distinguishing features of this only truly public tort, it is now necessary to engage in a study of the origins of this cause of action in order to establish its concern with the vindication of rights.

## D. HISTORICAL DEVELOPMENT: MISFEASANCE AS A RIGHTS-BASED TORT

In this section, a study of the historical development of the tort of misfeasance aims to illustrate and reflect upon the rights-based nature of the tort. This sets the framework through which much more recent judicial approaches can be critically analysed through the prism of the vindicatory paradigm so as to further our inquiry about the capacity of the key constituent ingredients of tort law actions to accommodate vindication concerns.

The tort of misfeasance in public office enjoys a long, if not necessarily distinguished, pedigree,[54] and yet it has been observed that its development has been "partly incremental and partly marked by more abrupt (and often not fully explained) extensions".[55]

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[54] For helpful accounts of the historical development of the tort, see R.C. Evans, "Damages for Unlawful Action: The Remedy for Misfeasance in Public Office" (1982) 31 *ICLQ* 640; Richard Moules, *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Thomson Reuters:

It has been suggested[56] that the tort can be traced back to the 1300s, where, in an action on the case, court officials were found liable for deliberately mishandling a writ of summons, resulting in detriment being caused to the plaintiff.[57] So too do scholars[58] place emphasis on the fact that by the time of the publication of Judge Fritzherbert's *Natura Brevium* in 1534, there existed a significant number of forms of writs of trespass on the case, permitting claims closely resembling misfeasance, involving misconduct of sheriffs and bailiffs.

It is, however, from the late seventeenth century onwards that the development of the tort can most meaningfully be traced. Of particular note here is the case of *Turner v Sterling*[59] when the plaintiff alleged impropriety in an election for the post of bridgemaster in the City of London, and the majority of the judges in the Court of Common Bench held that where an officer does anything against the duty of his place and office, and damage thereby accrues to the plaintiff, an action lies. However, the *locus classicus* is popularly said to be the powerful dissenting judgment some thirty years later of Lord Holt CJ in the King's Bench Division (and ultimately supported by a majority in the House of Lords) in *Ashby v White*,[60] a case in which the claimant elector was wilfully denied his right to vote by a returning officer.

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Sweet & Maxwell, 2009), 189-191. An exhaustive analysis of the development of the tort is provided in the judgment of Hirst LJ in the Court of Appeal in *Three Rivers* [2003] 2 AC 1, 34-50.

[55] *Per* Auld LJ in his dissenting judgment in the Court of Appeal in *Three Rivers* [2003] 2 AC 1, 137.

[56] Harry Wruck QC, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 *UBC Law Rev* 69, 71.

[57] YB 38 W Ass F 224, p. 13.

[58] See Harry Wruck QC, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 *UBC Law Rev* 69, 71; R.C. Evans, "Damages for Unlawful Administrative Actions: The Remedy for Misfeasance in Public Office" (1982) 31 *ICLQ* 640, 640-641.

[59] (1671) 2 Vent 24.

[60] (1703) 2 Ld Rymd 938; I Smith's LC 13th ed 253.

**The *locus classicus*: *Ashby* and Rights Vindication**

This celebrated case formed part of a far broader election-rigging scandal and it became the centre of a jurisdictional dispute between the House of Commons (which had exclusive control over the franchise) and the House of Lords (which ultimately allowed Ashby's action in the common law courts).[61] The House of Lords ultimately accepted the proposition of Holt CJ that if "publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences."[62] In a sequence of cases towards the turn of the 18th century similar claims were rejected on the ground that there was no proof of malice.[63] Later election cases dating from the same period include *Cullen v Morris*[64], where Abbott CJ identified "improper motive"[65] on the part of the defendant as the kernel of the tort, and *Tozer v Child*[66], where Lord Campbell CJ stressed that it was

> incumbent on the plaintiff to make out that the acts of the defendants complained of were malicious; and that malice might be proved, not only

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[61] For detailed historical treatment of *Ashby* see Eveline Cruickshanks, "*Ashby v. White:* the case of the men of Aylesbury, 1701-4" in Clyve Jones (ed), *Party and Management in Parliament, 1660-1784* (Leicester UP, Leicester 1984) 87. For discussion on the subsequent overturning of the vote of the Lords by the Commons see P.A. Hamburger, "Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London v Wood*" (1994) 94 *Columbia Law Review* 2091, 2143-2145.

[62] (1703) 2 Ld Rymd 938, 955; I Smith's LC 13th ed 253, 276.

[63] Thus in *Harman v Tappenden* (1801) 1 East 555 Lawrence J held that no action in misfeasance in public office could be maintained "for an act arising merely from error of judgment.... [where] there was no evidence of any wilful and malicious intention to deprive the plaintiff of his profits, or that they had disfranchised him with that intent, which is necessary to maintain the action." (at 562-563). Two related cases are recorded as footnotes to *Harman* (1801) 1 East 555, 563: *Burgoyne v Moss* (1768) and *Drewe v Coulton* (1787).

[64] (1819) 2 Stark 577.

[65] *Ibid.*, 589.

[66] (1857) 7 E & B 377.

by evidence of personal hostility or spite, but by evidence of any other corrupt or improper motive.[67]

**The Concept of "Standing" as presented in established misfeasance case law**

One central feature of the case law as it developed prior to the modern renaissance of the tort of misfeasance was the apparent existence of a strong requirement of what has been referred to as "standing"[68], that is, that the plaintiff in a misfeasance claim had to show that he or she was one of a class of persons to whom a duty was owed by the relevant public officer not to act in a particular way. The parallel here with the duty concept in negligence is clear – and it is here again that the notion of duty as a stand-alone constituent ingredient in a cause of action in tort litigation against public authorities comes to the fore. It is submitted that because the contemporary renaissance of the tort of misfeasance has significantly relaxed this standing or "duty" requirement, so too is there evidence in the development of misfeasance, as in the development of negligence already studied[69], of a reformulation of the constituent ingredients of the tort. This, it will later be argued in this Chapter, is again the result of the tension in contemporary understandings of misfeasance in public office between a rights vindication approach and a traditional "elements-" or "ingredients-" based approach to causes of action against public authorities in tort law. For, until very recently, this standing or "duty" requirement was accepted as an integral part of a plaintiff's case in a misfeasance action. Making this point forcefully in her 2007 article on the subject, Chamberlain draws upon the modern

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[67] *Ibid.*, 379; this direction was upheld by the Court of Exchequer Chamber (Cresswell J and Martin, Bramwell and Watson BB), 382-383.

[68] Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 216.

[69] See above, Chapter 2.

Australian case of *Tampion v Anderson*[70] as authority for the traditional importance of the duty element being met in a misfeasance case. There the plaintiff sued a Board of Inquiry into the practice of Scientology, alleging that the Board, before which the plaintiff had appeared as a witness, had exceeded its terms of reference in conducting its inquiry and making its report. The plaintiff sought damages for loss of reputation both to him and to his religion. The Supreme Court of Victoria held that, while it was arguable that the Board owed a duty to the plaintiff when directly questioning him, it owed no duty to him in questioning other witnesses or making final recommendations.[71]

The Supreme Court of Victoria emphasised the standing requirement in the following passage:

> ...to be able to sustain an action upon this basis a plaintiff plainly must not only show damage from the abuse; he must also show that he was the member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of.[72]

Although contending that the standing requirement has been significantly weakened owing to the changing judicial conception of the malice requirement (analysed in detail below in this Chapter), Chamberlain argues separately that recent developments in English law laying emphasis on the material damage requirement and disregarding the

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[70] [1973] VR 715.
[71] *Ibid.*, 721.
[72] *Ibid.*, 720.

"duty" or "right" requirement have also contributed to what she terms the "erosion" of this standing requirement[73], a point that is returned to below in this Chapter when examining the question of material damage as an ingredient in this cause of action.

**Malice as a Constituent Ingredient**

One noteworthy feature of the older cases is that they convey two very significant points about the requirement of malice as traditionally understood. First, notwithstanding the fact that Holt CJ's dissenting judgment in *Ashby* did not explicitly address the requirement of malice as an ingredient in establishing the tort, it came to be thought that an acceptance of the malice requirement as an integral ingredient in establishing misfeasance was a very significant factor in the acceptance of Holt CJ's approach in the House of Lords.[74] Secondly, while the firmness of the requirement of malice seems incontrovertible, the cases from this period do appear to demonstrate that the courts which decided them posited an extremely broad definition of malice. Thus reference is made to the defendant acting "contrary to his own conviction"[75]; similarly broad and open-ended are the references by Abbott CJ in *Cullen v Morris*[76] to an "improper motive", and Lord Campbell CJ's allusion in *Tozer v Child*[77] to "any other corrupt or improper motive." The point is a significant one, considering that it is the construction of the meaning of "malice" which has been central to the restatements of the tort of misfeasance in public office in various jurisdictions in the last decade. For the purposes

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[73] Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 222.
[74] See, for example, *Drewe v Coulton* (1787) 1 East 563, 566-567. This point is noted by Chamberlain, who goes on to observe that *Ashby* was widely regarded as having been poorly reported (Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 221).
[75] *Drewe v Coulton*, above n 74.
[76] (1819) 2 Stark 577.
[77] (1857) 7 E & B 377.

of the present argument, it must be asked whether more recent approaches to the malice requirement in misfeasance comprise another example of the recalibration of this constituent ingredient of the misfeasance action as a response to vindicatory pressures.

From the middle of the eighteenth century onwards, the tort of misfeasance in public office enjoyed a somewhat enigmatic status. Despite its recognition in a number of cases in the 18th and 19th centuries, the English Court of Appeal in the early 1900s denied the very existence of the tort in *Davis v The Borough of Bromley*[78], with Vaughan Williams LJ going so far as to state that even if it were the case that a public officer in conducting his duties had been actuated by bitterness towards the plaintiff, no action in tort could lie and the appropriate remedy was an order of mandamus directing that the decision-making process in question be recommenced *de novo*. The desuetude that had become the fate of the tort of misfeasance would continue well into the latter part of the twentieth century, apparently because of the extreme difficulties facing plaintiffs in attempting to establish the requisite malice so as to make out the tort[79]; but also presumably because of the contemporaneous burgeoning of the tort of negligence.[80]

**"Resurrection" of the tort occurring in context of emphasis on rights vindication**

The resurrection of the tort began in earnest with two Commonwealth cases decided in 1959, *Farrington v Thomson*[81] and (the better-known) *Roncarelli v Duplessis*[82]. The latter

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[78] [1908] 1 KB 170.
[79] Harry Wruck QC, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 *UBC Law Rev* 69, 72, referring to *Smith v East Loelloe RDC* [1956] AC 736, [1956] 2 WLR 888 and *David v Abdul Cader* [1963] 1 WLR 834, [1963] 3 All ER 579.
[80] Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 221, fn. 34.
[81] [1959] VR 286.

case provides a striking example of a senior appellate court interpreting the ingredients of misfeasance through a rights-oriented lens. The plaintiff in *Roncarelli* had owned a restaurant in Montreal and had held a liquor licence, the licence being valid for one year and being subject to cancellation by the manager of the Quebec Liquor Commission. The plaintiff had run his restaurant for some thirty years and no complaints had been made against him; during 1945 and 1946 he had, however, furnished bail for some hundreds of persons accused of public order offences. The accused persons were members of the sect of Jehovah's Witnesses, charged with breaching various bylaws governing the distribution of their literature. The defendant was the Prime Minister and Attorney General of Quebec and put pressure on a supposedly independent licensing commission to cancel the plaintiff's liquor licence. The Superior Court of Quebec held that the defendant had ordered the manager in bad faith to cancel the plaintiff's licence because of his activities in connection with the sect and that he had no statutory justification for interfering with the licence; accordingly, damages were granted to the plaintiff for the losses caused to him thereby. This conclusion was affirmed by the Supreme Court of Canada, with Rand J explaining that the impugned conduct on the part of the Premier constituted:

> a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the [licensing] statute, a punishment which

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[82] [1959] SCR 121, (1959) 16 DLR (2d) 689. Speaking of *Roncarelli* in the course of his opinion in the leading case of *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263, Iacobucci J (at [19]) observed that "[a]lthough *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognised tort in Canada".

> inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province.[83]

Rand J held that "[m]alice in the proper sense is simply acting for a reason and a purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtual vocation outlawry".[84] Rand J went on to define the concept of "good faith" in this context as:

> carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent for an alien purpose...it does not mean arbitrarily and illegally attempting to divest a citizen of *an incident of his civil status*.[85]

The italicised portion of the above passage is highly significant, it is submitted, for the emphasis it places on the vindication of the civil rights of the plaintiff. That this emphasis occurs in the course of Rand J's attempting to explain the idea of "good faith", as the antithesis of the ingredient of bad faith in misfeasance, is equally relevant: here we have evidence of a central ingredient of the tort being defined by reference to vindicatory concerns.

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[83] [1959] SCR 121, 141.
[84] *Ibid.*
[85] *Ibid.*, at 143 (italics mine).

By 1981 the Privy Council could describe the tort of misfeasance as "well-established" in the course of its advice in the case of *Dunlop v Woollahra Municipal Council.*[86] The core question at issue in *Woollahra* was whether "independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other"[87]. The action had been brought by a developer who claimed that orders of a local authority placing restrictions on the development of his property and which were held to be *ultra vires* had caused him loss because, during the delay in establishing the invalidity of the orders, the bottom had fallen out of the property market and he was deprived of the opportunity of selling his property at its true value and incurred continuing overdraft charges and rates and taxes. In the course of its advice the Privy Council emphasised the distinction between unlawfulness and invalidity, with Lord Diplock going on to conclude that "in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort."[88]

From the 1980s onwards the tort enjoyed a veritable renaissance in English law. The most important decision from the 1980s is perhaps that of the English Court of Appeal in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food*[89], a decision which Lord

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[86] [1982] AC158, *per* Lord Diplock, 172.
[87] *Ibid.*, at 170. The approach in *Wollahra* was adopted and applied in Ireland by O'Hanlon J in *CW Shipping Co Ltd v Limerick Harbour Commissioners* [1989] ILRM 416. For discussion of development of the tort in an Irish context, see below in this Chapter.
[88] *Ibid.*
[89] [1986] QB 716.

Steyn in *Three Rivers* described as constituting a "first step towards [the] goal"[90] of identifying the ingredients of the tort of misfeasance in public office.

In *Bourgoin* the plaintiffs, who were French turkey producers, sought compensation for losses which they claimed were attributable to the revocation by the defendant ministry of a general import licence which had the effect of prohibiting the importation of turkeys from those countries which sought to control a particular disease by vaccination rather than by slaughter. This effectively prohibited French turkey producers from trading in the United Kingdom; in particular, French turkeys were precluded from the Christmas season. Significantly, on a preliminary inquiry as to whether the pleadings disclosed a cause of action, the ministry accepted that its purpose in revoking the general licence was to safeguard the interests of English turkey producers; moreover, it acknowledged that it was aware at the time of its action that such action comprised a failure to meet the UK's obligations under the Treaty of Rome; that revocation would cause damage to the plaintiffs in the course of their business; and that the protection of English turkey producers from foreign competition was not a purpose for which powers were conferred upon the minister by the enabling legislation.

However, the defendant contended that the tort of misfeasance had not been established since the ingredient of "targeted malice"[91] was lacking: though conceding that it had acted improperly, the defendant maintained that it had not done so in furtherance of any purpose of harming the plaintiffs. For present purposes, the most significant feature of the

[90] [2003] 2 AC 1, 190.
[91] [1986] QB 716 *per* Oliver LJ, 776.

Court of Appeal judgment in *Bourgoin* is the approach taken therein to this question of malice, for it has been claimed that this decision marks the starting point in the recent jurisprudence of the "relaxation" or "loosening" of the malice requirement in misfeasance claims.[92]

Rejecting the defendant's argument on the malice point, the Court of Appeal in *Bourgoin* recognised that the tort of misfeasance in public office could be established in two ways: the mental element could comprise either a subjective intention to harm or a knowing excess of powers. The position was summarised by Mann J at first instance in a passage which was subsequently accepted by all members of the Court of Appeal as providing a correct statement of the law:

> There is no sensible distinction to be drawn between the case where an officer performs an act which he has no power to perform with the object of injuring A...and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to A...In my judgment each case is actionable at the instance of A.[93]

Thus, the Court of Appeal in *Bourgoin* accepted that "untargeted malice" could suffice for the purposes of satisfying the malice requirement in misfeasance.

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[92] Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 223.
[93] [1986] QB 716, 740.

The approaches of the Privy Council in *Woollahra* and the English Court of Appeal in *Bourgoin* respectively were considered and endorsed by the Irish Supreme Court in subsequent cases, but in a manner that left open a certain amount of confusion as to whether the *Bourgoin* introduction of "untargeted malice" had been accepted in this jurisdiction. Such potential for confusion was, for example, evident in the leading Supreme Court public authority negligence case of *Pine Valley Developments v Minister for the Environment*[94], where Finlay CJ emphasised that the tort of misfeasance will only be established where it can be shown that the public officer was actuated by improper motives and was cognisant of the harm which would be caused to the plaintiff. These twin requirements of mala fides and knowledge were again emphasised by the Supreme Court in *McDonnell v Ireland*,[95] a decision which was later to be cited in the argument of counsel in the House of Lords in the *Three Rivers* case, analysed in the next section of this chapter.[96] In *McDonnell*, Keane J (as he then was) spoke of the tort being made out "where the act in question is performed either maliciously or with actual knowledge that it is committed without jurisdiction and with the known consequence that it would injure the plaintiff'.[97]

From these judgments, then, notwithstanding the endorsement of *Bourgoin* which they contained, it was unclear whether the malice requirement had been broadened as a matter of Irish law on misfeasance in public office. It has only been in much more recent developments in the last five years in this jurisdiction that this question can now be

[94] [1987] IR 23.
[95] [1998] 1 IR 134.
[96] [2003] 2 AC 1, 180.
[97] [1998] 1 IR 134, 156.

answered clearly in the affirmative. For clarity in the present analysis, however, it is expedient first to consider developments since 2000 in English law in this area, in order to assess the status of the ingredients of misfeasance in a contemporary setting and their capacity to vindicate rights.

## E. THE DEVELOPMENT OF THE TORT IN THE PAST DECADE: THE EMERGENCE OF TWO FORMS OF MISFEASANCE AND THE IMPLICATIONS OF THIS DEVELOPMENT ON RIGHTS VINDICATION

It is said that the tort of misfeasance in public office consists of two separate forms or "limbs". These two forms[98] are best understood by an analysis of the judgment of the House of Lords in *Three Rivers* and, specifically, the approach taken in that case towards the mental element of the tort. A consideration of the approach in Irish law towards the two forms will then be provided.

### *Three Rivers* – and a Watershed

The claim in *Three Rivers* was brought by depositors of the collapsed Bank of Credit and Commerce International ("BCCI"). As Bingham LJ (as he then was) commented in the published summary of the report of his Inquiry into the Supervision of the Bank of Credit and Commerce International: "the systematic frauds now thought to have been practiced in BCCI were on a scale which had never been known before ..."[99]. The depositors contended that the Bank of England had failed properly to supervise the activities of the

[98] "I put it this way rather than saying that there are two alternative "limbs" to the tort, because the notion of alternative limbs when used as part of a definition of something from which each limb springs seems to me to invite confusion" (*Three Rivers* [2003] 2 AC 1, *per* Auld LJ, 137).
[99] HC Paper (1992-93) No 198, p. 29, para 2.3.

BCCI and they instituted proceedings against it for the losses they incurred due to BCCI's collapse.[100]

The first hearing in the House of Lords dealt with, *inter alia*, the scope and ingredients of the tort of misfeasance in public office. The second hearing before the House dealt with the question of whether it was right to strike out the claimant's action on the basis that there was no reasonable prospect of the claim succeeding at trial.[101] It is with the first judgment that the analysis in this Chapter is concerned. The leading judgment was delivered by Lord Steyn, who identified two distinct limbs in the mental element of the tort. If the plaintiff is able to establish either limb, then the tort of misfeasance in public office will be satisfied. One limb was referred to by Lord Steyn as "targeted malice."[102] This necessarily involves *mala fides* in the exercise of public power for an improper motive. It requires proof that the public officer intended to injure the claimant and sought to achieve this purpose[103]. Lord Steyn referred to the other limb as "untargeted malice",[104] or as "knowing unlawfulness". This alternative limb is satisfied where a public officer acts in the knowledge that he or she is acting *ultra vires* and that his or her actions will probably injure the claimant. Under this alternative limb it is not, therefore,

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[100] Although it is the leading case on misfeasance in public office in the common law world, the claim in *Three Rivers* was ultimately to come to a rather ignominious denouement. Having spent over a decade in the courts, the claim was withdrawn in November 2005, with the claimants paying an unprecedented £75 million in costs to the Bank of England. See *Three Rivers District Council v Bank of England* [2006] EWHC 816 (Comm); and Adrian Zuckerman, "A colossal wreck - the BCCI-*Three Rivers* litigation" (2006) 25 *CJQ* 287.

[101] Lords Steyn, Hope and Hutton held that the claim ought not to be struck out; Lords Hobhouse and Millett dissented.

[102] [2003] 2 AC 1, 191.

[103] It appears, however, that it is sufficient for the claimant to establish that the specific intent to injure was a purpose of the defendant, though not necessarily the purpose or predominant purpose: see *Weir v The Secretary of State for Transport* [2005] EWHC 2192 where Lindsay J assumed, without deciding the point, that this was the position, so long as the purpose was "above the level of being de minimis" (*per* Lindsay J, [23]). A similar approach was adopted more recently in *Romantiek BVBA v Simms & Ors* [2008] EWHC 3099 (QB) (16 December 2008, Wyn Williams J).

[104] *Ibid.*

necessary to establish that the public officer *intended* to cause injury. This is arguably the most significant point of departure between the first and second limbs identified by Lord Steyn: in the case of the second, recklessness will suffice to establish liability for the tort. Crucially, this recklessness is judged by reference to the defendant's subjective mental state. The House of Lords rejected the argument advanced by the plaintiffs in *Three Rivers* to the effect that recklessness in the context of misfeasance in public office should be assessed objectively, Lord Steyn observing that the problem with the imposition of an objective test was that "it could not be squared with a meaningful requirement of bad faith in the exercise of public powers which is the *raison d'être* of the tort".[105] As has more recently been observed in the Court of Appeal, "[m]ere reckless indifference without the addition of subjective recklessness will not do".[106]

It is important to note that under both limbs, although different thresholds apply for establishing the requisite mental state of the defendant, a plaintiff bringing a claim for misfeasance in public office must demonstrate that harm accruing to him or her was a foreseen consequence of the abuse of office complained of. As the New Zealand Court of Appeal explained in one of the leading cases in that jurisdiction, *Garrett v Attorney General*[107]:

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[105] [2003] 2 AC 1, 193.
[106] *London Borough of Southwark v Dennett* [2007] EWCA Civ 1091, *per* May LJ, [21]. See further *Carter & Ors v The Chief Constable of the Cumbria Police* [2008] EWHC 1072 (QB) (15 May 2008, Tugendhat J).
[107] [1997] 2 NZLR 332, 351.

> The common law has long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. There must be something more. And in the case of misfeasance of public office that something more, it seems to us, must be related to the individual who is bringing the action. While the cases have made it clear that the malice need not be targeted there must, as we have said, be a conscious disregard for the interests of those who will be affected by the making of the particular decision.

Crucially, then, if either of the two limbs identified in *Three Rivers* is satisfied, the public officer will be regarded as acting in bad faith; there is no additional requirement on the plaintiff to establish that the defendant officer was in fact dishonest or corrupt. In this context, under *Three Rivers*, bad faith can be established by illustrating that the defendant intended to injure the plaintiff or was reckless as to whether he or she was acting in a lawful manner. The importance of this point from the point of view of plaintiffs can scarcely be overstated. As Andenas and Fairgrieve observe, "reckless administrators are a more common phenomenon than outright dishonest ones".[108] The decision of the Law Lords in *Three Rivers* so to characterise this ingredient of the tort is thus extremely significant from the perspective of plaintiffs and provides support for the proposition that in approaching the balancing inquiry required when setting the contours of the tort of

[108] Mads Andenas and Duncan Fairgrieve, "Misfeasance in Public Office, Governmental Liability, and European Influences" (2002) 51 *ICLQ* 757, 765.

misfeasance, the vindicatory function of the tort has in this respect outweighed concerns about the public authority status of the defendant.

It is evident from the judgments in *Three Rivers* that what is required is recklessness in the subjective sense, that is, awareness of risk by the defendant. But the notion of "subjective recklessness" is not without its difficulties. In the first place, and most fundamentally, it is important to note that Geoghegan J in his opinion in the Irish Supreme Court judgment in *Kennedy* noted that subjectivity and recklessness as concepts may be somewhat "uneasy bedfellows".[109] Leaving this point to one side momentarily, it should be noted that even if it is accepted that it is appropriate to assess recklessness subjectively, the question arises as to what exactly is *meant* by that subjective recklessness, a term which has rightly been described as "elastic".[110] In this regard, two different constructions of "subjective recklessness" must be distinguished. On one interpretation, it could imply advertence to the risk of the consequences occurring but accompanied by entire indifference to whether that happened or not. In such a situation, an individual is fully cognisant of a risk, but elects to run it anyway: arguably the clearest example of an individual acting in a manner that is subjectively reckless as to whether injury will be caused to others. Thus, on this interpretation, awareness is mingled with a lack of concern. Another interpretation is "more radical"[111], and would cover the circumstances where the defendant had not thought about the particular consequence of certain acts or omissions and thus showed an indifference to their occurrence. This latter,

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[109] *Kennedy v The Law Society of Ireland* [2005] IESC 23, [2005] 3 IR 228, 261.
[110] Mads Andenas and Duncan Fairgrieve, "Misfeasance in Public Office, Governmental Liability, and European Influences" (2002) 51 *ICLQ* 757, 763.
[111] *Ibid.*

"radical" interpretation has in the past been used in the sphere of criminal law, as for example in rape cases. It seems fair to characterise both mental states as morally distinguishable, yet there is a lack of clarity in the *Three Rivers* restatement as to the precise mental state which must be identified so as to arrive at a determination of subjective recklessness on the part of the defendant. Thus Lord Hope of Craighead in *Three Rivers* observed that "recklessness about the consequences, in the sense of not caring whether the consequences happen or not, will satisfy the test".[112] Is it to be understood from this formulation that the second mental state outlined above, where a defendant has not adverted to the consequences of his conduct but does not care about those potential consequences, cannot be caught by the subjective recklessness test posited in *Three Rivers*? The defendant in such a case can hardly be said to have been guilty of "not caring whether the consequences happen or not", a yardstick which, if strictly construed, could suggest that a public officer must be aware that he or she may be acting unlawfully and might injure the plaintiff, but does not care. However, a more expansive reading of this definition in Lord Hope's opinion would allow for the second scenario outlined above to be embraced by the standard of subjective recklessness (where the public officer has not turned his or her mind to the question of whether the conduct is unlawful).

In their probing analysis of *Three Rivers*, Andenas and Fairgrieve point to certain features of the second[113] judgment of Lord Hope of Craighead which could, they argue, be

[112] [2003] 2 AC 1, 252. See also the opinion of Lord Steyn in the same case at 293.
[113] See above, text to n 101.

construed as supporting this "radical" interpretation of recklessness.[114] Of particular note here is the express acknowledgement by Lord Hope[115] that he saw much force in the dissenting judgment of Auld LJ in the Court of Appeal in *Three Rivers*. Auld LJ in his judgment had emphasised the iniquity of allowing the defendants to rely upon "self-imposed ignorance" (the defendant's failure to fulfil its supervisory obligations) to defeat the plaintiff's claim of misfeasance in public office. The majority, Hirst and Robert Walker LJJ, conducted an extensive review of the English and Commonwealth cases, before concluding in broad agreement with Clarke J that:

> The two limbs [targeted malice and knowingly unlawfulness] should broadly be in harmony, as they will be if the test is actual foresight: a test of mere foreseeability, on the other hand, would be a somewhat jejune alternative, introducing considerations more appropriate to negligence.[116]

In spite of this possible ambiguity of approach to the recklessness test in the judgment of Lord Hope, it seems fair on the above reasoning to conclude that Lord Hope was not espousing a different test to recklessness from that of the other members of the Appellate Committee in *Three Rivers*.

This importation of recklessness as a sufficient mental element for establishing the tort of misfeasance in public office was undoubtedly the most significant aspect of the *Three*

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[114] Other commentators have too observed the ambiguity in the judgment of Lord Hope. See, *inter alia*, Tina Cockburn and Mark Thomas, "Personal Liability of Public Officers in the Tort of Misfeasance in Public Office: Part 2" (2001) 9 *Torts L J* 245, 256, fn. 62.
[115] [2003] 2 AC 1, 251.
[116] *Ibid.*, 54.

*Rivers* judgment. The decision of the House of Lords to embrace the recklessness standard has arguably injected a new (and potentially fecund from the point of view of plaintiffs) vitality into the tort.[117] However, it is important not to overstate the extent to which the traditional strictness of the approach to the tort was relaxed in *Three Rivers*. Indeed, the House of Lords – and this is a point which would be highlighted by Geoghegan J in the Supreme Court his judgment in *Kennedy* – did take pains to keep the boundaries of the tort under tolerably clear restraint. Perhaps the clearest example of this is the outright rejection in *Three Rivers* of the argument that reasonable foreseeability could suffice as a mental element.[118] Lord Steyn was in fact strenuously opposed to the introduction of a reasonable foreseeability requirement, since a reasonable foreseeability test would introduce an element of objectivity, effectively diluting the requirement of *mala fides*. On the concept of recklessness, his Lordship elaborated thus: "Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law."[119]

It has been claimed that the effect of the *Three Rivers* approach is to reduce the malice ingredient of misfeasance to "little more than" a foreseeability inquiry, with Chamberlain observing that "something more" than mere foreseeability should be required to have standing to sue in misfeasance.[120] With respect, not only does this criticism sit in stark opposition to the clear and unambiguous statements of members of the House of Lords

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[117] As Spencer observes, "the decision that recklessness suffices makes this area of the law much more favourable to claimants – and, of course, correspondingly less favourable to defendants" (J.R. Spencer, "Civil Liability for Abuse of the Criminal Process: Downstream of Three Rivers" [2003] *CLJ* 543, 545).
[118] Though see Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 225.
[119] *Ibid.*
[120] Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 225.

discussed above, but it also fails to propose any workable method of delineating a test for the mental element in misfeasance: Chamberlain's "something more" offers no guidance as to what the *Bourgoin/Three Rivers* "untargeted malice" criterion should be replaced with. For these reasons, then, the present author disagrees with the assertion that the adoption of the untargeted malice limb represents a distortion of the constituent ingredient of malice in the misfeasance paradigm.

**The influence of human rights concerns on the *Three Rivers* Restatement**

Another point to be made at this stage is the influence of human rights concerns on the restatement by the House of Lords in *Three Rivers* of the ingredients of the tort of misfeasance in public office. Consideration of this question enables further light to be cast upon the inquiry as to the rôle of vindication in the reshaping of the ingredients of the tort of misfeasance. In this regard, it is significant to note, as Fairgrieve notes[121], that in the second of the House of Lords' decisions in *Three Rivers*, repeated reference is made to the claimants' right to a fair trial. Lord Hope explicitly states his reluctance to strike out claims concerning complex issues of fact and law without having same examined at trial, referring expressly to Article 6 of the European Convention on Human Rights. As explored in Chapter 1, these concerns about enabling individuals to access the courts comprise a stand-alone embodiment of vindication; this is further discussed in detail in relation to the decision of the European Court of Human Rights in *Osman v United Kingdom*[122], and its influence on the domestic tort of negligence, in Chapter 5.

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[121] Duncan Fairgrieve, "Damages Claims Against Public Bodies: Misfeasance in Public Office" (31 January 2007), available at www.adminlaw.org.uk/docs/Duncan Fairgrieve (last visited 10 August 2009).
[122] [1998] ECHR 101, (1998) 29 EHRR 245.

## F. MISFEASANCE RESTATED IN IRISH LAW: IMPLICATIONS FOR ITS STATUS AS A VINDICATORY TORT

In two important recent judgments, the Irish Supreme Court has considered claims for misfeasance in public office and provided significant guidance on the scope of the tort within Irish law.[123] These developments in the jurisprudence of the Supreme Court thus enable an assessment to be undertaken of the nature of the emerging understanding of the rôle to be played by this tort in the vindication of rights in this jurisdiction.

### The Approach in *Kennedy*

In its judgment in *Kennedy v The Law Society of Ireland*[124], the Supreme Court expressly accepted and endorsed the approach taken by Lord Steyn in *Three Rivers*. In approaching the misfeasance issue at first instance, Kearns J in the High Court articulated the following definition of the tort:

> Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt

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[123] In the decade prior to *Kennedy*, the Supreme Court had considered the tort in at least two judgments: *McDonnell v Ireland* [1998] 1 IR 134, discussed in Chapter 4 herein, and in *Callinan v VHI* (Unreported, Supreme Court, 28 July 1994). Of these two cases, only *McDonnell* was referred to by the Court in *Kennedy*; this may reflect the difficulties presented by *Callinan* in terms of identifying the Court's position in that case vis-à-vis the tort of misfeasance in public office. In his judgment in *Callinan*, Blayney J (with whom O'Flaherty and Denham JJ concurred) noted that the judge below (Keane J) "had not categorised the tort constituted by the VHI's exercising of their powers unreasonably and unfairly, but if he had done so, the probability is that he would have classified it as misfeasance in public office" (at page 29 of the unreported judgment). Blayney J noted that the tort had been considered in depth in the then recent English Court of Appeal decision in *Bourgoin S.A. and others v Minister for Agriculture, Fisheries and Food* [1986] 1 QB 716 (discussed above), but did not proceed expressly to endorse the approach taken in *Bourgoin* as representing the law in this jurisdiction. For analysis of relevant High Court authorities during this period, see Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (3rd ed, Round Hall: Sweet & Maxwell, 1998), 815-816.

[124] [2005] IESC 23, [2005] 3 IR 228.

> to perform the functions of his office whereby loss is caused to a claimant.[125]

Kearns J in attempting to define the tort went on to quote the well-known judgment of Keane J (as he then was) in *McDonnell v Ireland*,[126] referred to above, in which Keane J had emphasised that the tort is only committed where the act in question is performed maliciously or with actual knowledge that it is committed without jurisdiction and in the knowledge that it would injure the plaintiff. Kearns J proceeded to afford consideration to the then very recent decision of the House of Lords in *Three Rivers*, quoting at length from the judgment of Lord Steyn. It is clear from the approach of Kearns J that he was satisfied that the approach of the House of Lords in *Three Rivers* should be adopted in this jurisdiction. This is illustrated in, *inter alia*, the following passage from the judgment of Kearns J:

> ...[A] subjective test is to be applied to the state of mind of the officer concerned. Examples of targeted malice in the instant case would include the deliberate and malicious abuse of statutory power by the Law Society to benefit other solicitors at the expense of the applicant, or an investigation launched out of personal animus or ill-will towards the applicant. Having regard to the express acceptance by the applicant's counsel during the original hearing that malice in this sense was not being

[125] *Ibid.*, 184.
[126] [1998] 1 IR 134, 156.

> alleged, the court is in effect concerned only with the second limb of the *Three Rivers* test.[127]

Kearns J accepted[128] as setting out the applicable law on the scope of the tort of misfeasance in public office the following passage from Grubb's *Butterworths Law of Tort*, a passage worth setting out *in extenso*:

> Misfeasance in public office is not, however, constituted solely by an act of a public officer which he knows is unlawful and which results in loss. In addition, it must be shown that the public officer knew that his unlawful conduct would probably cause harm to the claimant or to a class of which the claimant was a member. On the one hand, therefore, mere foreseeability of such harm is not sufficient; on the other hand, the claimant is not required to prove that his loss was an inevitable consequence of the defendant's act or omission. Finally, reckless indifference as to the illegality and its probable consequences is sufficient to ground the tort in its second form. This recklessness must, however, be subjective. It follows that the officer must be shown not to have had an honest belief that he was acting lawfully, meaning that he either knew his act was unlawful or that he wilfully disregarded the risk that it was. Similarly, he will only be liable if he knew that his conduct would probably cause the claimant loss or he wilfully disregarded the risk that it

[127] [2004] 1 ILRM 178, 186.
[128] *Ibid.*, 188.

> would do so. The court's insistence on subjective recklessness reflects the fact that the essence of the tort is bad faith or dishonest abuse of a public power. There is also a policy argument for rejection of an objective approach, namely that liability for inadvertent unlawfulness is best left to the law of negligence, with its attendant restrictions on recovery of economic loss and the like. Adoption of an objective standard would enable claimants to circumvent the restrictions on negligence liability, and could deter a common sense approach by officials to the use of enforcement of rules and regulations. [129]

In *Kennedy*, Kearns J rejected the claim for damages for misfeasance in public office. In the subsequent appeal to the Supreme Court, the Court devoted its attention to the misfeasance claim and has in its judgment provided a modern restatement of this tort in Irish law.

The Supreme Court unanimously disallowed the appeal. The judgment of the Supreme Court was delivered by Geoghegan J, who correctly recognised that the tort "has been variously though not inconsistently defined".[130] Counsel for the appellant in *Kennedy* sought to argue that the concept of "malice" embraced not merely malice in the sense of an intention at the material time to injure the appellant, but that the concept also captured the notion of *mala fides*. Noting that the tort of misfeasance in public office was one

[129] Andrew Grubb (ed), *Butterworths Law of Tort*, (Butterworths, London, 2002) 17.54.
[130] [2005] 3 IR 228, 260.

"which has not received much judicial consideration in this jurisdiction",[131] Geoghegan J stressed the importance of considering other common law authorities, "without in any way surrendering the right to disagree", and ultimately had extensive recourse to the decision of the House of Lords in *Three Rivers*.[132] In an intriguing passage in his judgment, Geoghegan J appeared to express some unease with the marriage of subjectivity to recklessness:

> Subjectivity and recklessness are not easy bedfellows though analogous concepts do apply in the criminal law in relation to say manslaughter and certain types of non-fatal injury offences. It is, I think, necessary to consider whether this court should adopt this extension into the concept of "reckless indifference". [133]

This passage prompts a number of observations. It is instructive to reflect on the particular difficulties that Geoghegan J might have been contemplating when he opined that subjectivity and recklessness were not easy bedfellows.[134] Although Geoghegan J did not elaborate in his judgment on this unease, it is submitted that the sentiments expressed on this point are of crucial importance and underline the potential difficulties of application which may beset the incorporation into Irish law, post-*Kennedy*, of the *Three*

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[131] *Ibid.*, 263.
[132] [2003] 2 AC 1.
[133] [2005] 3 IR 228, 261.
[134] It is interesting to note in this regard the Supreme Court decision in *Weir-Rodgers v SF Trust* [2005] 1 IR 47, [2005] 1 ILRM 471, another case of significance for public authority defendants in which the judgment of a unanimous Supreme Court was authored by Geoghegan J. In *Weir-Rodgers*, Geoghegan J declined to express a view as to whether "reckless disregard" under the Occupiers' Liability Act 1995, s. 4 embodied an objective or subjective test, preferring to leave that determination for a case when it properly arose. For comment see Ray Ryan and Des Ryan, "Trespassers (and Recreational Users) Beware: The Supreme Court decision in *Weir-Rodgers v S.F. Trust*" (2005) 23 *ILT* 59.

*Rivers* formulation. It is submitted that this unease can be attributed to the very real potential for ambiguity that can surround the term "subjective" in the sphere of recklessness, as discussed above in the context of *Three Rivers*. It seems likely that concerns about the potential for such an indulgent approach to recklessness were at the root of Geoghegan J's comment in *Kennedy* that recklessness and subjectivity were "not easy bedfellows".[135] It is interesting to observe that in referring to the *Three Rivers* case, Geoghegan J does not cite the speech of Lord Hope, so it seems to be tolerably certain that the "subjective" approach to recklessness envisaged by Geoghegan J is the first, and not the "radical", approach set out above. Nonetheless, in light of the potential ambivalence of a standard of subjective recklessness, it may well be that this formulation will require more detailed treatment at Superior Court level in this jurisdiction in the not too distant future.

Having considered the reasoning of Lord Steyn in *Three Rivers*, set out above, Geoghegan J ultimately determined that the approach of the House of Lords in that case should be accepted in this jurisdiction. Applying the *Three Rivers* test to the facts of *Kennedy*, Geoghegan J regarded the case against the respondents as "extremely thin".[136] Geoghegan J regarded the findings of fact made by Kearns J as "fatal"[137] to the claim and he dismissed the appeal.

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[135] [2005] 3 IR 228, 261.
[136] *Ibid.*, 263.
[137] *Ibid.*, 269.

**Relationship between Negligence and Misfeasance and Implications for Vindicatory Power of the Latter Tort**

One particularly noteworthy aspect of the approach in *Kennedy* is the position adopted by the Supreme Court with regard to the plaintiff's parallel claims for misfeasance in public office, on the one hand, and negligence, on the other. As noted earlier in this Chapter, it is common for litigants to plead, where appropriate, both the tort of misfeasance in public office and the tort of negligence either in the alternative or together. A consideration of the Supreme Court cases prior to *Kennedy* concerning misfeasance in public office in this jurisdiction bears this out.[138] Moreover, it will be recalled that, in *Three Rivers*, one feature of English law which arguably provided a strong impetus for the House of Lords to provide its restatement of the tort of misfeasance was the existence of judicial decisions to the effect that no action in negligence could be taken against the controllers of BCCI.[139] With regard to the finding by Kearns J at first instance that the Law Society had been under no actionable duty of care towards the plaintiff when conducting its two-pronged investigation, Geoghegan J expressed the view that the learned trial judge ought "not to have embarked on a detailed treatment of the claims in negligence and breach of statutory duty". Geoghegan J continued:

> As a general proposition it can safely be said that apart from exceptional circumstances, a body such as the Law Society carrying out a public function in pursuance of a public duty is not liable to a private individual

[138] *Pine Valley Developments v Minister for the Environment* [1987] IR 23; *McDonnell v Ireland* [1998] 1 IR 134; *Glencar Explorations plc and Andaman Resources plc v Mayo County Council (No. 2)* [2002] 1 IR 84.

[139] These included the Privy Council decisions in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821.

> in tort unless the authority in so acting has committed the tort of misfeasance in public office. ...To allow damages to be awarded for breach of an alleged duty of care owed to the individual on the basis of what a reasonable person might have done (and therefore an objective test) would be to undermine the clear limits attached to the tort of misfeasance in public office.

With respect, this passage in the judgment in *Kennedy* gives cause for concern. It is not apparent why the (already relatively stringent) limitations attaching to the tort of misfeasance in public office should be regarded as justifying the preclusion of an alternative recourse to the tort negligence. It is true that the availability of the tort of misfeasance in public office has been said to be one of the reasons which may guide a court in assessing whether a duty of care in negligence arises against a public authority guilty of an act of maladministration[140]; so too is it settled law in this jurisdiction that an ultra vires act will not *per se* give rise to liability in tort[141]; but it is submitted that neither of these propositions warrants such a blanket refusal to contemplate the possibility of a duty of care arising in negligence when the defendant concerned is a public body against whom a parallel claim in misfeasance in public office may also be advanced.

What general propositions, then, can be formulated regarding the relationship between misfeasance in public office and the tort of negligence? Concededly, there exist reasons of both principle and policy for restricting the ambit of the duty of care when a public

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[140] *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, 1238.
[141] *Pine Valley Developments v Minister for Environment* [1987] IR 23.

authority is exercising its functions, so that plaintiffs in a negligence action against a public authority will face obstacles with which plaintiffs in other negligence actions are not confronted. But to automatically adopt the position that a claim for misfeasance in public office must cancel out any parallel claim in negligence, appears a step too far in this regard.

Further, and with respect, this concern about encroachment into other heads of civil liability[142] appears apt to conflate the objective standard in negligence with the subjective standard in misfeasance in public office as going towards the same question, when the two inquiries are separate and distinct: in negligence, the inquiry is as to whether the defendant authority behaved as no reasonable authority would behave, with the court making no finding as to *mala fides*, whereas in misfeasance in public office the subjective inquiry assesses whether the defendant consciously behaved in a manner which it knew or could foresee would injure the plaintiff. It has been observed that "[t]he concern of the law of negligence is not with the making or the *validity* of the decision but with the action or inaction of the public officer *following* a decision."[143] Thus, concerns about the need to prevent an incursion onto misfeasance in public office by considering a parallel claim in negligence, do not seem convincing. Further, and in the alternative, an objective test is only one feature of the assessment of a negligence claim; other discrete constituents of a court's inquiry, among them the existence of a duty in the first place, proximity, and

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[142] *Cf* the approach of the House of Lords in *Spring v Guardian Assurance plc* [1995] 2 AC 296 (where the apparent overlap with defamation was not a sufficient reason for declining to impose duty on an employer to take care in writing a reference for an ex-employee).

[143] Stephen Todd, "Liability in Tort of Public Bodies", Chapter 3 in N. J. Mullany and A. M. Linden, eds, *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, 1998) 36, 43 (emphasis in original).

separate considerations of whether it would be fair, just and reasonable, having regard to public policy under the three-step *Glencar* test, can all be regarded as imposing their own obstacles for plaintiffs. Commenting on the above passage in the *Kennedy* judgment, Professor Binchy has confessed to entertaining "severe doubts as to the thrust of this argument"[144], noting that no court in any other common law jurisdiction has ever propounded the proposition that "respect for the tort of misfeasance in public office requires the shrivelling of any potential liability in negligence that would otherwise arise".[145]

**The Approach to Misfeasance in *Beatty v The Rent Tribunal***

The tort of misfeasance in public office was again considered by the Supreme Court in its later judgment in *Beatty v The Rent Tribunal*[146], the negligence aspect of which is discussed in Chapter 2 herein. On the misfeasance claim, both Fennelly and Geoghegan JJ agreed in *Beatty* that, despite the recognition in *Three Rivers* that subjective recklessness short of deliberate misconduct may be sufficient, it nevertheless remains the case that "bad faith in the exercise of public powers … is the essence of the tort."[147] The

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[144] William Binchy, "Occupiers' Liability, Local Authorities and the Changes for Practice Introduced by the Civil Liability and Courts Act 2004", Paper delivered at *Recent Developments in Tort Litigation* Conference held at Trinity College Dublin, 18 June 2005, at 12.

[145] *Ibid.* On the inter-relationship between negligence and misfeasance, and on judicial approaches to the simultaneous pleading of both causes of action, it is instructive to note the 2008 decision of the Supreme Court of Canada in *Holland v Saskatchewan* 2008 SCC 42, in particular para [12] of the judgment of McLachlin CJC. The Court accepted that a negligence claim could lie for the failure of government "to implement an adjudicative decree". With respect, it is submitted that misfeasance in public office would be a more appropriate cause of action than negligence in this regard. *Cf* the approach of the Supreme Court of Canada in *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263, particularly at [26]; for more recent inferior court Canadian authority illustrating the distinction between negligence and misfeasance, and how difficult it is to plead the latter, see *Genesis Land Development Corp. v Alberta* 2009 ABQB 221 (Court of Queen's Bench of Alberta, 09 April 2009). My thanks to my colleague Dr. Eoin O'Dell for directing my attention to this latter judgment.

[146] [2005] IESC 66, [2006] 2 IR 191.

[147] [2006] 2 IR 191, 200.

Court was satisfied that no evidence of such bad faith had been displayed in the instant case, and thus the claim for misfeasance could not succeed. Geoghegan J, in an important *obiter* passage in *Beatty*, added that he would have "considerable doubt"[148] as to whether an action would lie against a judge or a statutory tribunal for misfeasance in public office in circumstances where the court or tribunal was acting within jurisdiction. In the course of his judgment in the same case, Fennelly J explained that "recklessness" for the purposes of the *Three Rivers* test could not be satisfied by a demonstration, attempted by counsel in *Beatty*, of evidence of extreme negligence. Such an approach "misunderstands the nature of the recklessness to which, for example, Lord Steyn referred in *Three Rivers*"[149]. Fennelly J continued thus:

> The sort of recklessness that will qualify as equating to malice is something much more than gross carelessness. It requires clear advertence to the risk (for example that there is no power to do the act) and not caring about the consequences. Objective recklessness is not enough.

In light of the foregoing analysis of the recent re-statements of the tort of misfeasance both in this jurisdiction and in the United Kingdom, a number of points become clear. In terms of the capacity of the tort to vindicate plaintiffs' rights, the developments taken to the malice requirement are undoubtedly an important supporting step in this regard. As against this, given the confirmation of the need for a subjective test for malice, and the emphasis in cases such as *Beatty*, above, that inadvertence must be of a considerably

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[148] *Ibid.*
[149] *Per* Fennelly J in *Beatty* [2006] 2 IR 191, 204.

more serious nature than that capable of sustaining a negligence action, it is submitted that our analysis thus far reveals a tort whose ingredients will not be easily established by plaintiffs. Because of this, the focus in the next section on the damage requirement is particularly important: it will be argued that, in order meaningfully to serve as an effective tort in the vindication of rights, the damage requirement in misfeasance ought to be far less onerous than that in, for example, the tort of negligence. As shall be seen presently, however, views diverge on this issue as recently manifested across the common law world. It is to this divergence that the attention of this Chapter now turns.

## G. PROOF OF DAMAGE AS A CONSTITUENT REQUIREMENT IN THE TORT OF MISFEASANCE: THE SIGNIFICANCE OF THE APPROACH IN *WATKINS* FOR THE VINDICATION OF RIGHTS THROUGH MISFEASANCE

### Case Study in Misfeasance in Public Office: *Watkins v Home Office* and subsequent case law

Jeffrey Shane Watkins was a convicted prisoner serving a sentence of life imprisonment, first in Wakefield and then in Frankland Prison. He was engaged in a variety of legal proceedings and various other proceedings were contemplated. Naturally, these proceedings generated, and necessitated, correspondence with legal advisers, courts and other bodies. Mr Watkins complained that staff at both prisons had repeatedly opened and read his mail when they were not entitled to do so.[150] He instituted proceedings against the Home Office and fourteen named prison officers claiming damages for misfeasance in public office.

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[150] Thus contravening r 37A of the Prison Rules 1964SI 1964/388, later superseded by the Prison Rules 1999, SI 1999/728, r 39 of which is in identical terms to r 37A.

At first instance, HHJ Ibbotson found that a number of officers had wrongly interfered with Mr Watkins's correspondence, but that most of them had done so without bad faith, held, as seen above in this Chapter, by the House of Lords in *Three Rivers* to be an essential ingredient of the tort of misfeasance in public office. The claim against those officers accordingly failed. In the case of three officers, however, the judge was satisfied that bad faith had been established. The conduct of those three officers was particularly egregious. One officer had removed and inspected the contents of letters marked as legal correspondence, dismissing Mr Watkins's protest with contempt, and wholly indifferent as to whether he was acting lawfully or not. A second officer had sought to deny (in bad faith) that the relevant prison rules applied to incoming mail. A third officer opened two letters addressed to Mr Watkins marked "Durham County Court" in order to ascertain whether the correspondence related to an action which Mr Watkins had brought against him in that court. Thus, in these three instances the necessary bad faith ingredient was established. Nevertheless, the trial judge dismissed Mr Watkins's claims against these officers also, on the ground that misfeasance was not a tort actionable *per se*, and Mr Watkins had failed to prove any financial loss or physical or mental injury of any kind. (Indeed, the judge formed the impression that in many ways Mr Watkins appeared to "thrive on these conflicts").

Mr Watkins appealed against the dismissal of his claims against the three officers, contending that the tort of misfeasance in public office was a tort actionable *per se*, and thus capable of being established without proof of damage, or alternatively capable of

being established by proof of anxiety and distress falling short of physical or mental injury.

**Judgment of the Court of Appeal: Vindication Expressly Endorsed**

The Court of Appeal unanimously allowed the claimant's appeal.[151] Very significantly for present purposes, it did so on the basis of a vindicatory analysis of the rôle of this tort. The Court of Appeal held that, notwithstanding that the tort of misfeasance was historically an action on the case – and the general rule was that actions on the case required proof of damage – misfeasance in public office was a tort which could, in certain circumstances, be actionable *per se*. The basis for the Court of Appeal's approach was its conclusion that, if there is a right which may be identified as a 'constitutional right', then there may be a cause of action in misfeasance in public office for infringement of that right without proof of damage.

Laws LJ in his judgment noted that the tort of misfeasance could be committed in two ways. First, it could be committed where a public officer deliberately or recklessly inflicted economic losses on the claimant. The second type of misfeasance case arose where a public officer had interfered with a constitutional right in relation to which no proof of loss was necessary. Laws LJ said:

> Where a claimant is exposed to economic or material injury by virtue of the public officer's wrongful and malicious act, it will be inherent in his

[151] *Watkins* v *Secretary of State for the Home Department and others* [2004] EWCA Civ 966, [2005] QB 883.

> claim that he has suffered quantifiable loss; and he does not have to prove that in causing such loss the public officer has violated some free-standing right which the claimant enjoys. That is one class of case. But the claimant may be adversely affected in a different sense. The wrongful act may have interfered with a right of a kind which the law protects without proof of any loss. In that case, the public officer's interference with the right will complete the tort and no actual damage needs to be shown. This is the second class of case. Its paradigm is the instance where the public officer's unlawful conduct has interfered with a constitutional right.[152]

In taking this approach, the Court of Appeal surveyed those cases in which a claim for damages for breach of a right had succeeded even though the claimant could not establish damage. Many of these cases involved interferences with suffrage rights. The most celebrated of these cases, and one that received detailed treatment in both the Court of Appeal and the House of Lords in *Watkins*, is *Ashby* v *White*[153], already referred to in this Chapter. Lord Holt CJ held that the claimant was entitled to succeed in his action against the defendant constable even if the latter's act of denying the claimant the right to vote did not "cost [him] ... one farthing",[154] on the grounds that "a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right".[155]

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[152] *Watkins* v *Secretary of State for the Home Department and others* [2004] EWCA Civ 966, [2005] QB 883. *Ibid.*, [67].
[153] (1703) 2 Ld Rymd 938, (1703) Smith's LC (13th ed) 253.
[154] *Ibid.*, 955; 274.
[155] *Ibid.*

Brooke LJ in *Watkins* regarded *Ashby* as authority for the proposition that "if there was a right which could be identified as a constitutional right, then there might be a cause of action for an infringement of that right without proof of special damage, provided that there was something more than the mere infringement".[156] In *Watkins*, the all-important "something more" was said to exist through satisfying the other constituent elements of the tort of misfeasance as clarified in *Three Rivers*.

The Court of Appeal in *R* v *Secretary of State for the Home Department, ex p Leech*[157] had recognised that a prisoner's right to have unimpeded access to the courts and to legal advice comprised a constitutional right. Accordingly, the narrow exception to the special damage requirement was of application in *Watkins*: breach of this constitutional right gave rise to an entitlement to (at the very least) nominal damages, even though damage to the claimant could not be shown. The Court of Appeal thus allowed Mr Watkins's appeal, awarded him £5 by way of special damages and remitted the case to the judge to determine whether an award of exemplary damages should be made and, if so, in what amount. The Court of Appeal gave leave to appeal to the House of Lords, which allowed the appeal.

[156] *Ibid.*, [48].
[157] [1993] 4 All ER 539.

**Approach of the House of Lords to the Damage Ingredient in Misfeasance**

The House of Lords unanimously overturned the Court of Appeal and held that the tort of misfeasance in public office was not actionable *per se* but required proof of damage to complete the cause of action.[158] Several reasons were given for this conclusion.

One was that their Lordships doubted whether *Ashby* was authority for the proposition that misfeasance in public office could be actionable *per se*. Lord Bingham, for example, emphasised that the vindicatory focus of Holt CJ's famous dissent in *Ashby* had been upon the importance of vindicating the plaintiff's property right; this interpretation of *Ashby* was in evidence in, for example, Professor Fleming's categorisation of the case as a claim of quasi-trespass for direct infringement of an incorporeal property right bearing all the attributes of trespass.[159] Lord Bingham suggested that this analogy with trespass – the paradigm example of a tort actionable *per se* – might explain the lack of emphasis upon damage in *Ashby*. Lord Rodger equally stressed that the focus in *Ashby* had been upon the vindication of a property right.[160] Both Lords Bingham and Rodger cited a number of subsequent cases in which damage had been regarded as a constituent element of the tort of misfeasance in public office,[161] concluding that the authorities comprised "a

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[158] [2006] UKHL 17, [2006] 2 AC 395.

[159] J.G. Fleming, *The Law of Torts*, 9th ed (Sydney: LBC, 1998), 22, footnote 9, referring also to *Nicholls v Ely Beet Sugar Factory Ltd (No 2)* [1936] Ch 343 and *Constantine* v *Imperial Hotels Ltd* [1944] KB 693. The latter two cases had also been invoked by the Court of Appeal in *Watkins* as authority for recognition of actionability *per se* in cases of interference with a constitutional right: see the judgment of Brooke LJ in *Watkins*, [31] – [32] and [41] – [43].

[160] *Watkins*, [55].

[161] *Ibid.*, at [15] – [20] of the judgment of Lord Bingham and [43] – [46] of the judgment of Lord Rodger. *Three Rivers* was included in this audit of case law which their Lordships in *Watkins* regarded as authority for the proposition that damage must be shown.

remarkably consistent body of law on the point now at issue". Lord Bingham continued as follows:[162]

> [S]pecial damage has either been expressly recognised as an essential ingredient, or it has been assumed. None of these cases... lends support to the proposition that the tort of misfeasance in public office is actionable per se... I would be very reluctant to disturb a rule which has been understood to represent the law for over 300 years, and which has been adopted elsewhere, unless there were compelling grounds for doing so.

As to the reliance upon *Ashby* and the paramountcy of the right protected in that case, the right to vote, Lord Bingham observed that there was

> an element of anachronism in relying on *Ashby* v *White* (itself a highly politicised decision) to support a proposition it would scarcely (despite the right to vote being "a thing of the highest importance, and so great a privilege") have been thought to support at the time.[163]

The course adopted by the Court of Appeal in *Watkins* was thus entirely novel. Although novelty was not "a fatal objection", the Law Lords identified a number of policy factors as to why the tort of misfeasance should not be actionable *per se* in a case where a

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[162] *Watkins*, [23].
[163] *Ibid.*, [25].

"constitutional right" has been breached.[164] Among the most significant of these policy arguments is the concern evinced in *Watkins* about the potential overlap between the development of tort law and the provision of remedies under the Human Rights Act 1998[165] – the so-called "live issue at the moment"[166] – to which detailed consideration is given in Chapter 5 herein.

Recourse to this argument in the context of the issue in *Watkins* is, with respect, problematic. Even accepting that the wide survey of judicial decisions conducted in *Watkins* led inexorably to the conclusion that special damage was a "settled" requirement of the tort in existing jurisprudence, this ought not necessarily to have precluded an affirmation of the approach taken by the Court of Appeal. As demonstrated above in this Chapter, the very recent and far-reaching judicial development of the tort of misfeasance in public office has included the insistence upon important controlling devices for restricting numbers of potential claims and claimants: the insistence (evident in both the recent English and Irish jurisprudence) that the bar of recklessness be not easily crossed in this context is perhaps the clearest example of this. Such controlling devices would act as a counterweight to the potential for the number of possible claimants being increased if the tort were recognised as actionable *per se* when a constitutional right was breached through targeted malice.[167] A further argument in favour of the approach taken by the Court of Appeal on the issue of infringement of constitutional rights is that the

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[164] A list of these factors is provided in the judgment of Lord Bingham in *Watkins*, [26].
[165] The Act could not avail Mr Watkins as the events of which he complained pre-dated its coming into force.
[166] Alastair Mullis and Donal Nolan [2005] *All ER Annual Review* 472, 474 (commenting on the House of Lords judgment in *JD* v *East Berkshire Area Health Authority* [2005] UKHL 23, [2005] 2 AC 373).
[167] A narrower argument framed in these terms in *Watkins* was not met with success either: see in particular the judgment of Lord Walker in *Watkins*, [73].

safeguarding of such rights is, or ought to be, a priority of some centrality in the evolution of the distinct tort of misfeasance in public office.

Further, in response to the reluctance expressed in *Watkins* towards the question of exemplary damages[168] – a feature of the case that is explored more fully in Chapter 6 – it is also important to emphasise out here a point that will be canvassed further in the next Chapter: there exists superior court jurisprudence in this jurisdiction, the focus of which is on vindication, to the effect that exemplary damages can be awarded even where no compensatory award is being made.[169]

A separate point to be considered in the context of the restrictive approach taken by the House of Lords in *Watkins* to the damage requirement considers the practical difficulties that plaintiffs will face in establishing loss – difficulties which may present both in terms of remoteness and causation issues. Once again, we are brought squarely back to the central question in the present thesis: the capacity of the constituent ingredients in a cause of action to be shaped or re-shaped so as to give effect to vindicatory functions of tort law in the context of litigation against public authorities. In this regard, it is submitted that the approach to the damage requirement in *Watkins* is one that fails adequately to consider the potential of those constituent ingredients to operate in such a manner as to undermine the values being pursued by the particular tort: here, the prevention and deterrence of the abuse of public power as well as the vindication of plaintiffs' rights vis-à-vis those

[168] See for example the judgment of Lord Hope: *Watkins*, [32]. The minority approach of Lord Walker on this point seems compelling: *Watkins,* [75].

[169] *Kearney v Minister for Justice* [1986] IR 116, *per* Costello J, 122, expressing the view that it was "quite clearly" open to the court to award exemplary damages as a matter of common law (albeit that in that particular case Costello J did not deem such an award appropriate).

exercising public power over them. Thus, speaking in the context of recent developments of the tort of misfeasance in Canada, Wruck has observed that it is extremely difficult for plaintiffs to meet this evidential burden in relation to issues of damage and causation when pleading misfeasance. He gives the following example of a "classic case" of such difficulty:

> In the classic case, where a public official has wrongly refused a licence, it does not necessarily follow that the plaintiff should be awarded damages for the income lost from the lack of a licence. Although there may have been wrongful conduct in the refusal of the licence, the licence application may have failed on the merits in any event.[170]

**Status of *Watkins* as persuasive authority in comparative context: The Irish Position**

For the reasons developed above, it is submitted that the House of Lords ruling in *Watkins* ought not to be followed in this jurisdiction. In terms of shaping the constituent ingredients of the cause of action in tort having regard to the vindicatory function of the tort of misfeasance in public office, it is submitted that the approach in *Watkins* does not strike the correct balance between plaintiffs and public authority defendants, particularly given the nature of the tort and its peculiarly heightened concern with the relationship between individuals and public authorities.

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[170] Harry Wruck QC, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 *UBC Law Rev* 69, 84. Wruck goes on to note that despite the problems associated with this issue, courts have awarded damages under such circumstances, citing *Keeping v Canada (A.G.)* 2003 NLCA 21, 226 DLR (4th) 285. Notwithstanding this qualification, it is submitted that Wruck's example serves to illustrate the difficulties facing plaintiffs in the context of establishing the *results* of an abuse of power and that this reality should, with respect, have been accorded greater consideration in *Watkins* when determining whether the tort could be actionable *per se*.

At this juncture, it must be noted that the judgment of the Irish High Court in *An Blascaod Mór Teoranta v Commissioner of Public Works (No. 4)*[171] may be relied upon to lend support to the proposition that the Irish courts require that damage be established for the purposes of misfeasance. This is because in the course of his judgment Budd J cited with apparent approval the following passage from the judgment of Brennan J in the High Court of Australia in the case of *Northern Territory v Mengel*[172]:

> Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete.

Given the closing reference in this statement to injury as "completing" the cause of action, it is arguable that Budd J regarded this as a necessary constituent ingredient in the tort of misfeasance.

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[171] [2000] 3 IR 565.
[172] (1995) 185 CLR 307, 357.

As against this construction, however, two competing points can be made. First, in a passage immediately preceding the quotation from *Mengel*, Budd J provided his own definition of the tort of misfeasance in the following terms:

> I accept that the tort of misfeasance in public office is committed when an act is performed by a public official, either maliciously or with actual knowledge that it is committed without jurisdiction and is so done with the known consequence that it would injure the plaintiff.[173]

Conspicuously absent from the above definition, of course, is any reference to the "known consequence" actually materialising. The ingredients of the tort expressly recognised by Budd J in this formulation are the performance of an act by a public official; malice or actual knowledge of a lack of justification; performed with the known consequence that it would (with the use of tense perhaps being important) cause injury to the plaintiff. When it is recalled, however, that in *An Blascaod Mór* it was held that the misfeasance claim could not proceed on other grounds[174], the statements of Budd J may be regarded as *obiter* comments. Given, moreover, that the case pre-dated the comprehensive restatement by the Supreme Court in *Kennedy*, the prospect of *An Blascaod Mór* alone militating against a rejection in Ireland of the *Watkins* line of reasoning seems slim.

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[173] [2000] 3 IR 565, 570.
[174] Namely that it was statute-barred and the defendant enjoyed immunity around parliamentary statements.

**Status of *Watkins* as persuasive authority in comparative context: The Canadian Position**

It is significant to note that the status of *Watkins* as a persuasive authority in other jurisdictions has already prompted the sounding of caution in a comparative perspective. Thus, in the context of Canadian law on the tort of misfeasance, it has been observed that the reasoning of the Law Lords in *Watkins* on the constitutional rights point is "difficult to understand"[175] in light of the incorporation into English law of the European Convention on Human Rights via the Human Rights Act 1998. As noted above[176], the House of Lords in *Watkins* in fact drew upon the existence in domestic law of the Human Rights Act as a basis for *not* developing the tort of misfeasance in a more pro-claimant manner. Commenting on these arguments in a comparative context, Wruck observes that "none of these arguments resonate very strongly in Canada"[177], noting that the damage requirement will require analysis by the Supreme Court of Canada. In exactly the same way, it is submitted that the approach in *Watkins* is not one that resonates in an Irish context in light of our distinctive understanding of fundamental rights enshrined in the Constitution. Detailed treatment of this point is contained in Chapter 4.

Although the issue remains to be judicially considered in this jurisdiction, it is submitted that the Irish courts should endorse the philosophy expressed by the Court of Appeal in *Watkins* and reject the contrary approach taken by the House of Lords. Such an approach

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[175] Harry Wruck QC, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 *UBC Law Rev* 69, 85.
[176] See above, text preceding n 166.
[177] Harry Wruck QC, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 *UBC Law Rev* 69, 86.

would confer upon a plaintiff who has established that misfeasance has involved a breach of a constitutional right the ability to recover.

**Weakness of *Watkins* decision evident in subsequent case law attempting to vindicate rights**

In addition to the arguments of principle advanced above as to why the House of Lords approach to the constituent requirement of actionable damage ought not be followed in this jurisdiction, it is further submitted that evidence from more recent case law in England indicates the problematic nature of the approach taken in *Watkins* and the difficulty of applying the decision in practice. With respect, this stands as another compelling reason as to why the decision should not be followed in this jurisdiction. The evidence of such problems to be seen in the emerging case law will now be analysed.

**The Impact of *Watkins***

The House of Lords ruling in *Watkins* that damage must be shown in a misfeasance claim had clear and direct implications for the later case of *Karagozlu v Commissioner of Police of the Metropolis*[178], where the key question at issue was whether loss of liberty constituted such damage.[179] As Sir Anthony Clarke MR observed of *Watkins* in delivering the judgment of the Court of Appeal in *Karagozlu*: "This decision radically altered the nature of the appeal which the appellant could advance in the instant case".[180]

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[178] [2006] EWCA Civ 1691, [2007] 1 WLR 1881.
[179] The implications of *Watkins* were also to be seen in, for example, the judgment of the Court of Appeal in *Ashley v The Chief Constable of Sussex Police* [2006] EWCA Civ 1085, [2007] 1 WLR 398. The subsequent judgment of the House of Lords on appeal ([2008] UKHL 25, [2008] 1 AC 962) did not affect this aspect of the Court of Appeal judgment.
[180] *Karagozlu*, [22].

Mr Karagozlu was serving sentences of imprisonment for conspiring to defraud Her Majesty's Customs & Excise and for perverting the course of justice. The sentences had been ordered to run consecutively, with the total period of imprisonment being nine and a half years. Pending his trial, he was held on remand in Category A conditions. By the time of his conviction he had been on remand for about three years. After conviction he was given the status of a Category B prisoner. He was subsequently given the status of a Category D prisoner and consequently moved to HMP Ford in Sussex, an open prison. Less than a month after this move, Mr Karagozlu was segregated in HMP Ford under r 45 of the Prison Rules 1999. The reason given on the relevant removal form was that information received by the authorities suggested that it was unsafe for Mr Karagozlu to remain in his then conditions. It was subsequently revealed to Mr Karagozlu that the reason for his being removed was entirely different: there was a concern that he had access to fire arms.

Mr Karagozlu issued proceedings seeking damages, including aggravated and exemplary damages, against the Commissioner of the Police and the Home Office. The proceedings maintained claims in misfeasance against the Commissioner and in both misfeasance and negligence against the Home Office. District Judge Avent in the Central London County Court struck out his claim against both defendants. The claimant did not appeal against the order striking out his claim against the Home Office. His application for permission to appeal against the order striking out his claim against the Commissioner was refused by the district judge. Permission was subsequently granted by HHJ Collins and the appeal was transferred to the Court of Appeal. What is significant for present purposes is the treatment afforded by the Court of Appeal to the issue of principle of whether a person

who loses his freedom as a result of misfeasance has suffered damage sufficient to entitle him to recover general damages from the defendant. In addressing this question, the Court of Appeal has, it is submitted, illustrated a reluctance to apply the full rigours of the House of Lords approach in *Watkins*.

**Judgment of the Court of Appeal in *Karagozlu***

In determining this issue of principle in Mr Karagozlu's favour, the Court of Appeal had recourse to a number of authorities relating to the torts of false imprisonment and malicious prosecution. The Court referred in particular to its previous decision in *Thompson and Hsu v Commissioner of Police for the Metropolis*[181], where Lord Woolf MR gave guidance as to directions which might be given to juries in cases of false imprisonment and malicious prosecution. The Court of Appeal in *Thompson* had taken the view that in cases of false imprisonment, general damages are awarded for damage suffered by the claimant for loss of his or her liberty.

It might appear surprising that such a parallel would be drawn between the question of whether loss of liberty satisfies the requirement of damage in misfeasance, on the one hand, and the availability of damages for the tort of false imprisonment, on the other. The distinction between the trespass torts and the tort of misfeasance was, as noted above, of key importance in leading the House of Lords in *Watkins* to reject the contention that misfeasance was a tort actionable *per se*.[182] Indeed, the Court in *Karagozlu* acknowledged that false imprisonment is a tort actionable *per se* without proof of special damage whereas, after *Watkins*, misfeasance is actionable only on proof of such damage.

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[181] [1998] QB 498.
[182] See earlier discussion of *Watkins* in this Chapter.

The Court of Appeal, however, took the view that this "does not seem to us to be a relevant distinction".[183] Sir Anthony Clarke MR explained thus:

> [It] does not seem to us to be correct in principle to distinguish between what is injury or damage for the purposes of the tort of false imprisonment on the one hand and for the purposes of the tort of misfeasance on the other. As we see it, loss of liberty should either be relevant injury or damage in both cases or in neither case. In either case, in the absence of a claim for identifiable loss, a successful claimant should be entitled to recover general damages for loss of liberty. Such damages should in our view be recoverable in both cases and assessed in accordance with the guidelines laid down in *Thompson*. The amount of the damages so assessed would of course depend upon the circumstances of the particular case.[184]

A further parallel was drawn between the tort of misfeasance and that of malicious prosecution, the Court noting that in *Thompson*, the Court had sought to lay down guidelines applicable both to false imprisonment and to malicious prosecution. Since malicious prosecution, like misfeasance (in the United Kingdom), is a tort which requires proof of damage, the Court in *Karagozlu* was satisfied that *Thompson* was of application in the context of misfeasance. In terms of the malicious prosecution point, reliance was laid on the decision of the House of Lords in *Gregory* v *Portsmouth City Council*[185], and

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[183] *Karagozlu*, [28].
[184] *Ibid.*, [29].
[185] [2000] 1 AC 419.

upon the analysis provided therein of the old case of *Savile* v *Roberts*[186], where Holt CJ had defined the interests protected by the tort of malicious prosecution as being comprised of a person's fame, person and property.

The Court of Appeal in *Karagozlu* regarded it as significant that Holt CJ in *Savile v Roberts* had treated loss of life, limb and liberty as injuries to the person, or at least as analogous to injuries to the person. Sir Anthony Clarke MR explained that the Court could see "no reason in principle to hold that what is damage for the purposes of malicious prosecution is not damage for the purposes of misfeasance".[187] Nor did an examination of the judgment of the Law Lords in *Watkins* prompt a different conclusion. The Court of Appeal further held that loss of residual liberty, such as a further restriction on a claimant's liberty caused by movement from open to closed prison conditions, was also actionable in misfeasance. Mr Karagozlu would have been much less confined both while at HMP Ford and on day release than he was after his transfer to HMP Winchester. In the opinion of the Court of Appeal this amounted to "a form of the special or material damage to which the House of Lords referred in *Watkins*".[188] The Court of Appeal thus allowed Mr Karagozlu's appeal against the order striking out his claim against the Commissioner.

With respect, it is submitted that the approach taken in *Karagozlu* comprises a clear example of the practical ineffectiveness of the approach taken in *Watkins*. In *Karagozlu,* when faced with an obviously compelling misfeasance claim that called for the claimant's rights to be vindicated, the Court of Appeal simply side-stepped the apparently

[186] (1698) 12 Mod Rep 208, 1 Ld Rymd 374.
[187] *Karagozlu*, [34].
[188] *Ibid.*, [53].

strict *Watkins* restriction by adopting an extremely loose approach to the idea of actionable damage. As already discussed in the context of the treatment of negligence herein[189], such an approach – although readily understandable in terms of the strong impulse for vindicating rights present in a case such as *Karagozlu* – ultimately has the effect of distorting conventional understandings of key constituent ingredients of causes of action in tort law. The long-term implications of such distortion may be significant, and extend much further than envisaged (if envisaged at all) by the court vindicating the plaintiff's rights in a given case. Accordingly, it would be doctrinally far preferable in this context were the approach of the House of Lords in *Watkins* not to be adopted in this jurisdiction: decisions such as *Karagozlu* serve as a warning of the undesirable consequences that can result from such restrictive approaches to compelling vindicatory pressures.

Notwithstanding this, however, it remains the case that after *Watkins*, the nature and extent of the ingredients of misfeasance – and in particular the material damage requirement stipulated in *Watkins* as a necessary ingredient – have continued to be the subject of uncertainty. A striking recent example of this is the judgment of the Court of Appeal in November 2008 in *Hussain v West Mercia Constabulary*.[190] In the court below, the claimant's misfeasance claim had been struck out on the basis that, on his pleaded case and on the medical evidence on which he relied, he could not establish that he had suffered damage or injury sufficient to constitute the tort of misfeasance in public office. The claimant was a taxi driver who alleged, *inter alia*, that in the course of his trade he has been involved in numerous incidents with members of the public, causing him to call

[189] See Chapter 2.
[190] [2008] EWCA Civ 1205 (03 November 2008).

on the assistance of the police on more than 50 occasions, and that the defendant has responded in a way that amounted to misfeasance in public office.

The medical evidence disclosed that the claimant had suffered physical symptoms of anxiety, which he argued constituted sufficient injury to complete the tort. The defendants contended that there was no evidence of any recognised psychiatric illness, and therefore the claimant could not satisfy the requirement of material damage as defined by Lord Bingham in his opinion in *Watkins*. In disallowing the claimant's appeal and striking out the claim, the Court of Appeal held that the damage of which the claimant complained did not meet the *Watkins* actionability criteria. For present purposes it is, however, significant to note a divergence of opinion on one point amongst an otherwise unanimous Court of Appeal. Delivering the leading judgment, Stanley Burnton LJ interpreted *Watkins* as requiring, for the purposes of mental injury satisfying the damage requirement, that the claimant establish a recognised psychiatric illness.[191] By contrast, Maurice Kay LJ cautioned that such a requirement ought not necessarily be imposed in every case of misfeasance where the claimant is claiming for psychiatric damage. In an important passage, Kay LJ stressed that too strict an interpretation of the *Watkins* ingredient of actionable damage would be to empty the tort of misfeasance of much of its content. He said:

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[191] Although not explicitly so stated by Stanley Burnton LJ in *Hussain*, it is submitted that this is the correct reading of the judgment: see paragraphs [14] – [16] of the judgment of Stanley Burnton LJ, and his comment at [15] to the effect that "[w]here the damage alleged is financial or physical damage to property or injury, the requirements of the tort of misfeasance are not more stringent than those of, for example, negligence." It is submitted that implicit in this comment is the proposition that the requirements are also not *less* stringent than those of other torts such as negligence and it is in this regard that the approach sits at variance with that proposed by Maurice Kay LJ in the same case.

> Misfeasance in public office is an intentional tort of considerable gravity. It is a tort of obloquy. As Lord Steyn explained in [*Three Rivers*], it involves either targeted malice or bad faith on the part of a public official. In most of its manifestations, it does not result in physical injury. Whilst it is entirely appropriate to deny actionability where the non-physical consequences are trivial (so avoiding lengthy trials which, at best, result in very modest awards of damages), it is important not to set the bar too high. There is a risk that, in the hands of an average claimant, it would become a toothless tort, availing only commercial claimants who can show pecuniary loss and individual claimants with eggshell personalities who are tipped over the edge into recognised psychiatric illness. For my part, I would not wish to shut out a claimant who has the robustness to avert recognised psychiatric illness but who nevertheless foreseeably suffers a grievous non-physical reaction as a consequence of the misfeasance... If my approach does not live easily with the established approach in cases of negligence resulting in personal injury, I would strive to treat misfeasance in public office exceptionally.[192]

It is submitted that this passage is important for the present analysis for at least two reasons. First, it further highlights the rôle of the tort of misfeasance in rights vindication: it is recognised as a tort of "obloquy", a term which points vividly to the tort as vehicle of inviting public disgrace on an entity that has abused power. Secondly, the last sentence of the above passage of Kay LJ's judgment comprises another significant example, of the

[192] *Per* Maurice Kay LJ, [20] (internal citations omitted).

kind already witnessed in the approach of the Court of Appeal in *Karagozlu*, of dissatisfaction with the full breadth of the shift made by the Law Lords in *Watkins* in imposing a requirement of actionable damage. Kay LJ's care in emphasising that he would take pains –"strive" – to treat misfeasance exceptionally (although made in the context of the stringency of the damage requirement in negligence) is redolent of the Court of Appeal's approach in *Watkins*, overturned by the House of Lords, in recognising the exceptional and constitutional nature of the tort which justified actionability per se without proof of damage. Accordingly, these elements of the more recent ruling in *Hussain* provide yet further support for the misgivings expressed above about the approach adopted by the House of Lords in *Watkins*.

*Watkins* was, according to Lord Walker in his judgment, "a difficult and troubling appeal".[193] So, too, does it provoke difficult and troubling questions, not only about the *raison d'être* of the tort of misfeasance in public office, but more generally about the evolving rôle of the law of tort in an era of heightening human rights protection, and the nature of the influence of that protection on the fashioning of causes of action such as misfeasance in public office. The sharp divergence in approach between the Court of Appeal and the House of Lords in *Watkins* demonstrates that the contours of the newly-revived tort of misfeasance in public office are still undergoing development and refinement; so too does it raise fundamental and fascinating questions about the vindicatory function of tort law. In this regard, perhaps the tone of the decision in *Watkins* is best captured by Lord Bingham when his Lordship states that "the primary

[193] *Watkins*, [67].

rôle 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."[194] This proposition is, with respect, not only controversial, but it also arguably rests uneasily with a number of recent judgments of the House of Lords discussed in Chapter 2, with two of the most notable examples are the majority decisions of the House of Lords in *Rees* v *Darlington Memorial Hospital NHS Trust*[195] and *Chester* v *Afshar*.[196]

It is further submitted, however, that this statement by Lord Bingham must not be read out of context: as another commentator has pointed out,

> Lord Bingham was slightly more balanced in his remarks than the quotation out of context might imply: this interpretation of the function of tort was one of two "policy factors" weighing against one another, both of which he found attractive to some extent.[197]

Another unwelcome consequence of the intense focus placed in *Watkins* upon the damage requirement is the distorting impact such a focus exerts upon the constituent ingredients of the tort of misfeasance. As such, the trends observed in the previous Chapter in the context of the tort of negligence – and the constituent ingredients thereof being substantially recast – is mirrored in the overly damage-focused approach of the House of Lords in *Watkins*. Indeed, to one commentator, the decision of the House of Lords in

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[194] *Ibid.*, [9].
[195] [2003] UKHL 52, [2004] 1 AC 309.
[196] [2004] UKHL 41, [2005] 1 AC 134.
[197] Jenny Steele, "Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?" [2008] *CLJ* 606, 616. The other factor being the mantra that "wrongs should be righted".

*Watkins* – and the Law Lords' focus on the material damage requirement in that case – "completed the erosion of the historical standing rules" in the tort of misfeasance in public office.[198] The following is her summary of the state of the respective constituent ingredients of the tort of misfeasance following *Watkins*:

> The underlying principles of the misfeasance tort have become tautologous: any time that a public authority's unlawful actions cause loss to the plaintiff, the court concludes that the plaintiff's rights were violated. This has allowed the courts to award damages for misfeasance even if the abuse of power was not directed toward the plaintiff, the officer owed no duty to the plaintiff not to cause the type of harm suffered, and no autonomous right of the plaintiff was violated.[199]

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[198] Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 227.

[199] *Ibid.*, 227-228. Chamberlain describes this situation as "particularly problematic" given that misfeasance claims particularly concern economic loss. In response to this, two points can be made. First, the caution with which the law of negligence treats claims in economic loss flows in large part from the far wider scope of that tort when compared with misfeasance: as illustrated above in this Chapter (and notwithstanding the attempts by Chamberlain and others to argue that these requirements have undergone considerable erosion) it remains the case that the tort of misfeasance with its in-built constituent hurdles for plaintiffs to cross, including the malice requirement and (at least as a matter of English law following *Watkins*) the material damage requirement, contains sufficient internal safeguards to allay fears of floodgates or indeterminate liability which typically act as policy arguments against recovery for economic loss. Secondly, it is respectfully submitted that the most recent misfeasance case law in the common law world reveals a wide range of claims in misfeasance extending beyond economic loss: consider *Watkins* itself, as well as *Brooks v Chief Constable of the Metropolis* [2005] UKHL 34, [2005] 1 WLR 1495; *Ashley & Another v Sussex Police* [2008] UKHL 25, [2008] 1 AC 962, *Van Colle v Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2008] 3 WLR 593, [2009] 1 AC 225 in the United Kingdom; and *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263 in Canada. Although the misfeasance claims in these cases were unsuccessful, the litigation in each of these cases illustrates that the tort is now being invoked as a means of vindicating rights. Whilst it is true that the leading Supreme Court authorities in Ireland on misfeasance do concern economic loss claims, (*Kennedy* and *Beatty*) there is also in this jurisdiction increasing evidence of the tort being invoked in the context of harm that is not simply of an economic nature: see for example Alison Healy, "Gardaí had 'irrational fixation' that man killed wife" *The Irish Times*, 2 April 2008 (making reference to proceedings in *Livingstone v Commissioner of An Garda Síochána,* including the following summary: "Mr Livingstone is claiming damages for alleged false imprisonment, abuse of legal process, abuse of power and/or misfeasance of public office, conspiracy and other matters." This case was settled before the end of the High Court hearing: see *The Irish Times*, 10 April 2008).

This criticism provides yet another cogent basis for arguing, as has been argued above in this section, that the damage requirement insisted upon in *Watkins* is an unwelcome development that distorts the emphasis in misfeasance in public office from the vindication of rights.

## H. CONCLUSIONS: THE ROLE OF MISFEASANCE IN THE VINDICATION OF RIGHTS

Writing less than a decade ago of the status of the tort of misfeasance in public office in Irish law, McMahon and Binchy said of the tort that "even today its precise contours are a matter of debate".[200] In this Chapter, it has been argued that the contours of the tort are themselves at present the subject of alteration and reassessment by the courts across the common law world, and that this fresh consideration of those contours enables a new understanding to be obtained of the vindicatory nature of the tort of misfeasance.

The dramatic expansion of the tort, brought about by the ongoing judicial consideration of the appropriate scope of its key constituent ingredients such as malice and damage, has resulted in a vastly altered legal landscape in which the tort of misfeasance now exists as a potentially promising avenue for plaintiffs in tort litigation against public authorities. As such, it seems increasingly difficult to maintain that the different ingredients of the tort render the "scope and possibilities provided by misfeasance limited".[201] By contrast, the recent developments analysed in this Chapter signify the considerable range of

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[200] McMahon and Binchy, *Law of Torts*, (3rd ed, Butterworths, Dublin, 2000) 548.
[201] Sarah Hannett, "Misfeasance in Public Office: The Principles" [2005] *JR* 227, 231.

options presented for litigants in actions against public authorities – even leading one commentator to conclude that "the once exceptional misfeasance tort now has the potential to supersede negligence in circumstances involving breach of public duty."[202] As a result of this rapid expansion of the tort of misfeasance in public office in recent decades, it may well be the case that the tort "threatens to shed its 'exceptional' character if current trends persist".[203]

As seen in this Chapter, the case law within the last decade, building on centuries of case law establishing the rights-based nature of the tort, brings increased conceptual clarity to an area of tort law that had long been in need of examination. The development of the tort itself cannot but complement the simultaneous evolution, more generally, of public law protection for individuals. Specifically, this development of the tort of misfeasance in public office must be viewed against the broader backdrop of the attitude being evinced by the courts generally to tort claims against public bodies. In this regard, it is submitted that a fortified tort of misfeasance in public office may ultimately prove to be a useful tool for litigants seeking to pursue a claim against state actors, but for whom the traditional avenues of tort law are, for whatever reason, either unaccommodating or simply closed altogether.

On this latter point it is salutary to note that on the very day on which the Supreme Court handed down its judgment in *Kennedy*, thereby heralding a renaissance for the tort of misfeasance in public office in this jurisdiction, the House of Lords handed down two

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[202] Erika Chamberlain, "The Need for a 'Standing' Rule in Misfeasance in a Public Office" (2007) 7 *OUCLJ* 215, 233.
[203] *Ibid.*, 215.

landmark decisions in which negligence claims against public authorities were dismissed: both were dealt with in Chapter 2. In the first case, *JD v East Berkshire Health Authority*,[204] a majority of the House of Lords held that social workers owed no common law duty of care to parents whom they had wrongfully accused of abusing their own children. In *Brooks v Commissioner of Police for the Metropolis and ors*,[205] a claim in negligence against the police force for the manner in which it conducted its inquiry into the notorious racially-motivated killing of Stephen Lawrence, the House of Lords affirmed (albeit, as discussed in Chapter 2, with some reservations) its earlier approach in *Hill v Chief Constable of West Yorkshire*,[206] thereby confirming that a private citizen could not bring a claim against the police force for the negligent manner in which it conducted an investigation.[207] Viewed against the backdrop of such a restrictive approach towards negligence actions against state officials, a reinvigorated tort of misfeasance in public office must surely seem an attractive and potentially promising alternative for plaintiffs[208]; actions is misfeasance are thus "even more likely to proliferate should they be found to provide an easier route to compensation than do actions in negligence".[209] As Brooke LJ stated in a recent negligence case:

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[204] [2005] UKHL 23, [2005] 2 AC 373.
[205] [2005] UKHL 24, [2005] 1 WLR 1495.
[206] [1989] AC 53.
[207] Significantly, the claimant in *Brooks* had also sought to bring an action in misfeasance in public office, but the decision of the trial judge to strike out this claim was upheld by the Court of Appeal and the point was not pursued in the hearing before the House of Lords.
[208] In spite of this, some commentators have called for the abolition of the tort given the degree to which it overlaps with other causes of action: see for example John Sharland, "Public Concerns" [2005] *SJ* 1401, who describes the continued existence of the tort of misfeasance as "simply an anomaly" (at 1402).
[209] K. Mason and G.T. Laurie, "Misfeasance in Public Office: An Emerging Medical Law Tort?" (2003) 11 *Med Law Rev* 194, 198.

> In matters of this kind, where public officers do not merely possess relevant powers but also have duties to perform in the public interest, it is to the evolving tort of misfeasance in public office that one needs to turn when an abuse of those powers is alleged."[210]

This trend may in and of itself be described as an emerging tension in the tortious liability of public authorities. For, as noted by one commentator in the context of Canadian law in this area:

> There is a danger that an over-extension of the tort of misfeasance in a public office can clash with Canadian law's refusal to recognise a tort of breach of statutory duty and its restrictive attitude to negligence claims against public authorities...The tort of misfeasance in a public office now seems to provide an alternative and perhaps more easily proved remedy to plaintiffs.[211]

It is thus essential to underline the still significant hurdles which must be surmounted by plaintiffs alleging misfeasance in public office. As Chadwick LJ observed in *Marsh v Chief Constable of Lancashire*[212], allegations of misfeasance in public office are amongst

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[210] *R. Cruickshank Ltd. v Chief Constable of Kent County Constabulary* [2002] EWCA Civ 1840, *The Times*, December 27, 2002.

[211] Lewis N. Klar, *Tort Law* (4th ed, Thomson, Carswell 2008), 321.

[212] [2003] EWCA Civ 284, [57]. It is for this reason, amongst others, that the courts have consistently emphasised that an allegation of bad faith must be properly particularised. As Megaw LJ said in *Cannock Chase DC v Kelly* [1978] 1 WLR 1, 6:

> ... [B]ad faith, or, as it is sometimes put, "lack of good faith," means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge.

the most serious – short of conscious dishonesty – that can be made against police officers, or any public official. It is important to stress that the augmented tort of misfeasance, post-*Three Rivers/Kennedy*, is only likely to avail those plaintiffs whose grievance arises from a state actor's executing his or her duties in bad faith, and is unlikely to prove a congenial route for those plaintiffs who, frustrated by policy or other restrictions in negligence claims, seek to simply shoehorn their claim into one of misfeasance in public office.[213] In this regard, the English courts have repeatedly emphasised that the prospect of a distinctive avenue of legal recourse against public authorities provided by the tort of misfeasance in public office ought not to be deployed so as to circumvent the strictures of, for example, the tort of negligence. Indeed, the courts have spoken of the "anxious scrutiny" which must attend the consideration of such pleading. In *Thacker v Crown Prosecution Service*[214], Judge LJ said:

> Prosecutors or employees of the Crown Prosecution Service are not immune from actions for malicious prosecution. Nevertheless it is essential that before such actions are … allowed to be pursued through the courts, anxious scrutiny should be made of them to ensure that the

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> It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant. If a charge of bad faith is made against a local authority, they are entitled, just as is an individual against whom such a charge is made, to have it properly particularised. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularised, the pleading may be struck out.

[213] Indeed, given the significant distinctions between the tort of misfeasance in public office and other torts, outlined earlier in this Chapter, there seems to be some force in the claim that "[t]here is now no realistic chance of pleading what is essentially a negligence case as misfeasance in the hope of obtaining a remedy": Keith Stanton, "Defining Misfeasance in Public Office" (2001) 9 *Tort L Rev* 20, 23. Perhaps a recent example of this is witnessed in the unsuccessful claim in *B v Reading Borough Council & Ors* [2009] EWHC 998 (QB) (24 June 2009).

[214] *The Times*, 29 December 1997, Court of Appeal (Civil Division) Transcript No. 2149 of 1997.

> immunity against actions for negligence ... is not circumvented by the pleading device of converting what is in reality no more than allegations of negligence into claims for malicious prosecution.

Although *Thacker* concerned a claim in the tort of malicious prosecution, this sentiment has recently been expressly approved in the context of the tort of misfeasance.[215]

Moreover, the unease expressed by Geoghegan J in the Irish Supreme Court decision in *Kennedy* about the potentially problematic application of a test of subjective recklessness should not be forgotten.[216] Whether or not the tort appears "exceptionally difficult to prove"[217], in light of the acceptance by the Supreme Court in *Kennedy* of the *Three Rivers* approach to bad faith, whereby recklessness can suffice to establish liability, the argument that the resuscitated tort of misfeasance in public office certainly affords fresh opportunities for rights vindication, now seems compelling. Accordingly, notwithstanding the fact that in the decided cases to date in this jurisdiction the restated tort of misfeasance in public office has not availed plaintiffs, the revivification of the tort has the potential to provide a significant counterpoint to the negligence action.[218]

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[215] *Carter & Ors v The Chief Constable of the Cumbria Police* [2008] EWHC 1072 (QB) (15 May 2008, Tugendhat J).

[216] Indeed, it is appropriate to recall the observation of Lord Hutton in *Three Rivers* that "the second limb of the tort cannot be viewed in isolation from the first limb and ... the concept of targeted malice which is the underlying principle of the first limb exercises a restrictive effect on the ambit of the second limb." ([2003] 2 AC 1, 223).

[217] Sharland, above n 208, 1401.

[218] For recent examples of cases in which the torts of negligence and misfeasance in public office have been simultaneously pleaded see for example *Kennedy v The Law Society of Ireland* [2005] IESC 23, [2005] 3 IR 228; *Beatty v The Rent Tribunal* [2005] IESC 66, [2006] 2 IR 191, *Ashley & Another v Sussex Police* [2008] UKHL 25, [2008] 1 AC 962, *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2008] 3 WLR 593, [2009] 1 AC 225.

From an Irish perspective, the judgments in *Kennedy* and *Beatty* mark a significant first step in the renaissance of the tort of misfeasance in public office in this jurisdiction. However, in the wake of *Kennedy*, although the ingredients of the tort can now be much more clearly stated, there remains uncertainty as to the limits of the tort. In particular, the indication in the judgment of Geoghegan J of unease with the marrying of subjectivity to recklessness – the two concepts which Geoghegan J vividly described as "not easy bedfellows"[219] – is one aspect of the *Kennedy* restatement with which courts in future cases will likely have to grapple. Certainly, it seems that the approach of the Supreme Court in *Kennedy* provides an indication that the importation into the tort of a reckless indifference threshold will not serve to open the floodgates to plaintiffs in this area.[220]

Further clarity would be welcome from the Irish courts vis-à-vis other ingredients of the tort. Thus, it would be useful to receive judicial clarification in this jurisdiction on whether the salient features of the tort of misfeasance in public office as it has developed in other jurisdictions, also prevail in Irish law. Chief among these concerns is whether Irish courts will impose a requirement of proximity in the delineation of this tort (which, it has been argued, would be an unfortunate step for the courts to take) and whether the award of exemplary damages will be permitted in cases where the claimant succeeds in establishing misfeasance in public office (a development which, it has been argued, is desirable and consistent with established jurisprudence on exemplary damages in this jurisdiction). Other issues which must await future judicial consideration include the test

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[219] [2005] 3 IR 228, 261.

[220] Indeed, it has been suggested that since the tort is only directed at extreme behaviour, its potential applicability can never be wide: Susan Kneebone, "Misfeasance in a Public Office After *Mengel's* Case: A 'Special' Tort No More?" (1996) 4 *Tort L Rev* 111, 138.

to be adopted in claims of vicarious liability for misfeasance in public office, and whether a damage requirement is a necessary constituent to complete the cause of action. On the latter point, it has been strongly argued in this Chapter there are sound reasons of policy and practice why the approach of the English Court of Appeal in *Watkins* should be preferred to that of the House of Lords in that case: no separate damage requirement should be required in claims for breach of constitutional rights. It is to just this type of claims, and their rôle in vindicating rights through tort law, that our analysis now turns in Chapter 4.

# PART III
# TORT LAW AND HUMAN RIGHTS: VINDICATION THROUGH THE CONSTITUTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

## Chapter 4

# VINDICATING RIGHTS THROUGH THE "CONSTITUTIONAL TORT": THE IMPACT OF BUNREACHT NA hÉIREANN

> There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever.
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> (*Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679 *per* Hardiman J, [79]).

### Chapter Overview

*This Chapter seeks to analyse the vindicatory potential of the action for breach of constitutional rights – "the constitutional tort" – in this jurisdiction. Commencing with an analysis of the Supreme Court's adumbration of its* Meskell doctrine, *the Chapter then examines how this doctrine has been developed in later case law. The argument advanced is that, towards the end of the first decade of the 21st century, the vindicatory potential of the constitutional tort remains largely untapped. Implications of this from a vindicatory perspective (including uncertainties surrounding constituent ingredients of the cause of action) are then considered. The chapter concludes with a comparative survey of recent developments involving vindicatory actions in other constitutional traditions, so as to ascertain how such developments may assist the courts in this jurisdiction in reinvigorating the constitutional tort as a tool of vindication.*

## A. INTRODUCTION TO THE CONSTITUTIONAL FRAMEWORK

**Article 40.3 and the Vindication Obligation**
Article 40.3 of the Constitution, as far as relevant, provides:

> 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The distinction drawn in this article between the State's obligation[1] to "respect" and its obligation to "vindicate" personal rights signifies the stand-alone significance of vindication as an aspect of rights protection that coheres with the meanings of vindication already explored in Chapter 1.

The inter-relationship between tort law and the availability of compensation for breach of constitutional rights has long been the subject of scholarly treatment.[2] Issues of taxonomy and nomenclature frequently prove problematic in this area: as the High Court has

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[1] In this regard, it is submitted that the notion of the State being under a positive obligation to vindicate rights presents a direct parallel with European Convention on Human Rights and the notion of the "positive obligation" inherent in, for example, the protection under article 2 ECHR of the right to life. This is analysed in the next chapter in relation to the ECHR. Regarding the Constitution, this terminology of positive obligations has been used in the case law: see for example the statement of Barr J in *BL v ML* [1989] ILRM 528, 542 that "the judiciary has a positive obligation to interpret and develop the law in a way which is in harmony with the philosophy of the [Constitution]". (The Supreme Court allowed an appeal from the substantive judgment of Barr J but this is not relevant for this statement).

[2] See William Binchy, "Constitutional Remedies and the Law of Torts", essay in James O'Reilly, ed, *Human Rights and Constitutional Law: Essays in Honour of Mr. Justice Brian Walsh* (Round Hall, 1992), 201; Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 4-25; T.A.M. Cooney and Tony Kerr, "Constitutional Aspects of Irish Tort Law" (1981) 3 *DULJ* 1; R.V.F. Heuston, "Personal Rights under the Irish Constitution" (1976) II *Ir Jur* (ns) 205, 212-222; David Gwynn Morgan, "Constitutional Interpretation" (1988) 10 *DULJ* 24; Gerard Hogan and Tony Kerr, "The Law in Ireland", in John Bell and Anthony W. Bradley eds, *Governmental Liability: A Comparative Study* (Cambridge: CUP,1991), 145-181; Andrew Butler, "Constitutional Rights in Private Litigation: A Critique and Comparative Analysis" (1993) 22 *Anglo-American Law Review* 1; John Temple Lang, "Private Law Aspects of the Irish Constitution" (1971) VI *Ir Jur* 237; Colm O'Cinneide, "Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?", Chapter 7 in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, London and New York, 2007) 213, 215.

recently observed, "an action for breach of a constitutional right is not a mere tort" but "is a wrong that may defy classification in the traditional categories of wrong".[3] The action is, however, "closely analogous to a tort, having to borrow tortious principles in respect of a number of issues".[4]

In this Chapter, the capacity of the Constitution and the rights protection guaranteed therein to secure the vindication of rights by means of the so-called "constitutional tort" is considered. This is done through an analysis of the *Meskell*[5] principle as it has been expounded and developed by the Irish courts, so as to attempt to gain an understanding of how, if at all, the constitutional tort action may operate as a vehicle for rights vindication in the context of the tortious liability of public authorities. Ultimately, the conclusion arrived at is that, notwithstanding the breakthrough nature of *Meskell*, its potential to underlay and infuse the tortious liability of public authorities with a vindicatory agenda has been significantly diluted and undermined due to the restrictive approaches taken by the courts since *Meskell*. The analysis engaged in through a study of the *Meskell* trajectory is, nevertheless, instructive in illuminating the ongoing discussion in this thesis about the interplay between vindication and the tortious liability of public authorities. By way of signalling a pathway forward for the constitutional tort, recourse is had to instructive and related precedents from other constitutional traditions, including recent case law arising from actions aimed at vindicating rights in the constitutions of Trinidad and Tobago, South Africa and elsewhere.

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[3] *Per* McMahon J in *Kemmy v Ireland* [2009] IEHC 178 (25 February 2009).
[4] Eoin Quill, *Torts in Ireland* (3rd ed, Gill & McMillan, 2009), 387.
[5] *Meskell v Córas Iompair Éireann* [1973] IR 121.

## B. *MESKELL* AND THE CONSTITUTIONAL TORT[6]

### The Background

An early example of the emergence of the constitutional right action – albeit in the context of litigation between private parties – was the judgment of the Supreme Court in *Educational Company of Ireland Ltd v Fitzpatrick (No. 2)*, a case concerning the right to freedom of association. In language that is strikingly redolent of the Weinribian conception of private law considered in Chapter 1, Budd J there observed in that "if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it."[7]

It is, however, the decision of the Supreme Court in *Meskell v Córas Iompair Éireann*[8] that is the most frequently cited authority recognising the constitutional tort in this jurisdiction.[9] There the Supreme Court recognised that constitutional rights are capable of enforcement by action, "even though such action may not fit into any of the ordinary forms of action in either common law or equity"[10], and in so doing the Court "plainly and necessarily establish[ed] that the ordinary forms of action may be used to enforce such rights where possible."[11] CIÉ, which at the time was a fully nationalised Irish public

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[6] See generally Andrew Butler, "Constitutional Rights in Private Litigation: A Critique and Comparative Analysis" (1993) 22 *Anglo-American Law Review* 1; John Temple Lang, "Private Law Aspects of the Irish Constitution" (1971) VI *Ir Jur* 237.

[7] [1961] IR 345, 368. See further *Murtagh Properties v Cleary* [1972] IR 330; *Murphy v Stewart* [1973] IR 97.

[8] [1973] IR 121.

[9] In the recent case of *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679, discussed in detail in Chapter 1, Hardiman J observed (at [77]) that "it has been recognised, at least since [*Meskell*], that constitutional rights are capable of enforcement by action".

[10] [1973] IR 121, *per* Walsh J, 132-133.

[11] *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679 *per* Hardiman J, [77].

transport company, agreed with the four major unions represented amongst its employees that it would terminate all existing employment contracts and offer all employees new contracts. The significant difference would be that the new contracts would oblige all employees to join one of the four trade unions. When the plaintiff refused to sign the new contract, he was dismissed. The Supreme Court, allowing an appeal from the High Court's rejection of the plaintiff's claim for damages and for a declaration that the employer had acted in violation of his constitutional rights, held that CIÉ had attempted to infringe the plaintiff's constitutional right to free association (which includes the right to disassociate[12]). Walsh J explained:

> ...if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.[13]

**Key doctrinal points clarified in *Meskell***

A number of points flow from the approach taken in *Meskell*. First, although the defendant there was a semi-state, nationalised company providing essential services to the public, there is no discussion in the Supreme Court judgment of the relevance of this. That the *Meskell* approach apparently applied equally to public and private defendants was confirmed by the later Supreme Court decision in *Glover v BLN Ltd.*[14], where Walsh J invoked "the dictates of constitutional justice"[15] so as to compel the directors of a

[12] *Educational Company of Ireland Ltd v Fitzpatrick* [1961] IR 345.
[13] [1973] IR 121, 133.
[14] [1973] IR 388.
[15] *Ibid.*, 424.

private company to conduct an inquiry in order to determine whether the plaintiff was in breach of his contract of employment. In addition to noting the ambiguity in *Meskell* as to the fundamental question of the nature of the relationship between constitutional rights and private law doctrine[16], it can also be said that this approach is a further illustration of the application in Irish law of what Kneebone in the context of tortious liability has termed the "basic rule" of non-differentiation between public and private actors.[17] Put another way, the horizontal/vertical distinction did not appear to trouble the Supreme Court in *Meskell*: the judgment indicates that the principles developed therein (in relation to a public defendant) are of equal application in the context of private parties, and *vice versa*. While this point may not appear to be of immediate relevance for this thesis given our exclusive focus on public authority defendants, it is in fact highly significant when one considers later jurisprudence (analysed below) in which the Supreme Court has contained the *Meskell* principle in the context of well-established causes of action in tort law (thus obviously implicating the tortious liability of public authorities). In this context, the most important decision is that of *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd.*[18], to which analysis now turns.

**The *Hanrahan* Gloss on *Meskell***

In the "crucial decision"[19] of *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd.* [20] the Supreme Court set about what has been termed the "taming"[21] of the *Meskell* principle in

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[16] For critical analysis of this symbiosis see generally David Gwynn Morgan, "Constitutional Interpretation" (1988) 10 *DULJ* 24.
[17] Susan Kneebone, *Tort Liability of Public Authorities* (LBC Information Services, 1998), 3.
[18] [1988] ILRM 629.
[19] Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 8.
[20] [1988] ILRM 629.

the context of the private law sphere. In particular, the decision signals a shift towards the ideology that where existing private law rules clearly govern an issue that is within the ambit of the protection of the Constitution, then it is to those established private law rules that litigants must have recourse in the first instance. Such rules – whether of common law or of statute – are presumed to be compatible with the Constitution: it will thus only be in exceptional circumstances that the courts will subject such rules to constitutional examination, and only where such rules are clearly ineffective will the constitutional right be engaged.

In *Hanrahan*, the plaintiffs in a claim in the tort of nuisance alleged, *inter alia*, that the defendants had infringed their constitutional rights to property and bodily integrity in polluting their land. The constitutional duty on the State to vindicate these rights, the plaintiff argued, meant that the courts were required to shift the burden of proof through the application of *res ipsa loquitur*. Otherwise, they contended, effective vindication of their rights would be extremely difficult to secure in practice. At this juncture, the significance of this point for the herein thesis should be explicitly highlighted: in *Hanrahan*, the plaintiffs sought to argue that a rule of tort law – here, *res ipsa loquitur* – should essentially be reshaped in that same ought to be applied through the prism of the vindicatory focus of the constitutional tort.

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[21] Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 17; Colm O'Cinneide, "Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?", Chapter 7 in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, London and New York, 2007) 213, 236.

This aspect of the plaintiffs' claim is summarised effectively by Henchy J in the following passage of his judgment:

> I agree that the tort of nuisance relied on in this case may be said to be an implementation of the State's duties under those provisions as to the personal rights and property rights of the plaintiffs as citizens. The particular duty pointed to by the plaintiffs is the duty to vindicate the personal right to bodily integrity and the property right to their land and livestock. They say that vindication of those rights under the constitutional guarantee is not properly effective by leaving them to their rights as plaintiffs in an action for nuisance and that the vindication they are guaranteed requires that once they show that they have been damnified in their person or property as alleged, it should be for the defendants to show that emissions from their factory were not the cause.[22]

This ambitious claim was, however, rejected by the Supreme Court. The Court regarded the constituent structures of the tort of nuisance as comprising implementation of the State's Constitutional duties to vindicate these rights. Henchy J explained the reasoning of the Court in the following passage:

> So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to

[22] [1988] ILRM 629, *per* Henchy J, 635-636.

> intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts — for example, negligence, defamation, trespass to person or property — a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional ... but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right. But that is not alleged here. What is said is that he may not succeed in having his constitutional rights vindicated if he is required to carry the normal onus of proof. However, the same may be said about many other causes of action. Lack of knowledge as to the true nature of the defendants' conduct or course of conduct may cause the plaintiff difficulty, but it does not change the onus of proof.[23]

In terms of the implications of this passage for acknowledging the vindicatory rôle of the law of tort, this passage has recently been said to comprise "an absolutely express statement of the role of the law of tort in implementing the State's duties under Article 40.3 and the personal rights Articles of the Constitution." This statement was made in

[23] *Ibid.*, 636 (internal citations omitted).

*Grant v Roche Products (Ireland) Ltd*[24], where Hardiman J for the Supreme Court expressly drew on the above passage of Henchy J's judgment in *Hanrahan* and, referring also to a relevant passage of Hogan and Whyte's *J.M. Kelly: The Irish Constitution*[25], Hardiman J concluded that

> There is thus authority both judicial and academic for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever.

It is significant that *Hanrahan*, for all its attempts at containing or "taming" the *Meskell* principle, should most recently have been cited by the Supreme Court as authority for this proposition of a robust vindicatory function of tort law. With respect, this characterisation of *Hanrahan* may sit at odds with the overall impression created by the judgment of Henchy J in *Hanrahan*, particularly when read in light of *Meskell*. Instructive in this regard, as ever, is the commentary of McMahon and Binchy, who comment on Henchy J's "striking reluctance to involve the courts in the role of refashioning tort law, root and branch in the light of the Constitution".[26] Noting the important distinction between a cause of action in tort which is not "basically ineffective" and one which is "less than fully effective", the learned authors describe it as "curious" that courts should be "impotent" to provide redress where a particular cause of action in tort law inadequately

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[24] [2008] IESC 35, [2008] 4 IR 679, [77]. This case is analysed in detail in Chapter 1.
[25] 4th ed (Lexis Nexis: Butterworths 2003), 1313.
[26] Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 8.

gives effect to a constitutional guarantee, but where that inadequate effectuation falls short of what can be termed "basic ineffectiveness".[27] As they rightly remark of the law of torts, "the idea that this corpus of common law is surrounded by a shroud through which the light of the Constitution can penetrate in only narrow shafts is difficult to understand."[28]

### *Hanrahan* and the Nature of Rights Vindication

A key question to be explored in considering the inter-relationship between the action for breach of constitutional rights and the capacity of tort law to vindicate such rights is the manner in which rights violations will be deemed to occur. In this regard, Professor Binchy has identified three distinct approaches towards rights infringement. The first is essentially an approach of strict liability: liability will accrue regardless of the defendant's taking due care or having no intent to infringe the particular right. Of this model, Binchy rightly observes that "there is no way of avoiding the legitimacy and relevance of the question whether, in a specific case, it is just to impose what is, in effect, strict liability".[29] The second approach is one which espouses a criterion of intent or negligence on the part of the wrongdoer, a model which Binchy points out "fits uncomfortably into a rights-based *schema*". [30] A third approach identified is what he terms "a more contextualised process of enquiry, whereby issues of intention or negligence would be addressed in precise and detailed factual contexts".[31] This last

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[27] *Ibid.*, 9.
[28] *Ibid.*, 9.
[29] William Binchy, "Constitutional Remedies and the Law of Torts", essay in James O'Reilly, ed, *Human Rights and Constitutional Law: Essays in Honour of Mr. Justice Brian Walsh* (Round Hall, 1992), 201, 206.
[30] *Ibid.*, 207.
[31] *Ibid.*

approach, he argues, offers the best method of interpreting the approach taken in *Hanrahan*, given Henchy J's emphasis on the existence of and detailed constituent ingredients of the tort of nuisance.

It is submitted that the model of analysis undertaken in the present thesis is one which illustrates and supports both Binchy's view of the desirability of this third model, and indeed the feasibility of the *Hanrahan* statement itself. For, in analysing the different constituent ingredients of distinct causes of action in tort law, the manner in which each distinct ingredient gives effect to a vindicatory purpose has been considered. The shift from a duty to a breach inquiry, for example, as well as recent shifts in judicial thinking about causation and damage, are instances of this in the context of the tort of negligence; in misfeasance in public office, on the other hand, detailed consideration has been given to the question of whether a damage requirement does or should exist amongst the requisite ingredients needed to establish that tort.

At the root of the difficulties of the *Meskell/Hanrahan* approaches is the basic truth of tort law design acknowledged by Professor Binchy in the following passage:

> The medieval English judges who fashioned the contours of trespass to the person, chattels and land exercised no prophectic role in seeking to anticipate the Irish Constitution's protection of citizens' rights to life, bodily integrity, health and property. Of course, the substance of many of these constitutional rights is in no sense novel...The difficulty of looking

> to the corpus of tort law to discharge the lion's share of the burden of conferring specificity onto the range of compensation for infringement of constitutional rights is not that tort law is hopelessly equipped for the task, but rather that it is not the most appropriate model, in that it concentrates on the question of the defendant's conduct rather than the plaintiff's rights.[32]

As we have seen above, in the *Hanrahan* case, it was famously said that where tort law was basically ineffective to vindicate a right, the constitution would have to step in to fill the void. Curiously, in the near twenty years since the *Hanrahan* judgment, this potential has not been exploited. Thus it is that issues regarding negligence and the Constitution, and indeed this so-called tort of breach of constitutional rights, remain stubbornly underdeveloped.

The approach in *Hanrahan* has been commended as embodying a fine example of a "co-ordinate approach" where the courts accord due respect to existing legislative or common law frameworks and do not trespass with undue haste on this terrain.[33] By contrast, McMahon and Binchy argue that the effect of *Hanrahan* could in reality be to insulate entire swathes of Irish tort law from the ambit of constitutional scrutiny.[34]

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[32] *Ibid.*, 207-208.

[33] Andrew Butler, "Constitutional Rights in Private Litigation: A Critique and Comparative Analysis" (1993) 22 *Anglo-American Law Review* 1.

[34] This avowedly non-interventionist approach is well encapsulated, for example, in the judgment of Costello J in *PH v J Murphy & Sons Ltd* [1987] IR 621, [1988] ILRM 300.

**The Approach of the High Court in *W v Ireland (No. 2)***

The significant case of *W v Ireland (No. 2)*[35] concerned a claim by a victim of a convicted paedophile for damages for the shock, distress and upset caused to her as a result of the delay in his extradition from the Republic of Ireland to Northern Ireland. The plaintiff argued that the Attorney General owed her a duty of care and/or "a constitutional obligation" to consider the execution requests and speedily to process same in order to ensure that the perpetrator was quickly brought to justice. She claimed that as a result of the breaches of duty, breaches of constitutional obligation and breach of statutory duty she suffered loss and damage that was a foreseeable consequence of the wrongful acts and omissions of the Attorney General. Costello P rejected the plaintiff's claim in negligence on the basis that the Attorney General owed no duty of care towards potential victims of those individuals relating to whom extradition decisions had to be taken and orders made. In so holding, Costello P drew support from, *inter alia*, *Hill v Chief Constable of West Yorkshire*[36], discussed at length in Chapter 2. (The claim for breach of statutory duty was rejected on similar grounds.)

For present purposes, what is significant about *W* is the attention that Costello P then devoted to the claim for damages for breach of the plaintiff's constitutional rights under Article 40.3, and in particular her right to bodily integrity. In his analysis of this aspect of the claim, Costello P delineated a distinction between two classes of constitutional rights: those which, quite apart from the Constitution, were protected by common law and/or

[35] [1997] 2 IR 141.
[36] [1989] AC 53.

statute; and those which were not so separately recognised. Clearly, at issue in *W* was a rights argument engaging the first of these two classes: the right to bodily integrity enjoys protection in a wide body of both common and statutory law. The net question for resolution was this: could the Constitution be interpreted as conferring a separate cause of action in damages notwithstanding the existence of tort law and statutory provisions which afforded the plaintiff a cause of action in damages?

Costello P said:

> The question can be posed this way; should the Constitution be construed so as to confer on a pedestrian injured by an army lorry a right to claim damages against the State for infringement of the right to bodily integrity in addition to, or as an alternate to, an action for damages for negligence? I am satisfied that it should not be so construed.[37]

Costello P held, *inter alia*, that no action lies for breach of a guaranteed constitutional right where existing laws protect that right. He stated that:

> I am satisfied that the law of torts which is applicable in this case was not ineffective to protect the plaintiff's constitutionally guaranteed rights. It does not follow that because a plaintiff does not recover damages under the applicable law (in this case, the law of torts) it must be ineffective in protecting guaranteed rights. It is necessary to consider why the plaintiff's

[37] [1997] 2 IR 141, 166.

> claim has failed. As already explained, the applicable principles of the law of torts established that there was ... [no] duty owed to the plaintiff.[38]

One crucial point of critical analysis of the above passage has already been made by Hogan and Morgan when the learned authors observed of the above passage:

> Attractive through Costello P's reasoning is, it carries with it the danger that the courts will too readily assume that judge-made law dealing with the law of wrongs created in some instances centuries before the Constitution was enacted adequately protects constitutional rights.[39]

### *McDonnell* and the "Taming" of *Meskell*

In *McDonnell v Ireland*[40], the plaintiff sought damages for the breach of his constitutional rights to earn a livelihood and to property in circumstances where he had forfeited his office as a clerk with the Department of Posts and Telegraphs having been convicted of membership of the IRA.[41] He claimed that, since he had been dismissed under a constitutionally infirm provision and not subsequently reinstated, he had sustained considerable economic loss. His claim was dismissed by Carroll J on the basis that it was statute-barred. Upholding this approach and rejecting the plaintiff's appeal, Keane J (as he then was) delivered the leading judgment in the Supreme Court in which he described the

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[38] *Ibid.*, 169.
[39] Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (3rd ed, Round Hall: Sweet & Maxwell, 1998), 824.
[40] [1998] 1 IR 134.
[41] Pursuant to section 34 of the Offences Against the State Act 1939, a provision that was later to be struck down by the Supreme Court as unconstitutional in *Cox v Ireland* [1992] 2 IR 503.

plaintiff as having "some kind of action, however loosely defined and conceptually uncertain, for breach of his constitutional rights".[42] Keane J held that the Statute of Limitations 1957 was applicable to the constitutional tort action in just the same way as to any other tort action, a conclusion in which he was supported by Hamilton CJ and O'Flaherty J; Barron and Barrington JJ reserved the question of whether the cause of action for breach of constitutional rights would be statute barred under the 1957 Act. In a memorable passage of this judgment, Barrington J cautioned that "constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules".[43]

The approach in *McDonnell* has been described by McMahon and Binchy as involving the "taming" of the *Meskell* principle. Certainly, the case is most frequently cited as authority for the proposition that a claim for breach of constitutional rights is not open to a plaintiff.[44] Commenting on the significance of the decision, O'Cinneide convincingly argues that its effect has been further to weaken the potential of *Meskell* to ensure rights vindication through tort law. O'Cinneide's prognosis of the post-*McDonnell* position starkly captures its effects in the following terms:

> [T]he judgments in *McDonnell* seemed to suggest that constitutional norms had no role to play in private law adjudication: existing private law, in the absence of 'plain inadequacy' or legislative dereliction of duty, is to be

[42] [1998] 1 IR 134, 156.
[43] *Ibid.*, 147-148.
[44] For a recent example of this application of *McDonnell* see for example, *McMahon v Irish Road Haulage Association* [2009] IEHC 145 (24 March 2009).

> considered to be entirely in conformity with the Constitution and immune from alteration.[45]

As to this point about there essentially being a requirement of legislative "dereliction of duty", it should be stressed that even this may well be a formidable threshold for a plaintiff to cross in terms of successfully mounting a claim for breach of constitutional rights. Indeed, the jurisprudence suggests that it is necessary to establish some positive mis-step on the part of the legislature in terms of intrusion upon rights, as distinct from a failure proactively to protect rights. Support for this proposition can be drawn from the decision of the High Court delivered less than a year prior to *Hanrahan*, in *PH v J Murphy & Sons Ltd*.[46] Although there is no mention made in the judgment of Costello J here to the *Meskell* principle, the case involved an attempt to invoke the constitutional tort in circumstances where the negligence of a private party had caused such severe personal injuries to a father that his family sought damages for breach of their constitutional rights to family life within the meaning of Article 41.[47] Costello J rejected the stand-alone constitutional tort claim, and in so doing posited a distinction between deliberate interference, on the one hand, and careless negligence, on the other, apparently regarding only the former as sufficient to give rise to a claim for breach of constitutional rights. Costello J said:

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[45] Colm O'Cinneide, "Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?", Chapter 7 in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, London and New York, 2007) 213, 241.

[46] [1987] IR 621, [1988] ILRM 300.

[47] Article 41.1 of the Constitution of Ireland provides:

> 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
> 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

The guarantee which the State gives in *Article 41(1)(2)* is a guarantee to protect the Family *'in its constitution and authority'*. So, if it could be shown that the Oireachtas had *enacted a law* which in some way failed to protect the *'constitution'* of the Family or the *'authority'* of the Family (as defined in the Constitution) then the State's guarantee would have been breached. Again, the State would have failed in its obligation to protect the Family if one of its officials *deliberately acted* so as to attack or impair the *'constitution'* or the *'authority'* of the Family and an action for damages would lie unless the impugned acts could in some way be justified under some other provision of the Constitution. But the *'constitution'* and the *'authority'* of the family unit could be impaired, indeed destroyed, by the negligent and careless act of a State official – for example, by the negligent driving of an army lorry which killed the parents of young children and which resulted in the dispersal of the children into different foster homes. Could it be said that the State had then broken its *Article 41(1)(2)* guarantee. I do not think so. It must be remembered that the Court is construing a constitutional document whose primary purpose in the field of fundamental rights is to protect them from unjust laws enacted by the legislature and from arbitrary acts committed by State officials. It would require very clear words to construe the State's constitutional obligations (as distinct from its common law obligations) as including a duty to ensure that its officials would not drive carelessly. I do not think that the words employed in *Article 41* are apt to do so, and the State's guarantee of protection does not, in my

> judgment, include a guarantee that its officials will drive State vehicles without negligence.
>
> It follows that the rights which are conferred by *Article 41(1)(2) are (a)* the right to protection from legislation which attacks or impairs the constitution or the authority of the Family and (b) the right to protection from the *deliberate* act of State officials which attack or impair the constitution or authority of the Family. It would also follow that a private person whose *negligent* act had so seriously injured the head of a Family that the constitution of the family unit was fatally impaired had not thereby infringed any constitutional right enjoyed by members of the affected Family under either paragraph of *Article 41(1)*. In the light of these conclusions I must hold that the defendants in this case had not been guilty of any breach of a constitutional duty imposed on them by this Article.[48]

The restrictive approach taken in the above passage to the question of the protection of rights vindication is one that posits an extremely limited conception of vindication of those rights. In this context, vindication is limited to an obligation to prevent direct, deliberate attack on the protected right in question, and specifically excludes non-deliberate conduct. An obvious consequence of such a characterisation is to reduce dramatically the range of potential torts in the context of which a particular article of the Constitution (in this case Article 41) could be engaged. Also problematic is the strong suggestion in the judgment that the *Meskell* doctrine only requires the State to refrain from deliberately breaching Constitutional rights, rather than imposing any duty on the

[48] [1987] IR 621, 626-627.

State to take steps to ensure that such rights are vindicated. This point becomes particularly important when compared with the position under the European Convention on Human Rights, examined in the next Chapter, in particular having regard to the notion of the existence of "positive obligations" on the State to safeguard and vindicate Convention rights. In this manner, judicial approaches in Ireland such as that of the High Court in *H* to the potential of the Constitution to secure vindication through the imposition of positive obligations sit in stark contrast with the potential for considerably greater rights vindication under the European Convention on Human Rights.

## C. ASSESSING THE CURRENT VINDICATORY POWER OF THE CONSTITUTIONAL TORT

### Appraising the Effects of the "Taming" of *Meskell*

There has been surprisingly little in the way of judicial consideration of this area since the so-called taming of the *Meskell* principle in the judgments considered above – thus, perhaps, indicating the "success" of this taming exercise. This may well be explained by pleadings practice in statements of claim, where "damages for the infringement of constitutional rights" tends to be pleaded amidst a long list of reliefs being sought, thus potentially justifying the note of apparent exasperation sounded by Barrington J when he spoke of the undesirability of Constitutional rights being used as "wild cards"[49] when all other claims prove fruitless. On such occasions as the potential has arisen for the nature of the constitutional tort to be further considered, the tendency has been to avoid detailed treatment of the claim *qua* constitutional tort claim.

[49] *McDonnell v Ireland* [1998] 1 IR 134, *per* Barrington J, 148.

A good example of this trend would appear to be the recent High Court case of *Gray v Minister for Justice*.[50] The plaintiffs in *Gray* claimed that they were forced to leave their home in Kerry after Gardaí disclosed to journalists in two leading newspapers that a dangerous, convicted rapist was residing with them at their home in Ballybunion. The plaintiffs claimed that as a result, they were subjected to abuse, harassment and intimidation of such a character that they were obliged to leave their home in Ballybunion permanently. They alleged that the Gardaí acted in breach of a duty of confidence owed by the State to the plaintiffs not to disclose sensitive and inflammatory information to the media when such disclosure was likely to place the information in the public domain and to result in the harassment and intimidation of the plaintiffs and a violation of their constitutionally protected right to live peacefully in their home. It was further alleged that two members of the Gardaí unlawfully entered the plaintiffs' home where they, inter alia, assaulted and battered one of the plaintiffs.

The plaintiffs sought damages for personal injuries, loss, damage, upset, inconvenience and distress which they claimed to have suffered as a direct consequence of the unlawful actions of members of the Gardaí as the servants and agents of the State. Quirke J imposed liability in negligence, holding, *inter alia*, that the State owed to the plaintiffs a duty not to unnecessarily expose the plaintiffs to the risk of foreseeable damage and injury resulting from the negligent disclosure of confidential information procured by and within the possession of the State.[51] In this way, the claim for breach of constitutional

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[50] [2007] 2 IR 655.

[51] A notable feature of the analysis of Quirke J in this judgment is that reference is made to *Ward v McMaster* [1988] IR 337 and not to *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 IR 84, notwithstanding the differences between the approach of McCarthy J and Henchy J in *Ward v*

rights essentially became enmeshed with the negligence claim and was not the subject of separate stand-alone treatment in the judgment. Perhaps the closest the judgment comes to explicitly sourcing the relief granted in the breach of constitutional rights is in relation to the issue of vicarious liability. Quirke J had no difficulty in finding the State vicariously liable for the wrongdoing of individual members of An Garda Síochána. Quirke J stated that:

> The State is vicariously liable in such circumstances for the negligence of its servants and agents and for any breach by its servants and agents of the constitutionally protected rights of its citizens arising out of that negligence. [52]

As in relation to the substantive negligence issue considered above, however, this approach to the imposition of vicarious liability, whilst explicitly referring to the breach of constitutional rights, does not explore the constitutional component of the statement of claim in any detail.

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*McMaster* and the fact that in *Glencar* the Supreme Court appeared to signal a clear preference for the formulation of Henchy J in *Ward*.

[52] [2007] 2 IR 655, [92]. It is submitted that this approach is fully supported by Supreme Court authority, as evidenced, for example, by the 2007 judgment in *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9, [2007] 4 IR 587, a case that is discussed in detail in the context of exemplary damages in Chapter 6.

**Consequence of Dearth of Developments in this area on constituent ingredients of the constitutional tort**

One consequence of the conspicuous lack of any significant development of the constitutional tort in recent years has undoubtedly been the creation of a degree of uncertainty around the constituent ingredients of the tort that must be met. Thus, as with the analysis engaged in in Part II of this thesis, the influence of vindicatory objectives on the constituent ingredients on a cause of action can be seen.

**The Damage Requirement**

Analysis has already been undertaken of the damage requirement in the context of the two causes of action studied in Part II of this thesis – negligence and misfeasance in public office. In the context of the tort of negligence, for example, we have seen that damage is the gist of the negligence action, but it has been argued that increasing emphasis on the vindicatory function in the context of public authority tort actions has led in some cases to a considerable re-characterisation of the scope of this "gist" requirement.[53] By contrast, in relation to misfeasance in public office, the uncertainty surrounding this question of whether damage must be shown has been highlighted, with particular emphasis being placed on the recent decision of the House of Lords in *Watkins v The Home Office*.[54] Unfortunately, a similar level of ambiguity is also manifest in the case law to date on the constitutional tort in this jurisdiction concerning whether there exists such a requirement of establishing damage in order to complete the cause of action.

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[53] Detailed analysis of this point is contained in Chapter 2.
[54] [2006] UKHL 17, [2006] 2 AC 395. For detailed treatment see Chapter 3 herein.

On the one hand, an authority from this jurisdiction which serves as a useful counterpoint to the recent United Kingdom approach in *Watkins* is the judgment of the High Court in *Kearney v Minister for Justice*[55], a case also involving irregularities in the handling of a prisoner's correspondence (there, a failure by the prison authorities to deliver letters to the plaintiff detainee promptly). Costello J appeared satisfied that the infringement of the prisoner's right in this case was actionable *per se*, observing that "[f]ortunately, the plaintiff suffered no pecuniary or other loss as a result of the delay in delivering [to] him the letters...".[56] Although declining to award exemplary damages on the basis that there was not sufficient evidence to illustrate that the wrongful conduct was so oppressive or vindictive as to warrant same, Costello J awarded the plaintiff damages of £25.

The judgment in *Kearney* thus appears to be premised on the understanding that there is no requirement that the plaintiff who has established the commission of a constitutional tort must go further and establish consequent damage.

In their analysis of *Kearney*, however, McMahon and Binchy caution that "[o]ne should not conclude from *Kearney* that all infringements of constitutional rights are actionable *per se*."[57] This is because, as the learned authors point out[58], *Meskell* offers no real guidance on the question of whether (any or all) constitutional rights are actionable *per se*. The position is rendered somewhat more clouded when one analyses other decisions

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[55] [1986] IR 116.
[56] *Ibid.*, 122.
[57] Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000) 21. The learned authors highlight the emphasis placed in the celebrated ruling of the High Court in *Kennedy and Arnold v Ireland* [1987] IR 587 upon four categories of damages in a breach of privacy context: compensatory, aggravated, exemplary, and punitive (*per* Hamilton P, 594.)
[58] Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 21.

of the superior courts, including another decision of Costello J, that in *H v Murphy*, already analysed above. There, Costello J in the relevant passage of his judgment said:

> If the defendants' careless act amounted to a constitutional wrong *which inflicted harm on the plaintiffs* then I think damages are in principle recoverable; otherwise, the protective provisions of the Constitution would be vacuous and valueless. If therefore the plaintiffs can establish that the defendants were guilty of a breach of a constitutionally imposed duty *which inflicted harm on the plaintiffs* then damages are recoverable even though at common law an award in respect of such harm could not be made.[59]

The italicised words in the above passage appear to suggest that establishing actual damage is a pre-requisite for successfully completing the cause of action by means of the constitutional tort. As against this, however, two points should be noted: first, as analysed above in a different context, the *H* judgment undoubtedly represents an extremely strict approach to the constitutional tort and the question of its relationship to other torts. In addition, it must be recalled that the judgment in *H* pre-dated that in *Hanrahan* by almost a full year. It may, therefore, be overly literal to rely on the passage quoted above in support of the proposition that a minimum actionable damage or a "gist" requirement, as in negligence, also exists in relation to the constitutional tort. At the very least, however, the above passage illustrates a lack of clarity in this area which the courts have regrettably to date not yet remedied. This uncertainty in and of itself does no service to

[59] [1987] IR 621, 625 (italics mine).

the vindicatory nature of the constitutional tort and is, alas, a further illustration of the weak protective regime of rights vindication offered by the doctrine.

## D. VINDICATING RIGHTS THROUGH CONSTITUTIONAL TORTS: A SURVEY IN COMPARATIVE PERSPECTIVE

In light of the rather uninspiring state of the constitutional tort in Irish law – to say nothing of the lack of significant developments in this area in the last decade – it is instructive to have regard briefly to the manner in which other constitutional traditions have striven to ensure effective vindication of rights engaged by tort law through their constitutional regimes. Although beyond the scope of the present work, it is important to note, as Oliver and Fedtke point out, the relevance of comparing and contrasting the approach taken to the constitutional tort in Ireland with the approach taken in the German system. This is because both systems start from the same essential premise: that no rule of private law may conflict with the values established by the constitutional instrument. Unlike the Irish courts, however, the courts in Germany have pursued the "indirect" approach, requiring that all rules of law must be construed in a manner that accords with the spirit of the Constitution. As Oliver and Fedtke illustrate, this approach has led to significant developments in German private law, such as the recovery of damages for the infringement of personality rights contrary to the express provisions of the Civil Code.[60]

[60] Citing the *Soraya* decision of the Bundesverfassungsgericht, BVerfGE 34, 269, 14 February 1973 (Dawn Oliver and Jörg Fedtke, "Comparative Analysis", in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, London and New York 2007) 467, 480).

**Perspectives from South Africa**

Turning to common law comparisons which will be considered here, an instructive point of such comparison is the position in South Africa, where the courts have employed constitutional rights to develop private law since the adoption of the new South African Constitution in 1996. Interestingly, in light both of the analysis in Chapter 2 and the analysis of the *W v Attorney General (No. 2)* case above in this Chapter, the South African Constitution has been used to develop the liability of the police. Thus in *Minister of Safety and Security v Van Duivenboden*[61] the Supreme Court of Appeal imposed liability upon the police arising from their failure to confiscate a firearm from a particular individual, who subsequently shot the claimant. The court said that what was needed was an assessment, in accordance with the norms of society, of the circumstances in which it should be unlawful to culpably cause loss. Nugent JA said:

> The Constitution is the supreme law, and no norms or values that are inconsistent with it can have legal validity – which has the effect of making the Constitution a system of objective, normative values for legal purposes.[62]

The Supreme Court of Appeal said that although the imposition of a duty of care on public authorities is often inhibited by the belief that it is important to allow them to carry

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[61] (2002) (6) SA 431 (SCA) Referred to in The Rt Hon Lady Justice Arden DBE, "Human Rights and Civil Wrongs: Tort Law under the Spotlight" (Hailsham Lecture 2009, delivered 12 May 2009, available at http://www.judiciary.gov.uk/docs), at 13 (last visited 25 August 2009).

[62] (2002) (6) SA 431 (SCA), *per* Nugent JA at [17]. Howie JA, Heher AJA and Lewis AJA concurred with this judgment; for a separate judgment expressing reservation about the elevation of the accountability concept in this way, see the approach of Marais JA in the same case at [31] – [39].

out their functions without the chilling effect of the threat of litigation, this argument ought not to be exaggerated as the need to establish negligence and legal causation meant that liability could be kept within acceptable boundaries.

In terms of a vindicatory analysis, it is particularly significant that the Supreme Court of Appeal emphasised that the norm of accountability "...must necessarily assume an important rôle in determining whether a legal duty ought to be recognised in any particular case." The strongly vindicatory thrust of this approach is evident in the Court's invocation of an earlier precedent in which it had been observed that:

> [W]ithout effective remedies for breach [of a Constitutional right], the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced....[I]t is essential that...when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if this needs be, to achieve that goal.[63]

Reflecting on *Van Duivenboden* and other relevant authorities[64], Macqueen comments that it "seems clear that the [Supreme Court of Appeal] has, in this area at least, fully

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[63] *Fose v Minister of Safety and Security* 1997 (3) SA 721 (CC) *per* Ackermann J, [69].
[64] Amongst them *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).

accepted the role of the Bill of Rights in the development of the law of delict at least so far as concerns the liability of public authorities".[65]

Similarly, Du Bois has characterised the decision in *Van Duivenboden* as

> inaugurat[ing] an approach which anchors state liability in the constitutional directive to ensure that the state be held accountable – a foundation for responsibility that seemingly diverges from the grounding of the delictual liability of citizens in corrective justice.[66]

For present purposes, the significance of such a characterisation is that it recognises the capacity of constitutional rights to act as a driving force in repositioning and reprioritising the nature of tort law – in this instance, leading to the effecting of a shift away from a purely corrective justice paradigm, infusing the tort of negligence with vindicatory objectives. In this way, the latent power of the constitutional tort in this jurisdiction, in terms of its capacity to vindicate rights, can be appreciated. The point is, indeed, reinforced when one considers that the Constitutional Court in South Africa – as

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[65] Hector L. Macqueen, "Delict, Contract and the Bill of Rights: A Perspective from the United Kingdom" (2004) 121 South African Law Journal 359,

[66] Prof Francois du Bois, Abstract of "Public accountability and corrective justice: State liability in South Africa's evolving mixed legal system", paper presented at a Joint Colloquium Hosted by The International Association of Legal Science and The World Society of Mixed Jurisdiction Jurists, "Mixed Jurisdictions as Models? Perspectives from Southern Africa and Beyond" University of Stellenbosch, South Africa, 14-15 May 2009, available at www.mixedjurisdiction.org/docs/South_Africa_May_2009.pdf (last visited 15 August 2009).

distinct from the Supreme Court of Appeal considered above – has itself been willing to reshape the position in negligence of the police by reference to constitutional rights.[67]

**Practical Vindicatory Effects of Remedies in the Constitutional Tort: Further Comparative Perspectives**

In terms of the practical effectiveness of the vindicatory nature of a constitutional tort claim, it is submitted that it is instructive to have regard to recent approaches of the Privy Council considering constitutional claims under other constitutional regimes.

In *R (Greenfield) v Secretary of State for the Home Department* [68] the claimant sought a damages award under the HRA 1998 for a violation of article 6 ECHR. The House of Lords held that no such award was necessary in order to afford "just satisfaction", as required by Article 41ECHR. Significantly, Lord Bingham, who had regard to the Strasbourg jurisprudence, commented that "[t]he pursuit of damages should rarely, if ever, be an end in itself in an [Article 6 ECHR] case". He continued:

> Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted.[69]

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[67] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938. For detailed analysis see for example Christopher J. Roederer, "Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights" (2009) 26 *Arizona Journal of International and Comparative Law* 427, 495-500.

[68] [2005] UKHL 14, [2005] 1 WLR 673, [2005] 2 All ER 240.

[69] *Ibid.*, [19].

This passage prompts a number of observations. First, the reasoning here supports one of the conceptions of vindication put forward in Chapter 1, to the effect that having access to the forum of a court and having one's rights recognised, regardless of other outcomes ensue, can comprise vindication.

Secondly, however, the above passage appears to embrace a restrictive view as to the remedial aspect of this vindicatory objective. Were such an approach to be widely followed, it could be argued that the pursuit of vindicatory relief would be less attractive to litigants than attempting to have recourse to traditional causes of action in tort. This apparent implication from the above passage in *Greenfield*, however, appears to sit at odds[70] with the approach of the Privy Council in two cases which followed the earlier case within a matter of weeks.

In the first of these, *Attorney General for Trinidad v Ramanoop*[71], a police officer beat and humiliated the claimant before arresting him and locking him up for a number of hours. In instituting proceedings, the claimant confined his pleadings to constitutional relief so that the only claim that was brought against the police officer, and the State, was one for breach of constitutional rights. The trial judge awarded the claimant damages for the deprivation of his liberty and for the assaults, but held that he had no jurisdiction to award exemplary damages, and that in any event exemplary damages were inappropriate and superfluous in proceedings brought under section 14 of the Trinidad and Tobago Constitution. In the Court of Appeal, Sharma CJ held that section 14 of the Constitution

[70] As Steele notes: see Jenny Steele, "Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?" [2008] *CLJ* 606, 620.
[71] [2005] UKPC 15, [2006] 1 AC 328.

contained no limit on the forms of redress the court may direct; in order to vindicate constitutional rights there was a need for a remedy additional to declarations and compensatory damages. In her dissenting judgment Warner JA noted that payment of compensation is a form of redress under section 14(1), but held that an award of exemplary damages could not be ancillary to redress, because "nothing in section 14 speaks to punishment".[72] She distinguished from exemplary damages, of which a punitive element is an essential characteristic, an award of an amount which would discourage future breaches of the same kind, holding that the court could make an award of the latter character.[73] The Court of Appeal allowed the claimant's appeal and remitted the matter to a judge for the assessment of "exemplary/vindicatory" damages. On further appeal before the Privy Council, Lord Nicholls in delivering the advice of the Board observed as follows:

> When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and,

[72] *Per* Warner JA, [18].
[73] *Ibid.*, [2].

moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under section 14 is confined to an award of compensatory damages in the traditional sense.[74]

[74] [2005] UKPC 15, [2006] 1 AC 328, [18] – [20].

The second of these two recent cases, *Merson v Cartwright*[75] was a case heard by the Privy Council at the same time as *Ramanoop*. The claimant there sought damages for assault and battery, false imprisonment, and breach of her constitutional rights. The question before the Privy Council here was whether an action for damages for infringement of constitutional rights was cumulative with the damages for the other torts. Lord Scott, who delivered the advice of the Board, referred to the relevant passages from *Ramanoop* discussed above and then gave added the following by way of providing an account of the purpose of such damages:

> [T]he nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the

[75] [2005] UKPC 38.

right; in other cases an award of damages, including substantial damages, may seem to be necessary.[76]

It is submitted that these recent developments are instructive in terms of their analysis of the nature of vindicating rights through constitutional tort actions. In particular, the explicit reference to vindicatory damages as a stand-alone head of damages enabling further effect to be given to the vindication of the plaintiff's rights is significant, for at least two reasons. First, it echoes the references to vindicatory damages already encountered in this thesis in the analysis in Chapters 1 and 2. As such, the above cases comprise a further example of the capacity for rights vindication in constitutional regimes to exist coherently and harmoniously alongside a common law system of rights protection. This point is of particular significance for the analysis of the European Convention on Human Rights undertaken in the next Chapter. Secondly, this emphasis on vindicatory damages as a discrete method of vindication underlines the continuing importance of the constitutional tort action. So, albeit that the analysis in this Chapter reveals a constitutional tort which has been "tamed" or restricted in recent years, its potential so to vindicate rights is highlighted by the approaches to the other constitutional regimes considered above.

[76] *Ibid.*, [18].

## E. CONCLUSIONS

The reluctance demonstrated by the Irish courts to explore the parameters of *Meskell* or to allow for an expansive application of the principle justify the conclusion that the courts have, after an auspicious starting point, largely "backtracked", thus "reducing the tool to an ultima ratio device".[77]

In terms of the emerging themes and tensions which this trajectory reveals, one of the most significant for present purposes is the manner in which the courts will consider the ambit and reach of the common law and register their reluctance to interfere with that ambit and reach. Thus in the "crucial decision"[78] of *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd.*[79] analysed in detail above, where the Supreme Court effectively brought about the "taming"[80] of the *Meskell* principle in the context of the private law sphere, the Supreme Court provided a clear indication of a shift towards the ideology that where existing private law rules clearly govern an issue that is within the ambit of the protection of the Constitution, then it is to those established private law rules that litigants must have recourse in the first instance.

According to O'Cinneide, the impact of the direct horizontal effect doctrine has frequently been

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[77] Dawn Oliver and Jörg Fedtke, "Comparative Analysis", in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, London and New York 2007) 467, 480.

[78] Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 8.

[79] [1988] ILRM 629.

[80] Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 17; Colm O'Cinneide, "Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?", Chapter 7 in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, London and New York, 2007) 213, 236.

> muted and even nullified by the adoption of a cautious approach by the judiciary towards developing private law remedies to reflect rights norms, in particular where existing private law rules clearly apply to the matter at issue.[81]

As we have seen in this Chapter, these common law rules – whether of common law or of statute – are presumed to be compatible with the Constitution: it will thus only be in exceptional circumstances that the courts will subject such rules to constitutional examination, and only where such rules are clearly ineffective will the constitutional right be engaged. In this way, the position adopted in relation to the Constitution of Ireland has significant parallels with the approach taken more recently by the courts in the United Kingdom on the question of the relationship between the common law of tortious liability and the rights vindication mechanisms available under the ECHR and the incorporating legislation. It is to this mirror image of a common law/rights instrument vindication tension that the analysis now turns in Chapter 5.

[81] Colm O'Cinneide, "Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment?", Chapter 7 in Dawn Oliver and Jörg Fedtke eds, *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, London and New York 2007) 213, 215.

# Chapter 5

# VINDICATING RIGHTS IN TORT LAW THROUGH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

> Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate rights.[1]

### Chapter Overview

*The purpose of this Chapter is to attempt to identify the complexities in the potential complementarity between tort law and human rights law in the vindication of rights, considering the difficult inter-relationship between the European Convention on Human Rights and the tortious liability of public authorities and the extent to which the former is and should be influencing the development of the latter. This lays the groundwork for a specific focus upon the case law concerning the liability of the police. Building upon the Negligence analysis already conducted in Chapter 2, a critical analysis is given of the most recent international case law considering the implications for this area of the ECHR.*

## A. INTRODUCTION: THE INCORPORATION OF THE CONVENTION AND ITS POTENTIAL FOR INFLUENCING THE DEVELOPMENT OF THE TORTIOUS LIABILITY OF PUBLIC AUTHORITIES

### Relevant Effects of Incorporation

The European Convention on Human Rights Act 2003[2] has now been in force in this jurisdiction for over five years. The ECHRA is an essential focal point for analysis in the present thesis, since its recent incorporation of the European Convention on Human Rights[3] into Irish law means that the effects of this incorporation on domestic tort law (and, more specifically, the core ingredients of distinct torts) must be examined. Of the

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[1] *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, *per* Lord Brown, [138].
[2] Hereafter "ECHRA".
[3] Hereafter "ECHR".

equivalent incorporating legislation in the United Kingdom, the Human Rights Act 1998[4], it has been observed that that legislation "is not a tort statute" and that that "its objects are different and broader".[5] Already, however, there has been scholarly comment to the effect that the incorporation of the Convention will influence the content of domestic tort law. As Steele has observed in an English context, for example, the dividing line between torts of damage and torts that are actionable *per se* is likely to grow in significance given the influence of the HRA. This is because there is "pressure to provide remedies through tort law – not just through actions under the HRA itself – where interests associated with or akin to 'Convention rights' have not been respected."[6] There has, moreover, now developed a significant body of case law in the English courts concerning the nature of the relationship between – and the reciprocal influence of – the ECHR and domestic tort law. In less than five years, this case law has seen significant shifts in judicial thinking about the nature of this relationship and influence, with the most recent judgment of the House of Lords in the joint cases of *Van Colle* and *Smith*[7] demonstrating a marked divergence of opinion between different judges.

For the purposes of the broad question under consideration in this Chapter, three articles of the ECHR are particularly significant for public authority defendants in tort litigation because they have been interpreted by the Strasbourg Court as being capable of giving rise to positive obligations – "one of the key defining features of the Strasbourg

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[4] Hereafter "HRA".

[5] *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, [2005] 2 All ER 240, *per* Lord Bingham, [19]. This statement is strongly disputed by Stevens, who argues that the HRA is "possibly the most important "tort statute" ever enacted" (Robert Stevens, *Torts and Rights*, Oxford: OUP, 2007, 289).

[6] Jenny Steele, "'Breach of Duty Causing Harm?' Recent Encounters between Negligence and Risk" (2007) 60 *CLP* 296, 297.

[7] *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225.

jurisprudence"[8]: they are Article 2 (the right to life), Article 3 (the prohibition of torture) and Article 8 (the right to respect for private and family life). The other article of most significance is Article 6, which guarantees access to the courts, but it will be argued that the scope of Article 6 to affect the substantive content of domestic negligence law is now extremely limited.

## B. OVERVIEW OF SELECTED RELEVANT ECHR ARTICLES

### Article 2

Article 2 ECHR provides:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

From the perspective of public authority defendants, Article 2 has been described as an obligation to provide protective policing measures[9]. The leading authority on this point is the decision of the European Court of Human Rights in *Osman v United Kingdom*[10], analysed in detail below, a decision which has very recently prompted a number of significant negligence actions which have culminated in decisions of the House of Lords

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[8] Colm O'Cinneide, "The European Convention on Human Rights and the Irish Constitutional System of Rights Protection: Complementary or Divergent?", Chapter 29 in Eoin Carolan and Oran Doyle eds, *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008) 507, 526.

[9] Alistair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004), 15.

[10] [1998] ECHR 101, (1998) 29 EHRR 245.

analysing the relationship between the contours of common law negligence and those of a claim under Article 2. A key feature of these recent cases has been the display of a marked disagreement between the Court of Appeal in England and Wales, and the House of Lords.

**Article 3**

Article 3 ECHR provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 ECHR has been summarised as embodying the imposition of an obligation upon public authorities to take protective measures.[11] For present purposes, the most significant authority requiring analysis here is the ECtHR decision in *Z v United Kingdom*[12] (which decision is also of fundamental importance in signalling a change of approach on the part of the ECtHR concerning the relationship between Article 6 ECHR and negligence law in the contracting states). As will be seen, the exceptional seriousness of facts of *Z* has been highlighted by many commentators as an illustration of the high threshold for success facing plaintiffs in such claims.[13]

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[11] Mowbray, above n 9, 43.
[12] [2001] ECHR 333, (2002) 34 EHRR 97.
[13] See for example Rebecca Bailey-Harris and Michael Harris, "Local Authorities and Child Abuse – The Mosaic of Accountability" [2002] *CFLQ* 117.

**Article 8**

Finally, although not the subject of detailed separate treatment in this Chapter, Article 8 ECHR is also of interest for present purposes in that it is in the context of case law based on this article that arguments have been advanced to the effect that where the factual matrix of a claim engages Article 8, the domestic law of tort should be expanded so as to accommodate such a factual matrix.

Article 8 ECHR provides as follows:

> 1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Amongst the best examples of this argument being advanced – and a clear demonstration of the resulting tensions revealed in judicial reception of this argument – is the case of *Wainwright v The Home Office*[14], discussed below.

Each of these articles will now be considered in terms of the implications of each article for affecting the contours of tortious liability.

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[14] [2003] UKHL 53, [2003] 3 WLR 1137.

## C. ARTICLE 2 ECHR: *OSMAN v THE UNITED KINGDOM*

**Overview of the importance of *Osman* in the context of inquiry in this Chapter**

In the context of the central argument being advanced in this thesis about the rôle of rights vindication in shaping both the nature and extent of redress in tort against public authorities in general and the constituent ingredients of causes of action in particular, the decision of the European Court of Human Rights in *Osman v United Kingdom*[15] marks a crucial development. This is because, as Wright has observed, "the tone of the European Court of Human Rights decision was one of concern that human rights standards should be vindicated."[16] As Lord Bingham has recently remarked of *Osman*, "[e]very ingredient of this carefully drafted ruling is, I think, of importance".[17]

Before analysing the factual background to the case in detail, it should be emphasised that the *Osman* case must be considered from at least two distinct perspectives: the Court's approach to article 2, on the one hand, and to article 6, on the other. This is because – notwithstanding the extent to which *Osman* has been criticised for the approach taken to article 6 and domestic negligence law[18] – it is, somewhat ironically, the approach which the ECtHR took to the interpretation of article 2 ECHR that has ultimately proven so significant for subsequent negligence actions against public authorities. This is due to the interpretation given by the *Osman* court to the duty on

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[15] [1998] ECHR 101, (1998) 29 EHRR 245.
[16] Jane Wright, *Tort Law and Human Rights* (Oxford, Hart Publishing, 2001), Preface, *v*.
[17] *Per* Lord Bingham (speaking of *Osman*) in *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [29].
[18] See for example Conor Gearty, "Unravelling *Osman*" (2001) 64 *MLR* 159.

public authorities to safeguard the right to life: very significantly, the Strasbourg court[19] firmly rejected the submission of the United Kingdom Government that the failure to appreciate the risk to life in the circumstances known at the time or to adopt preventative measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. The Court rejected the adoption of such a high threshold on the basis that it would comprise a failure to secure the practical and effective protection of the right enshrined in Article 2. Instead, the Court ruled that it would be sufficient for the purposes of establishing a breach of article 2 to show that the authorities had not done all that could *reasonably* be expected of them so as to avoid a real and immediate risk to life, where they *knew or ought to have known* of such a risk. The italicised terms in this formulation have been emphasised so as to illustrate the striking similarity between the article 2 requirement and the requirement of a plaintiff in a negligence action already considered in Chapter 2: in adopting the threshold it adopted in *Osman*, the ECtHR was laying the ground not only for potential overlap between the negligence action and article 2 (which would in any event have been possible in the – admittedly far more limited – circumstances of gross negligence contended for by the UK Government, but rejected by the Court, as the appropriate standard under article 2) but for the potential for claimants in negligence litigation to derive support from article 2 in order to bring home their case in common law negligence.

Thus, the potential for the ECHR to effect a recalibration of domestic tort law – in this context, the cause of action in negligence – was made possible by the approach of the ECtHR in *Osman*. It would be another decade, from 1998 until 2008, by the time the full

[19] *Osman*, [116].

ramifications of this approach would be understood and it is the attempt of the analysis in this Chapter to evaluate those ramifications and their implications of the constituent ingredients of the negligence inquiry.

***Osman*: The Factual and Procedural Background**

Before analysing the judgment of the European Court of Human Rights in *Osman*, it is necessary to go back further to the proceedings in the English courts and, in particular, to the decision of the Court of Appeal in *Osman and another v Ferguson and another*[20]. The bizarre and troubling background to the case involved a schoolteacher named Paget-Lewis who developed an obsessive infatuation for a teenage pupil, Ahmet Osman. There followed a series of extremely inappropriate and increasingly escalating incidents that ultimately culminated in the killing of Ahmet's father, Ali, the wounding of Ahmet, the wounding of a deputy headmaster and the killing of the latter's son. The domestic proceedings were instituted by Ali Osman's widow and Ahmet Osman against, *inter alios*, the Commissioner of the Metropolitan Police. The Commissioner applied, unsuccessfully before the judge but successfully before the Court of Appeal, to have the Osmans' claim struck out on the basis that it disclosed no cause of action since the Commissioner and his officers owed Ali and Ahmet no duty of care in negligence. For the purposes of this application to have the case struck out, the pleaded facts were to be assumed to be true.

These pleaded facts demonstrated that following the series of extremely inappropriate incidents already referred to, complaints about the teacher were made to the school's

[20] [1993] 4 All ER 344.

senior management team, and these complaints were subsequently upheld by the school in its internal inquiry. Matters took a yet more serious and sinister turn when the teacher changed his name by deed poll to Osman – this was not the first time he had taken the name of a pupil – and there were several serious incidents of violence perpetrated on the Osman family home. As matters escalated the teacher suggested that in a few months he would be "doing life" and had spoken of "a sort of Hungerford". This escalating series of events were all reported to the police, who assured the Inner London Education Authority that the Osman family would be protected and assured Ahmet's headmaster that the police would put in place the necessary measures to protect the deputy headmaster and the plaintiffs. Bizarrely, however, the only effective action taken by the police was limited to laying an information for careless driving. Matters culminated tragically some months later when the teacher went to the Osman family home, shot Ahmet and his father and then continued on to the home of one of the deputy headteachers, who was also killed. Upon being arrested the following morning, he reportedly stated: "Why didn't you stop me before I did it, I gave you all the warning signs?"

Assuming these facts to be true for the purpose of the strike-out application, a majority of the Court of Appeal (McCowan and Simon Brown LJ) took the view that there existed on these facts a sufficient relationship of proximity between the plaintiffs and the police.[21] Beldam LJ expressed no opinion on this point.[22] All three members of the Court of Appeal were, however, of the opinion that the public policy considerations identified by

[21] [1993] 4 All ER 344, 350, 354.
[22] [1993] 4 All ER 344, 354.

the House of Lords in *Hill v Chief Constable of West Yorkshire*[23], already analysed in detail in Chapter 2, precluded the recognition of any duty of care. The case was accordingly struck out; leave to appeal to the House of Lords was refused.

The Osman family instituted proceedings before the European Court of Human Rights, invoking articles 2, 6, 8 and 13 ECHR. Although the European Court held that there had been no violation of Articles 2 or 8, and that no separate claim arose under Article 13, the Court did conclude that there had been a violation of Article 6. The ECtHR's approach to articles 2 and 6 will now be considered separately.

**The Approach to Article 2 in *Osman***

In terms of its approach to the Article 2 claim, the significance of the decision of the ECtHR in *Osman* lies in the formulation articulated as to the scope of the obligation under article 2 in that case. The crucial passage of the Court's judgment in this regard is as follows:

> In the opinion of the court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to

[23] [1989] AC 53. For detailed treatment of these factors see Chapter 2.

> take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[24]

What is immediately striking and relevant for present purposes about the above formulation of the correct legal test for establishing a violation of article 2 ECHR is its many similarities with the considerations that permeate the common law negligence inquiry. As Professor Spencer observes, "[t]o the untutored eye, this test looks much like the sort of test the English courts would apply in deciding if the police were negligent, assuming liability in the tort of negligence existed".[25] As will be argued below, however, the decision of the House of Lords in *Van Colle*[26] illustrates the dangers of drawing such a cursory conclusion. At this stage, it is helpful to identify some fundamental differences between the Article 2 test and the common law negligence test.

Perhaps the most fundamental of these key differences between the Article 2 test and common law negligence test is that the duty of care ingredient in the tort of negligence is – as discussed in detail in the analysis of the core constituent ingredients of Negligence in Chapter 2 herein – a separate and distinct question considered prior to the question of breach. By contrast, the Article 2 approach in *Osman* does not operate on such a distinction (or, at least, any distinction is not clearly drawn).

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[24] *Osman*, [115] – [116. Lord Bingham would later observe that "[e]very ingredient of this carefully drafted ruling is, I think, of importance" (*Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [29]). The House of Lords in *Van Colle* emphasised that the "real and immediate risk" standard is not one that varies from case to case as was indicated by, for example, the lower courts in *Van Colle*: for discussion, see below in this Chapter.

[25] J.R. Spencer, "Suing the Police for Negligence: Orthodoxy Restored" [2009] *CLJ* 25, 26.

[26] *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225.

The claimant relied on the statements of principle contained in Lord Carswell's speech in *Re Officer L*[27], where Lord Carswell, having cited the leading passage of the judgment of the European Court of Human Rights in *Osman*, went on to identify two further points which have become clear in the subsequent development of the case law. The first is that this positive obligation arises only when the risk is "real and immediate"[28], a criterion which according to Lord Carswell "should be one that is not readily satisfied: in other words, the threshold is high."[29] The second point is that the obligation imposed upon the state is subject to a principle of proportionality in the level of precautions which they have to take to avoid being in breach of article 2.

Such a construction of the article 2 obligation is, it is submitted, striking for its resonance with the common law negligence inquiry, but is one that is borne out by approaches not only such as that of the House of Lords in *Re Officer L*, but also of the European Court of Human Rights itself. As such, the symbiosis between the European Convention on Human Rights and domestic tort law is a dual symbiosis being influenced by the two forces gravitating towards one another. Indeed, as the ECtHR itself stated in *Osman*, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life.[30]

As Lord Carswell observed in *Re Officer L* of the *Osman* formulation:

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[27] [2007] UKHL 36, [2007] 1 WLR 2135.
[28] In *Re W's Application* [2004] NIQB 67 (27 October 2004), Weatherup J observed that "... a real risk is one that is objectively verified and an immediate risk is one that is present and continuing" (at [17]).
[29] [2007] UKHL 36, [2007] 1 WLR 2135, [20].
[30] *Osman*, [116].

> The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation: it is not obliged to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations.[31]

Another key difference between the negligence standard and the Article 2 approach is the question of causation. In *Van Colle*, discussed below, Lord Brown drew the distinction between the approach of the English civil law and under the ECHR to issues of causation when he said:

> ...[A] looser approach to causation is adopted under the Convention than in English tort law. Whereas the latter requires the claimant to establish on the balance of probabilities that, but for the defendant's negligence, he would not have suffered his claimed loss ... under the Convention is appears sufficient generally to establish merely that he lost a substantial chance of this.[32]

Moreover, conspicuous by their absence from the *Osman* formulation are any policy considerations akin to the third stage of the *Glencar/Caparo* test.[33] Whilst the explicit inclusion of the phrase "judged reasonably" appears to allow a degree of latitude for the

[31] [2007] UKHL 36, [2007] 1 WLR 2135, [21].
[32] *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [138].
[33] See further Chapter 2.

assessment of such factors in determining the question of breach under article 2, the inquiry is heavily intermingled with the question of breach.

Given its significance for the inquiry of this thesis, the relationship between article 2 and the common law negligence test is afforded detailed separate consideration later in this Chapter in the context of analysing key recent judgments.

## D. ARTICLE 6 ECHR : The Approach of the *Osman* Court to Article 6

It was in relation to its approach to Article 6 ECHR and the relationship of that article with the domestic law of negligence that the decision in *Osman* was to strike a particularly controversial chord, at least amongst lawyers in common law legal systems within the ECHR framework.[34]

Article 6(1) provides, *inter alia*, that in the determination of his civil rights or any criminal charge, everyone is entitled to a "fair and public hearing". Implicit within this right is the right of access to a court.[35] The following passage of the Court's reasoning in *Osman* is significant in that evokes that definition of vindication indentified in Chapter 1 that involves the public airing of a grievance, regardless of the ultimate result:

> In [the Court's] view, it must be open to a domestic court to have regard to the presence of other public-interest considerations which pull in the

[34] See, for example, the comments of Lord Browne-Wilkinson in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 558-560. For extra-judicial writings of senior judges see for example Lord Hoffmann, "Human Rights and the House of Lords" (1999) 62 *MLR* 159. Lord Steyn, "Perspectives of Corrective and Distributive Justice in Tort Law" (2002) XXXVII *Ir Jur* 1, 10.
[35] *Golder v United Kingdom* (1979-1980) 1 EHRR 524.

> opposite direction to the application of the rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case. It is to be noted that in the instant case Lord Justice McCowan...appeared to be satisfied that the applicants, unlike the plaintiff Hill, had complied with the proximity test, a threshold requirement which is in itself sufficiently rigid to narrow considerably the number of negligence cases against the police which can proceed to trial. Furthermore, the applicants' case involved the alleged failure to protect the life of a child and their view that that failure was the result of a catalogue of acts and omissions which amounted to grave negligence as opposed to minor acts of incompetence. The applicants also claimed that the police had assumed responsibility for their safety. Finally, the harm sustained was of the most serious nature.

For the Court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police. In the instant case, the Court is not persuaded by the Government's argument that the rule as interpreted by the domestic court did not provide an automatic immunity to the police."[36]

Much of the significance of the above passage lies in the commitment the ECtHR espouses to the vindicatory nature of the Article 6 access right: regardless of what the outcome for the Osmans would have been in the domestic fora, the Court lays emphasis on the intrinsic value from a vindication perspective that would have accrued to them

[36] *Osman*, [151] – [152].

from a hearing "on the merits". Notwithstanding that this approach can be (and has been) strongly criticised for its failure to appreciate the nature of domestic proceedings in negligence, the attitude it evinces to vindication is important in that provides evidence of a judicial approach to vindication that stretches beyond the notion of vindicatory awards or damages, for example, encompassing instead a broader notion of public vindication.

**The ECtHR's *Volte Face* in *Z***

The Article 6 guarantee has long been understood as not purporting to encroach upon the terrain of the substantive content of domestic law. It was in relation to this latter point that the approach in *Osman* provoked the reaction it did. For the Court held, "to the consternation of many English lawyers"[37] that the denial of a cause of action in negligence amounted to the grant of a blanket immunity to the police in respect of negligence claims and this was a violation of article 6. This aspect of *Osman* has been much discussed elsewhere both in case law and academic literature, and both the criticism ventilated therein and the subsequent *volte face* of the European Court itself in *Z v United Kingdom*[38] need not be rehearsed at length here. Two important points should, however, be noted. First, it is significant that the Court in *Z* did not explicitly overrule *Osman* or proclaim as wrong the approach taken therein to the impact of article 6 on the domestic law of negligence. Consider, for example, the following key extract from a much-quoted passage of the Court's ruling in *Z*:

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[37] The Rt Hon Lady Justice Arden DBE, "Human Rights and Civil Wrongs: Tort Law under the Spotlight" (Hailsham Lecture 2009, delivered 12 May 2009, available at http://www.judiciary.gov.uk/docs), p. 9.
[38] [2001] ECHR 333, (2002) 34 EHRR 97.

> The Court is satisfied that the law of negligence as developed in the domestic courts ... includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element *in this case* does not disclose the operation of an immunity. *In the present case*, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from immunity but from the applicable principles governing the substantive right of action in domestic law.[39]

In the italicised words in this passage, there are indications that the "turnaround" in which the Court was engaging post-*Osman* was one that was appropriate on the facts of *Z*, but that may not be warranted in other cases. Accordingly, the effect of the article 6 approach in *Osman* may continue to linger over domestic rules of negligence. In this regard the graphic description by Hickman of Article 6 as casting an "uncertain shadow"[40] over domestic tort law seems apt.

A second point to note in relation to the approach in *Z* is that one of the key factors[41] influencing this decision on the part of the ECtHR was what McIvor has termed the "multi-functional status of the defendant local authority in *Z*"[42]. The European Court attached significance to the fact that the immunity complained of in *Z* concerned only one single aspect of the public authority's powers and responsibilities in respect of the

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[39] *Ibid.*, [100] (the italics are mine).
[40] Tom Hickman, "The "Uncertain Shadow": Throwing Light on the Right to a Court under Article 6(1) ECHR" [2004] *PL* 122.
[41] Another was undoubtedly the then very recent English case law following *Osman*: see below n 44.
[42] Claire McIvor, *Third Party Liability in Tort* (Oxford: Hart Publishing, 2006), 117.

children in its care. Accordingly, this aspect of domestic negligence law did not amount to "an arbitrary removal of the court's jurisdiction to determine a whole range of civil claims"[43]. The Court was also clearly influenced by the responses to *Osman* manifested in the English courts' attempts at displaying a more nuanced approach to Article 6 concerns.[44] There is, however, a deep irony here, in that later English case law involving the police, examined in the Negligence Chapter of this thesis, reveals how the courts have reverted to broad brush exclusionary zones precluding liability of the police due to broadly and often under-elaborated fears of "defensive policing". In this way, McIvor correctly criticises the response of the English courts to the *Osman* and *Z* trajectory, a response which she describes as having involved the courts moving "in completely the opposite direction".[45]

As a result of the controversy provoked by the Article 6 approach in *Osman*, and the subsequent shift taken in *Z*, it seems fair to describe the approach of the Court in the former case to the Article 6 issue as ""a moment of aberration".[46] Notwithstanding this, however, it is nonetheless correct to observe, as Arden LJ did in *Jain v Trent Strategic Health Authority* when that case was in the Court of Appeal, that the Human Rights Act

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[43] *Z v United Kingdom* [2001] ECHR 333, (2002) 34 EHRR 97, [98].

[44] As to the recent jurisprudence, the court referred in particular to then very recent decision of the House of Lords in *W v Essex County Council* [2000] 2 WLR 601 where the House of Lords allowed an appeal from the decision of the courts below to strike out a negligence action by foster parents against a public authority for the consequences of harm caused by the foster child to members of the family in which he had been placed; and *Barrett v Enfield London Borough Council* [2001] 2 AC 550, where the House of Lords similarly refused to strike out a negligence action arising from inadequate care received by a child when in the care of a local authority.

[45] Claire McIvor, *Third Party Liability in Tort* (Oxford: Hart Publishing, 2006), 118, citing *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373 and *Brooks v Commissioner of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495, discussed in detail in the context of negligence in Chapter 2.

[46] *Per* Lord Hoffmann in *R v G* [2008] UKHL 37, [2009] 1 AC 92, [4]. See further Lord Steyn, "Perspectives of Corrective and Distributive Justice in Tort Law" (2002) XXXVII *Ir Jur* 1, 10.

has "encourage[d] courts to identify more specific policy factors and to consider the interests of the individual affected by the decision-making by the public authority. This led the House of Lords in *D* to consider whether to shift the emphasis from duty to breach but the majority largely rejected this. In the result, the duty of care remains a major control mechanism for the purpose of controlling the potential opening of the floodgates in this field."[47]

It is submitted that, in 2009, *Osman* is now of most significance in regard to the article 2 formulation and the interaction of that formulation with the potential for liability in negligence being imposed upon a public authority. This issue is explored more thoroughly below in the context of the discussion of how the ingredients of domestic tort law can be influenced by the vindicatory principles of the ECHR.

## E. ARTICLE 8 ECHR: THE APPROACHES OF THE ENGLISH AND STRASBOURG COURTS IN *WAINWRIGHT*

### Distinctive Features of Article 8 of Relevance in Vindication Context

Article 8 provides another striking example of the potential for the ECHR to influence the development of the common law as it relates to public authority defendants. Although the term is not precisely defined[48], "respect" clearly involves positive obligations, which positive obligations may extend to the adoption of measures designed to secure respect of private life even in the sphere of the relations of individuals between themselves.[49]

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[47] [2007] EWCA Civ 1186, [64].
[48] *Botta v Italy* (1998) 26 EHRR 241.
[49] *X & Y v United Kingdom* (1985) 8 EHRR 235.

As attempted earlier in this Chapter in relation to article 2, it may helpful to identify some key differences between the article 8 regime and the potential for a privacy-related action in tort law against a public authority defendant.

Amongst the most significant differences is that the article posits no clear distinction between the separate questions of duty and breach which, as already analysed in this thesis, form core constituent ingredients of the cause of action in torts such as negligence.[50] While a rough classification can be offered based on the wording of the article itself – with the duty stage being mirrored in the positive obligation laid down under Article 8(1) to protect private life, and the breach issue being clearly relevant in determining whether the failure to meet the positive obligation can be justified by reference to the requirements of 8(2) – the precise relationship between the two is elusive. This point is a significant one, given the impact Article 8 has exerted on the common law: the constituent ingredients of common law causes of action may as a result be significantly recalibrated owing to the pressure from a parallel regime in which the separation between those constituent ingredients is considerably less strict. In order to consider this point further, a case study is now undertaken of what is probably the most significant case in recent years concerning the relationship between article 8 and tort law, a case that was litigated in the House of Lords and that ultimately culminated in the European Court of Human Rights.[51]

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[50] See above, Chapter 2.
[51] *Wainwright v United Kingdom* [2006] ECHR 807, (2007) 44 EHRR 809.

By way of background, the following point should be made. Initially following the coming into force in the United Kingdom of the Human Rights Act, it appeared that Article 8 may have the capacity significantly to influence the development of domestic tort law. Perhaps the apogee of such judicial willingness to infuse domestic tort law with Article 8 considerations is to be found in the following *obiter dictum per* Lord Woolf CJ, in *A v B and C*[52]:

> [Articles 8 and 10] have provided new parameters within which the courts will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because under s6 of the 1998 Act, the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which arts 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.[53]

### *Wainwright*[54]: The Background

The claimants, a mother and son, were strip-searched for drugs on a prison visit in 1997. The search was not conducted according to the relevant Prison Rules, and the claimants

[52] [2002] EWCA Civ 337, [2002] 2 All ER 545.
[53] *Ibid.*, [4].
[54] *Wainwright v The Home Office* [2003] UKHL 53, [2003] 3 WLR 1137.

were humiliated and distressed. No drugs were in fact found. The second claimant, aged 21, who was mentally impaired and suffered from cerebral palsy, developed post-traumatic stress syndrome. They claimed damages for trespass, and the second claimant claimed, in addition, damages for battery. At first instance, the judge held that trespass to the person, consisting of wilfully causing a person to do something to himself which infringed his right to privacy, had been committed against both claimants, and, further, that trespass to the person, consisting of wilfully causing a person to do something calculated to cause harm to him, namely infringing his legal right to personal safety, had been committed against the second claimant, as had battery. The Court of Appeal allowed the Home Office's appeal against the finding of trespass, dismissed the first claimant's claim and reduced the award of damages to the second claimant.

On appeal to the House of Lords, two arguments were advanced as to how English law could be developed having regard to Article 8 influences. The first was that, in order to enable the United Kingdom to conform to its international obligations under ECHR, the House of Lords should declare that there is (and in theory always has been) a tort of invasion of privacy under which the searches of the Wainwrights were actionable and damages for emotional distress recoverable. Alternatively, counsel proposed that if "a general tort of invasion of privacy seemed too bold an undertaking"[55], the House of Lords could comply with the ECHR in respect of this particular invasion by an extension of the principle in *Wilkinson v Downton*.[56] The appellants were unsuccessful on both fronts. The

[55] Argument of Counsel as quoted by Lord Hoffmann in *Wainwright v The Home Office* [2003] UKHL 53, [2003] 3 WLR 1137, [14].
[56] [1897] 2 QB 57.

approach of the House of Lords on the relationship between the common law of tort and Article 8 is perhaps best captured by Lord Hoffmann in the following passage:

> The English common law is familiar with the notion of underlying values - principles only in the broadest sense - which direct its development. A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.[57]

The approach in *Wainwright* was relied upon in *Watkins v Secretary of State for the Home Department*[58] – a case already analysed in detail in Chapter 3 – where the ingredients necessary to establish the tort of misfeasance in public office (and, in particular, whether material damage must be established) were in issue. Lord Rodger of Earlsferry stated:

> The Convention rights form part of our law and provide a rough equivalent of a written code of constitutional rights… In general, at least, where the matter is not already covered by the common law but falls

[57] *Per* Lord Hoffmann in *Wainwright*, [31].
[58] [2006] UKHL 17, [2006] 2 AC 395.

> within the scope of a Convention right, a claimant can be expected to invoke his remedy under the Human Rights Act rather than to seek to fashion a new common law right.[59]

### *Wainwright* in the ECHR

The applicants in *Wainwright* submitted that the strip-searching infringed Article 3 and/or Article 8 ECHR. They argued that the conduct of the prison officers departed from procedure to such an extent that it was actuated by a desire to cause them humiliation for questionable motives. As well as the improper touching of the second applicant and the failure to provide them with the consent forms before the search, they referred to the fact that the first applicant suspected that she could be seen through the window by people outside. The experience was, they claimed, highly distressing and constituted degrading treatment contrary to Article 3 in the circumstances.

The applicants further submitted that Article 8 was engaged as they were seeking to visit a member of their family, the first applicant's son and the second applicant's half-brother and emphasised the importance of the visiting regime in prison for maintaining family links. They denied that there was any element of waiver in the fact that they did not refuse to undergo the searches, pointing out that the domestic courts had found no real consent in law. They had to comply with the condition in order to exercise their right to visit: it was thus nrealistic to assert that they could have objected to the way in which the searches were carried out. The applicants argued that that the searches were not "in accordance with the law" within the meaning of Article 8, as the Prison Rules were not

[59] *Ibid.*, [64].

drafted with sufficient precision to enable persons to know the reasons when they might be subjected to a search or the procedure to be followed. Nor were the searches proportionate. They rejected the wide margin of appreciation claimed by the State, emphasising the particularly invasive nature of the interference. There was no justification for a blanket order of search which regarded these applicants as a risk. Notwithstanding the difficulty of identifying drugs smugglers, they argued that the authorities should make a reasonable attempt to identify the likely suspects and the low-risk categories of visitors. It was inherently unlikely, they argued, that a middle-aged woman and a handicapped person who required constant supervision would attempt to bring in drugs. The manner in which the searches were carried out in breach of the prison's own internal guidelines also rendered the interferences disproportionate.

In relation to the Article 8 argument, the European Court of Human Rights upheld the applicant's claim, holding that the searches were not proportionate to that legitimate aim in the manner in which they were carried out. The Court stated:

> Where procedures are laid down for the proper conduct of searches on outsiders to the prison who may very well be innocent of any wrongdoing, it behoves the prison authorities to comply strictly with those safeguards and by rigorous precautions protect the dignity of those being searched from being assailed any further than is necessary. They did not do so in this case.[60]

[60] *Wainwright v United Kingdom* [2006] ECHR 807, (2007) 44 EHRR 809, [41].

The ultimate outcome in *Wainwright* thus resulted in the vindication of the plaintiffs' rights under the ECHR, but their victory before the Strasbourg Court served only to underline the starkness of the division between the domestic common law of the United Kingdom concerning the tortious liability of public authorities (as epitomised by the House of Lords decision in *Wainwright*) and the capacity for the same wrongdoing to trigger a successful claim under the ECHR before the Strasbourg court. A position of marked divergence, as opposed to any semblance of convergence, between the ECHR and domestic tort law was thus heavily reinforced. Such a result provokes the question of when, if at all, positive *convergence* may and should take place as between the ECHR and the domestic tortious liability of public authorities. It is to this difficult question that our attention now turns, in analysing recent case law from the United Kingdom. This analysis will in turn provide the framework through which detailed study can be undertaken in the next Chapter of this question of possible convergence in the specific context of the negligence liability of the police and its relationship with Article 2 ECHR.

## F. INFUSING DOMESTIC TORT LAW WITH ECHR VINDICATION: FOCUS ON NEGLIGENCE ACTIONS AGAINST PUBLIC AUTHORITIES IN THE HUMAN RIGHTS CONTEXT

### Diametrically Opposed Positions on a "Live Issue"

Attention will now be focused upon a "'live' issue at the moment"[61], the relationship between common law liability in negligence and the remedy that may be available under

[61] Alastair Mullis and Donal Nolan, "Tort" [2005] *All ER Annual Rev* 472, 474. For discussion of the possible impact of the Convention on common law duties of care in Basil Markesinis and Simon Deakin, *Tort Law* (6th ed, Oxford: OUP, 2007) 132-137.

the incorporating instruments in Ireland and the United Kingdom (ECHRA 2003 and HRA 1998 respectively) to an individual whose Convention rights have been violated.

Put briefly, two diametrically opposed positions may be taken on this issue. One is that since a breach of the plaintiff's Convention rights entitles him or her to a direct remedy under the incorporating legislation in any case, there is simply no need to develop the law of tort so as to confer redress under the common law. By contrast, there is the view that it would reflect poorly on the law of tort in a contracting state if it did not provide a remedy to such a plaintiff, thereby forcing him or her to rely on a direct claim under the Act instead. It should be noted, in this context, that there are important issues of strategy and litigation management that distinguish the two regimes. First, there is the question of limitation periods: under the 2003 Act, the limitation period for instituting proceedings is just one year. Moreover, since the Act requires the Irish courts in assessing claims under the 2003 Act to have regard to the principles espoused by the European Court of Human Rights, the level of damages awarded is likely to be considerably more modest than that available to litigants having recourse to the tort of negligence.[62]

Since the House of Lords' decision in *Wainwright*, analysed above, apparently sounded the death knell for the hand-in-hand development of the common law with the ECHR, there have in recent years been significant developments in the English courts in relation to the question of whether the coming into force of the Human Rights Act 1998 in that

[62] In the United Kingdom context, this point is made by, *inter alios*, Jane Wright, *Tort Law and Human Rights* (Oxford: Hart Publishing, 2001), 44 and Claire McIvor, *Third Party Liability in Tort* (Oxford: Hart Publishing, 2006), 96. The issues surrounding the approach to the award of damages by Irish courts considering claims under the 2003 Act is further discussed below in this Chapter.

jurisdiction could affect previous approaches taken by the courts precluding the imposition of liability in negligence upon a public authority. These developments are now appraised in order to assess the extent of the vindicatory impact of the incorporation of the Convention on domestic tort law – an appraisal which is clearly of strong relevance in an Irish context.

It will be recalled that in 2005 the House of Lords delivered judgment in the case of *JD v East Berkshire Community Health NHS Trust & Ors*[63], a case that was discussed in Chapter 2. *JD* provides "a graphic example of the impact of *Z* [*v United Kingdom*]".[64] In *JD*, which comprised a number of appeals arising out of facts that pre-dated the coming into force of the Human Rights Act, a majority of the House of Lords[65] upheld the ruling of the Court of Appeal[66], that a local authority, when exercising through social workers its duty to protect children from abuse, owed no duty of care to those children's parents. It will be recalled that the Law Lords strongly rejected the argument that a duty could be owed, chiefly on the basis that to recognise the existence of a duty would be to undermine the existing and more central duty owed by the authority to the children in its care, namely, to protect those children from the risk of parental abuse when suspected.[67]

One important feature of the *East Berkshire* litigation was that, at the time of the occurrence of the events giving rise to those proceedings, the UK Human Rights Act

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[63] [2005] UKHL 23, [2005] 2 AC 373.
[64] Richard Drabble QC, "Introduction to the Human Rights Act 1998", Chapter 1 in Richard Drabble QC, James Maurici and Tim Buley, eds, "Local Authorities and Human Rights" (Oxford: OUP, 2004), 1, 2 (referring to the Court of Appeal judgment in *JD*).
[65] Lord Bingham dissenting.
[66] [2003] EWCA Civ 1151, [2004] QB 558.
[67] See in particular the judgment of Lord Nicholls of Birkenhead, [85] and [86], and that of Lord Rodger, [110]. See also *per* Lord Brown, [129] and [138], and Lord Steyn, [96], agreeing with Lord Rodger and Lord Brown.

1998 had not yet come into force. In the Court of Appeal judgment in *East Berkshire*, consideration had been afforded to the relevance of the Human Rights Act on this point, in that the Court was invited to consider whether the enactment of the HRA, notwithstanding its non-application to the facts of that case, could or did affect the common law principle of no duty of care to parents. It will be recalled that the Court of Appeal was strongly of the view that the coming into force of the HRA did not require the recognition of a duty towards parents in such circumstances. On the appeal to the House of Lords, the Law Lords did not deal specifically with the point considered by the Court of Appeal. Notwithstanding this, the judgments of the Law Lords had included numerous references to the Human Rights Act, with the effect that it certainly appeared that the majority holding in the House of Lords in *East Berkshire* was clearly intended to apply to cases in which the conduct impugned had occurred subsequent to the coming into force of the Human Rights Act.

It was this conclusion that was, however, subsequently the subject of controversy in the appeal to the Court of Appeal in *Lawrence v Pembrokeshire County Council.*[68] The claimant contended that the HRA 1998 required a development of the common law to recognise the existence of a duty to parents which had been rejected less than two years previously by the House of Lords in *East Berkshire*. The judgment of the Court of Appeal provides important insights into the interaction between domestic tort law and the ECHR, and the capacity of the latter to imbue the former with a vindicatory function.

[68] [2007] EWCA Civ 446, [2007] 1 WLR 2991, [2007] HRLR 30.

**Interaction between domestic tort law and influence of ECHR: The Approach in *Lawrence***

In *Lawrence*, the claimant's family, including the father of her children, had come to the attention of the defendant's child protection team in about 1999. As a result of sporadic and inconclusive attention from various members of that team, the council placed the children on the child protection register as being at risk of physical and/or emotional harm from either or both the parents. The council caused them to remain on the register for about 14 months before it finally removed them from it in June 2003. Mrs Lawrence claimed that the conduct of the council not only wrongly interfered with their family life, but also caused her psychiatric injury.

An Ombudsman upheld the claimant's complaint of maladministration and as a result she was paid £5,000 in compensation by the council.

Mrs Lawrence then instituted proceedings against the council under sections 6 and 7(1)(a) of the Human Rights Act, for breach of her Article 8 right to respect for her family life with her four children, and in negligence for personal injury. The claimant argued that the coming into force of the Human Rights Act required a development of the common law to recognise the duty to parents which had been rejected by the House of Lords in *East Berkshire*.

In the proceedings before Field J, Mrs Lawrence's pleaded complaints were the same under both heads of claim. Whilst the council acknowledged that she had an arguable claim under Article 8, it relied on the one year limitation period imposed by section 7(5)(a) of the Human Rights Act, which had elapsed before she brought the proceedings

(a similar limitation period is laid down in s. 3(5) of the Irish 2003 Act). As to the claim in negligence, the council contended that it was bound to fail because of the rulings in *East Berkshire* that the law does not recognise a duty of care by healthcare or local authorities to parents against whom they suspect, in good faith but erroneously, of child abuse.

Field J held that the Human Rights Act did not require a modification of the existing law, since to do so might deflect the professional investigator from deciding what was in the best interests of the child. It was for the claimant to establish that the council owed her a common law duty, not for the council to justify the absence of such duty.

Of particular note in the judgment of the Court of Appeal is the emphasis placed on the distinction between the art 8 right to respect for family life and the putative right of a claimant at common law to a duty of care. The distinction was that art 8 was not concerned with the *establishment of a duty* but instead with a *threshold of interference* by a public authority with family life.[69] To create a duty of care on the basis of art 8 would effectively require the local authority and/or social workers concerned to prove, by reference to their concern for the welfare of the children, that they were not in breach of such duty. To do so would amount to "a plain distortion of the common law action in negligence".[70] In the view of both Field J and the Court of Appeal, the advent of art 8 to domestic law did not undermine or weaken as a matter of public policy the primacy of the need to protect children from abuse or the risk of abuse from, among others, their parents. The common law had generally sought to avoid the imposition of duties potentially in

[69] See in particular the judgment of Auld LJ in *Lawrence*, [32].
[70] *Per* Auld LJ, [38].

conflict with each other. The fact that there were such conflicting interests in child protection cases did not mean that social workers could not have regard to both conflicting interests and yet behave professionally. It was difficult to see why a different rule should apply to social workers from that which would apply to police investigating suspected child abuse.

*Lawrence* thus constitutes a strong rejection of an argument for "harmonious infusion" of the common law of negligence with Article 8. It does so on the basis of the critical distinction between the key constituent ingredients of negligence and the more streamlined vindicatory inquiry of Article 8. As such, the judgment recognises distinctive and important differences between the two regimes, sounding a note of caution about superimposing one regime upon the other. This in turn prompts reflection upon the extent to which the ECHR *can* exert an influence upon the common law position. In this next section, it will be argued that, notwithstanding the firmness with which the infusion argument in *Lawrence* was rejected, subsequent developments manifest more subtle ways in which the confluence called for by the claimant in *Lawrence* can, at least to a significant extent, be achieved. In order to advance this argument, recourse is had to the most prominent recent development in the House of Lords jurisprudence in this area at the time of writing: its decision in *Van Colle*. The material that follows not only builds upon the foregoing analysis of *Lawrence*, but seeks to augment the treatment of the tort of negligence in Chapter 2 herein.

## G. THE IMPLICATIONS OF *VAN COLLE* AND *SMITH* FOR INFUSING DOMESTIC TORT LAW WITH VINDICATORY AIMS

### The Spectre of *Hill*

It is now over twenty years since the decision of the House of Lords in *Hill v Chief Constable of West Yorkshire*[71], analysed in detail in Chapter 2, where, as we have seen, the Appellate Committee of the House of Lords, affirming the approach of the Court of Appeal and that at first instance, famously held that public policy militated against the imposition of a duty of care in negligence upon the police force in investigating crime. Notwithstanding the recent (albeit to an extent qualified[72]) affirmation by the House of Lords in *Brooks v Metropolitan Police Commissioner*[73] of its earlier ruling in *Hill*, it is submitted that a number of still more recent decisions of both the Court of Appeal and the House of Lords cast doubt over the sustainability of the approach taken by the House of Lords in *Hill*'s case. In particular, two discernible trends in the recent jurisprudence provoke the argument, to be advanced in the analysis below, that this area of domestic law has been dramatically infused by the vindicatory pressures of the ECHR.

In this section, two recent cases are selected as case studies and accorded detailed treatment for the purposes of advancing this argument. It is particularly appropriate that the two cases are treated together since, although they were the subject of separate judgments both at first instance and in the Court of Appeal, the two cases were heard as conjoined appeals in the House of Lords, and judgments were delivered together in both cases. These two cases are particularly important to the theme of rights vindication

[71] [1989] AC 53.
[72] See discussion of this aspect of *Hill* in Chapter 2.
[73] [2005] UKHL 24, [2005] 1 WLR 1495.

through tort law being explored in this thesis. As one commentator has recently observed, the two cases are significant in that they indicate "how far victims' rights have, or have not, been given substance within the criminal process".[74] It is, of course, the vindication of these rights within the *tort* process with which the present Chapter is concerned. The two cases demonstrate the capacity of the European Convention on Human Rights to revivify and reinvigorate the type of case which, under the *Hill* orthodoxy, previously stood no prospect of success. As such, they enable a study to be undertaken of the way in which the vindication of rights can be achieved in the context of the tortious liability of public authorities. As one commentator has observed, the judgment in the first of these cases, *Van Colle*, "provides us with the clearest account to date of the relationship between [the Human Rights Act] and the common law action for negligence against a public authority".[75]

**Analysis of Two Distinct Trends in Complementarity Debate**

In engaging in this study, two distinct trends are identified. The first of these trends (which, for convenience, can be called the "ECHR trend") is the availability of relief by way of proceedings under the incorporating legislation (the 2003 Act in this jurisdiction; the 1998 Act in the United Kingdom) when a claimant alleges a breach by the police of his or her rights under the European Convention on Human Rights (ECHR). Although it is ten years since the UK's Human Rights Act received royal assent, it is only in an

[74] Mandy Burton, "Failing to Protect: Victims' Rights and Police Liability" (2009) 72 *MLR* 272, 273.
[75] Claire McIvor, "The Positive Duty of the Police to Protect Life" (2008) 24 *PN* 27, 28. It should be noted that this comment was made in the context of an article focusing on the Court of Appeal's *Van Colle* ruling, predating that of the same Court in *Smith v Chief Constable of Sussex Police*, analysed below, and, of course, the House of Lords judgments in both cases.

analysis of case law decided in approximately the last year that the full breadth of its implications for *Hill* can now be appreciated.

In the context of Article 2 ECHR, it is has been clear since the decision of the European Court of Human Rights in *Osman v United Kingdom*[76], already analysed above[77], that the nature of the positive obligation laid down in article 2 means that this article can be breached not only in circumstances of intentional killing but also in the context of a failure of a contracting state to act to protect the life of an individual.[78] Since the coming into force of the Human Rights Act in that jurisdiction (and, indeed the ECHR Act 2003 in this jurisdiction), litigants can now institute civil proceedings in the domestic courts for the breach of article 2 occasioned by the failure of the police force to adhere to this positive obligation. Recent cases have focused attention on the manner in which litigation strategy is being tailored to avoid the strictures of *Hill* and its policy prohibition. Thus, the ECHR trend not only exposes *Hill* as conceptually anomalous in terms of the framework of rights vindication – it has now shown it to be diminished in terms of its practical influence. While this may be regarded by some as merely an unremarkable consequence of the overlap of two different regimes for potential redress against the police, it is submitted that the effects of this trend require analysis. This is because the explicit basis for *Hill* is in public policy, and thus its emasculation in this manner is apt to raise questions both about the sustainability of the decision in *Hill* and the future development of the law of negligence in relation to public authorities. Accordingly, what these developments in the case law signify is the possibility of domestic negligence law

[76] [1998] ECHR 101, (1998) 29 EHRR 245.
[77] See above in this Chapter.
[78] Discussed in more detail in Chapter 2.

being affected and influenced by vindication through the European Convention on Human Rights.

The second and related trend, although itself influenced by the ECHR, is distinct in nature from the ECHR trend, and can be characterised as the "ECHR-inspired trend". It involves the countenancing by the courts of negligence actions against the police, though purporting to salute the correctness of *Hill*. This countenancing of potential actionability is achieved through a heightened-intensity scrutiny of the proximity stage of the negligence inquiry which seeks to distinguish *Hill* on the basis of the closeness of the relationship between the claimant and the police force – a closeness not present in Hill's case, since, as we have seen in Chapter 2, Jacqueline Hill was one of a vast number of members of the public at risk. The difficulty with this new approach, however, is that the question of proximity between Ms Hill and the police force, although it was treated in detail by Lord Keith in his judgment in *Hill*, did not form part of the *ratio decidendi* of that case. The true *ratio* of *Hill* was at once narrower and broader than this: it was that public policy concerns dictated that no duty of care should be imposed. It is submitted that for the English courts to couch their analysis in terms of proximity as a way of overcoming *Hill* is to effectively decline to follow a binding precedent.

It will be argued that the effects of both the ECHR trend and the ECHR-inspired trend discernible in these recent cases has been to create an anomalous position in this area of the tortious liability of public authorities. The inevitable result is that the formal position as adopted in *Hill* – that public policy militates against the imposition of a duty of care in

negligence on the police force – is increasingly untenable. This is because, as described above, the effect of developments in the context of article 2 ECHR via the ECHR trend means that it is today a rather misleading proposition from the perspective of that regime. But even when viewed from the perspective of negligence law itself, the *Hill* position is now increasingly difficult to sustain owing to the second or "ECHR-inspired" trend, that is, the willingness currently being manifested by the courts as a response to vindicatory pressures, to conduct an intensely fact-specific inquiry on the issue of proximity.

Having analysed in detail one significant example from the recent jurisprudence of each of these trends, this analysis concludes that the cumulative effect of these trends is that *Hill* has lost both its theoretical and practical force: this area of the common law should be infused with the ECHR vindication of rights.

**The ECHR Trend: *Van Colle v Chief Constable of Hertfordshire Police*[79]**

Tort litigation in the United Kingdom has witnessed a number of examples of the ECHR trend in recent years, with prominent judgments of the House of Lords and Court of Appeal expressly giving consideration to the relationship between tort law and the HRA. As we have seen, in the context of the trend's interface with the negligence liability of public authorities, the decision of the Court of Appeal in 2007 in *Lawrence v*

[79] [2008] UKHL 50, [2008] 3 WLR 593, [2009] 1 AC 225 noted J.R. Spencer, "Suing the Police for Negligence: Orthodoxy Restored" [2009] *CLJ* 25, allowing an appeal from the decision of the Court of Appeal ([2007] EWCA Civ 325, [2007] 1 WLR 1821, noted J.R. Spencer, "Tort Law Bows to the Human Rights Act" [2008] *CLJ* 15.

*Pembrokeshire City Council*[80], analysed above, appeared to have halted its march somewhat.

It is submitted, however, that the clearest example of the capacity of the ECHR trend to provoke a tension in the line of negligence case law is the divergence of approach between the Court of Appeal and the House of Lords in the cases of *Van Colle v Chief Constable of Hertfordshire Police*[81] and *Smith v Chief Constable of Sussex Police*[82].

In the House of Lords, both cases were dealt with together: thus, for clarity of exposition, an overview of each case will be provided at both the first instance and Court of Appeal stages, with the judgment of the House of Lords in both cases then being examined.

***Van Colle*: The Background**

The deceased, Giles Van Colle, was shot dead two days before he was due to give evidence as a witness for the prosecution at the trial for theft of the accused, who was convicted of his murder. In the weeks before his death Van Colle and other witnesses were subjected to intimidation, but no steps were taken to protect him. The police officer in charge of the theft case was not aware of the relevant witness protection policy. The claimants, the deceased's parents, brought an action against the defendant chief constable for failing to protect their son from the risk of serious harm of which the officer in charge of the theft investigation was or should have been aware.

It should be noted at this point that although the issue was not determined or addressed in any detail the prospect of bringing a negligence claim in these circumstances was

[80] [2007] EWCA Civ 446, [2007] 1 WLR 2991.
[81] [2008] UKHL 50, [2008] 3 WLR 593, [2009] 1 AC 225.
[82] *Ibid.*

described as being "fraught with difficulty".[83] At the Court of Appeal level, for example, Sir Anthony Clarke MR referred to the "critical distinction"[84] between what it termed the solution "so far" adopted by the common law and the position under the ECHR. Under the common law position, the view of the Court of Appeal was that, on the authorities as they currently stand, no common law duty of care would be recognised on the part of the police. The authorities relied upon in support of this proposition were *Hill* and *Brooks*.[85] The Court contrasted this position with the positive obligation in Article 2 ECHR, which was the source for the applicants' claim.[86]

The applicants contended that by failing to protect the deceased, the police officer had failed in his duty to act compatibly with the right to life in article 2 and the right to respect for a private life in article 8 of the ECHR. At trial, the first issue was whether the failure by the police to protect Mr Van Colle was sufficiently blameworthy to satisfy the *Osman* breach of article 2 test set out earlier, and, if so, the second was whether an award of damages was "necessary to afford just satisfaction" within the meaning of section 8 of the Human Rights Act 1998.

The claimants succeeded on both issues at trial before Cox J. She held that the State's positive obligation under Article 2 to protect life included a positive obligation in certain circumstances to adopt preventative, operational measures in order to safeguard an

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[83] [2007] EWCA Civ 325, [2007] 1 WLR 1821, *per* Sir Anthony Clarke MR, [9].
[84] *Ibid.*, [62].
[85] It should be said that the Court of Appeal disagreed with the trial judge on this issue, with the latter having suggested that the recognition of a common law duty of care in this instance would have been entirely consistent with *Hill* and *Brooks*.
[86] Pursuant to section 6 of the HRA 1998, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, and section 8 of the same Act, which empowers the courts to award damages against the public authority if it breaches section 6.

indentified individual whose life was at risk. This obligation came into being when it was established that the state authorities knew or ought to have known at the material time of the existence of a real and immediate risk to the life of the individual. Cox J found that the police officer in charge of the case knew, or ought to have known, that the deceased was at a special risk of harm and that, in failing to take measures that would guard against that risk, he was in breach of Article 2.

On appeal to the Court of Appeal, the Chief Constable challenged the judge's decisions on both liability and quantum. He argued that, on the facts as pleaded, a duty had neither been owed nor breached and that the wrong test for causation had been applied. In accordance with the ordinary common law approach to causation, it was necessary to show that but for the infringement of Art 2 the deceased would have survived. On the question of quantum, the Chief Constable submitted that the judge's award was too high. Allowing the appeal in part, the Court of Appeal upheld the findings of the judge on liability but found that the amount of damages awarded was excessive in the circumstances. It accordingly reduced the award from £50,000 to £25,000.

**Implications of the Approach of the Court of Appeal in *Van Colle***

The decision of the Court of Appeal in *Van Colle* harbingered significant financial consequences for the police – according to the Court of Appeal, a number of separate actions were awaiting its outcome.[87] Professor Spencer in commenting on the Court of Appeal judgment and its implications for the House of Lords ruling in *Hill* observed that the effect of *Van Colle* "[a]t a theoretical level… means that an important House of Lords

[87] *Per* Sir Anthony Clarke MR, [11].

decision, though not formally overruled, has for most practical purposes been gutted."[88] In a similar vein, Claire McIvor has observed that the judgment in *Van Colle* "provides us with the clearest account to date of the relationship between [the Human Rights Act] and the common law action for negligence against a public authority".[89] Paraphrasing counsel for the defendant in *Van Colle*, she observes that "the HRA has thus not so much brought rights home as created a parallel system of remedies which creates a real tension between the HRA and the common law."[90]

Because of the ECHR trend, the type of factual background to a case such as *Hill* or *Van Colle* has seen a dramatic shift in the nature of the judicial inquiry: the focus is now on whether the police could reasonably have prevented the crime, and is no longer on the question of whether the police can *as a matter of policy* be sued in negligence if they could have so prevented it. Notwithstanding that this shift has taken place via a conduit that is outside the framework of the law of negligence – the HRA – its effect on the law of negligence is no less profound. This was the situation before *Van Colle* was appealed to the House of Lords[91], whose judgment is dealt with below. Before turning to that judgment, however, it is necessary first to analyse the case with which *van Colle* would

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[88] J.R. Spencer, "Tort Law Bows to the Human Rights Act" [2008] *CLJ* 15, 16.
[89] Claire McIvor, "The Positive Duty of the Police to Protect Life" (2008) 24 *PN* 27, 28. It should be noted that this comment was made in the context of an article focusing on the Court of Appeal's *Van Colle* ruling, predating that of the same Court in *Smith v Chief Constable of Sussex Police*, analysed below. It is submitted that the latter judgment may now be said to provide the clearest of such accounts.
[90] McIvor, *loc cit*, 29, paraphrasing counsel for the defendant in *Van Colle*.
[91] It should be noted that leave to appeal to the House of Lords – as reported in [2007] 1 WLR 2021 – was there said to have been refused. *Van Colle* was, however, subsequently joined with a later case, *Smith*, analysed below, in which both appeals to the House of Lords were heard together.

be paired in the House of Lords, *Smith v Chief Constable of Sussex Police*.[92] The House of Lords judgments in the two cases will then be analysed together.

***Smith v Chief Constable of Sussex Police***

Stephen Smith was attacked with a claw-hammer and seriously injured by his former partner, Gareth Jeffrey. He claimed that the local police in Brighton had been repeatedly told by him that Jeffrey was threatening to kill him but had done nothing to stop it happening. Jeffrey, arrested for attempted murder, was convicted of making threats to kill and causing grievous bodily harm with intent: that is, he would have been guilty of murder had Mr Smith died.

Because he was outside the one year time limit for suing for breach of his Convention rights[93], Mr Smith brought a claim in negligence against the Sussex police. He claimed that from the time of his initial complaint the Sussex police had ample evidence and information to arrest Jeffrey for making threats to kill; that they had no excuse for not doing so; that it was apparent that if they left Jeffrey at large he might well attempt to carry out his threats; and that this, predictably, was what he did.

There are important discernible traces of the ECHR trend in both the procedural progression of *Smith* up to the Court of Appeal and the manner in which the case was litigated on behalf of the plaintiff. Turning first to the procedural history, on the defendant's application the claim was initially struck out by Judge Simpkiss. Although he was not persuaded that the claim was bound to fail on causation, the judge accepted that

[92] [2008] EWCA Civ 39, *The Times*, 17 March 2008, noted Iain Steele, "Negligence Liability for Failing to Prevent Crime – The Human Rights Dimension" [2008] *CLJ* 238.
[93] Pursuant to s.7 HRA 1998. A similar provision exists in this jurisdiction in s 3(5)(a) ECHRA 2003.

there was no sufficient relationship of proximity between Mr Smith and the police, and that the claim should not be entertained on grounds of public policy. In granting the claimant permission to appeal, Mackay J directed[94] that the appeal be transferred to the Court of Appeal because it raised an important point of principle: "whether a negligence claim of this kind is today reinforced by the Human Rights Act, specifically through the operation of articles 2 and 8 of the Convention."[95] Thus, the case made it way to the Court of Appeal so that the Court could squarely address the question of what is the relationship between the ECHR trend and the existing law of negligence in this area as laid down in *Hill*.

In addition to this background procedural point, so too does the manner in which the litigation in *Smith* was conducted provide a further important indication of the potential impact of the ECHR trend on the ECHR-inspired trend. It was pointed out, for example, that "*as a bridge* between the Convention rights and the negligence claim, [counsel for the appellant] relied upon the Sussex Police's domestic violence policy, which explicitly invoked arts. 2 and 3 ECHR in giving proper priority to a form of crime which police culture has tended to disregard or marginalise."[96] It was, in addition, submitted on behalf of the claimant that Convention values now give "shape and colour"[97] to the common law doctrine of negligence.

Sedley LJ refused to accept that *Hill* constituted a barrier to Mr Smith's claim, since

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[94] Pursuant to CPR 52.14(i)(a).
[95] *Per* Sedley LJ, [2].
[96] Emphasis added.
[97] The description of counsel for the appellant in *Smith*, as articulated by Sedley LJ, [5].

> Mr Smith's claim does not depend on his status as a member of the public facing a risk common to many others. What *Hill* lays down is a perimeter of public policy. Our present concern is what lies within it.[98]

The Court of Appeal in *Smith* made reference to its earlier judgment in *Van Colle*, discussed above in the context of the ECHR trend. The *Smith* court regarded *Van Colle* as being relevant in that "the trial judge's finding of a particular nexus in the victim's status as a prosecution witness… bears as much on common law liability as on liability under the Human Rights Act."[99]

The Court of Appeal in *Smith* referred to the "unanswered question" of "how (if at all) the common law of negligence is to develop in response to the Human Rights Act and the Convention values it imports".[100]

In *Smith*, the claimant contended that, if the common law requires a claim to match the standard set under art. 2 in the interests both of individual justice and of public policy, Mr Smith's case did so. Considering this argument, Sedley LJ concluded that the article 2 obligation

> coheres well enough with the common law, which recognises that it is not reasonable to expect the police to answer in damages to every individual

[98] *Smith*, [12].
[99] *Ibid.*, [23].
[100] *Ibid.*, [24].

> whose life or health might have been spared or saved by more competent police work, but that where, for example, someone's life or safety has been so firmly placed in the hands of the police as to make it incumbent on them to take at least elementary steps to protect it, unexcused neglect to do so can sound in damages if harm of the material kind results.[101]

Because of this coherence, Sedley LJ concluded that Mr Smith's case was not "doomed to failure" in the way that, for example, the Osmans' case was found by the English Court of Appeal to have been hopeless owing to (what was then perceived as) the *Hill* exclusionary rule. Accordingly, the Court of Appeal held that Mr Smith's claim ought not to have been struck out. For present purposes, it is particularly instructive to note the manner in which the Court of Appeal in *Smith* refers interchangeably to the HRA cause of action and the negligence action. Thus Sedley LJ observes:

> *Whether under art. 2 or at common law*, it cannot be a valid ground of distinction that an informer is entitled to protection while a witness is not, nor that a witness to a crime which has been charged is entitled to a measure of protection not available to a witness to a crime which should have been charged but through neglect has not been.[102]

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[101] *Ibid.*, [27].

[102] *Ibid.*, [29] (emphasis added). Similarly telling is the remark made by Rimer LJ, [43]:

> Although the present claim is not brought under the Human Rights Act 1998, the substance of the complaint in it is that the police failed to take preventive operational measures that they ought reasonably to have taken.

As Steele observed of the Court of Appeal's judgment, "*Smith* thus confirms the move away from blanket denial of duties of care on public policy grounds and illustrates the "HRA's" ability to influence the development of the common law."[103] He emphasises that in both of these respects, the decision mirrors the approach taken at Court of Appeal level in *JD v East Berkshire Community Health NHS Trust*[104], already discussed in Chapter 2 where the Court in holding that a local authority owed a duty of care to a child who it is considering taking into care expressly relied upon the availability of a parallel "HRA" claim as a factor that diluted the force of public policy arguments previously thought to militate against the recognition of such a duty of care. It is submitted that the same argument could equally be advanced regarding police liability for failing to prevent crime: the *Hill* policy factors explored in detail in Chapter 2 lose much of their force where the police will face claims under the incorporating ECHR legislation in any event. The point is a significant one for present purposes, underlining as it does the manner in which the constituent ingredient in the cause of action – that is, the "fair just and reasonable" stage of the duty inquiry in negligence – was clearly reformulated by the Court of Appeal in *Smith* owing to the incorporating legislation (in this instance, the UK Human Rights Act).

Another important point flowing from this aspect of *Smith* must also be considered. Quite apart from the recognition given in the judgments to the *inevitability* of the cause of action in negligence being influenced by the vindicatory pressures of the Human Rights Act, it is significant that the judgments in the Court of Appeal in *Smith* also appear to

[103] Iain Steele, "Negligence Liability for Failing to Prevent Crime – The Human Rights Dimension" [2008] *CLJ* 238, 240.
[104] [2003] EWCA Civ 1151, [2004] QB 558.

welcome the *desirability* of this process of complementarity and convergence in the alignment of a vindicatory agenda, viewing it as a stand-alone end in itself that is to be commended. This welcome by the Court of Appeal sits in strong contrast with the approach taken by the House of Lords, analysed below.

Rimer LJ, for example, in considering whether common law principles of negligence should be influenced by the Article 2 ECHR positive obligation, commented:

> It appears to me odd that...our jurisprudence can apparently acknowledge two parallel, but potentially inconsistent, approaches to the same factual situation: (i) the common law position, which is said to excuse the police from any duty to do anything at all to assist someone such as Mr Smith whose life they knew was being threatened by an identified third party, and (ii) the position under Article 2, under which they were arguably required to take positive, albeit proportionate, preventive measures to protect him. As it seems to me, it is arguable that they should, on the basis that where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it; if so, the common law may well require a re-visiting of the *Hill* policy considerations, at least in the context of cases raising considerations of the right to life.[105]

[105] *Smith*, [45].

Pill LJ, for his part, also expressed the view that there was "a strong case for developing the common law action for negligence in the light of Convention rights".[106] He continued:

> In my view, it is appropriate to absorb the rights which Article 2 protects into the long-established action of negligence. A claim in negligence should, on appropriate facts, have regard to the duties imposed and standards required by Article 2 [ECHR]... Given the structure of our legal system, as now constituted, I do not consider it acceptable, in circumstances such as the present, to place a claim under Article 2 and a claim in negligence in quite separate compartments, each with its own limitation period. The two rely on the same facts and, essentially, the same considerations arise; the requirement to protect human life ...[107]

**The Judgments of the House of Lords in *Van Colle* and *Smith* and their Implications for Vindicating Rights through Tort Law**

In its conjoined judgment on both *Van Colle* and *Smith*, the House of Lords allowed the appeals by the defendant police authorities in both cases. It has been observed that, in so doing, "they reinserted in the bottle the genie that the Court of Appeal had seemingly allowed to escape from it, and pushed the cork down firmly on top of him as well".[108] Before proceeding to analyse the approaches in these appeals, it is helpful briefly to reflect upon the key differences between the two cases at the time of their both coming before the House of Lords:

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[106] *Ibid.*, [53].
[107] *Ibid.*, [55] – [56].
[108] J.R. Spencer, "Suing the Police for Negligence: Orthodoxy Restored" [2009] *CLJ* 25, 25.

| *Van Colle* | *Smith* |
|---|---|
| Threat made culminated in murder | Threat made culminated in serious injury |
| Claimants were deceased's parents, suing on behalf of his estate and on their own behalf | Mr Smith was the only claimant, suing on his own behalf |
| Claim was brought under sections 6 and 7 HRA 1998, in reliance on articles 2 and 8 ECHR | No claim made under HRA due to expiry of limitation period |
| No claim made under the common law | Claim made exclusively under common law |
| A full trial was conducted in which judgment was given for the claimants and damages awarded; Court of Appeal upheld that judgment subject to a reduction in damages | No trial at first instance since proceedings were struck out as disclosing no cause of action; the CA then remitted the case for trial |
| Finding of violation of art 2 ECHR | No finding of violation since no trial held |

*Key differences between* Van Colle *and* Smith *when both cases came before House of Lords*[109]

[109] The majority of these differences are summarised in the judgment of Lord Bingham in *Van Colle/Smith* [2008] UKHL 50, [2009] 1 AC 225, [2].

The House of Lords unanimously allowed the appeal by the Chief Constable of the Hertfordshire Police from the decision of the Court of Appeal in *Van Colle* and, by a majority (Lord Bingham dissenting) allowed the appeal by the Chief Constable of Sussex Police from the decision of the Court of Appeal in *Smith*.

**House of Lords Approach to *Van Colle*: Article 2 ECHR rights vindication envisaged as doctrinally distinct from negligence**

In relation to *Van Colle*, the Law Lords held that the article 2 test had not been met. As Lord Bingham put it, "the warning signs in this case were very much less clear and obvious than those in *Osman*, which were themselves found inadequate to meet the test".[110] It is clear from the judgments of all members of the Appellate Committee that the article 2 test imposes a serious and heavy burden on claimants: as Lord Brown put it, the test "is clearly a stringent one which will not easily be satisfied".[111]

While this stance is in and of itself uncontroversial and indeed entirely in keeping with the approach taken in *Osman*, it is submitted that the position taken in *Van Colle* signals a determination on the part of the House of Lords to affirm the doctrinal separation between the vindicatory mechanism of Article 2ECHR, on the one hand, and the common law negligence action, on the other. The approach taken to the standard imposed by Article 2 will, it is submitted, make it extremely difficult in future cases for article 2 to be invoked successfully, for at least two reasons.

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[110] *Ibid.*, [39].
[111] *Ibid.*, [115] *per* Lord Brown.

The first is the rather elusive statement (which is not developed) by Lord Phillips in *Van Colle* to the effect that the *Osman* formulation of "ought to have known" most likely means "ought to have appreciated on the information available to them", as opposed to "ought to have carried out their duties with due diligence, to have acquired the information that would have made them aware of the risk".[112] Given the importance of this distinction, it is, with respect, regrettable that this point is not elaborated upon beyond Lord Phillips's somewhat cryptic observation that "[t]he reasoning of the [*Osman*] court leads me to believe that the former meaning was intended".[113] The effect of such a statement is to impose yet further separation between the article 2 cause of action and that in negligence: given the significant implications of this for restraining the infusion of negligence with article 2 vindication principles, a greater degree of analysis will be required from future courts on this point.

Meanwhile – and returning to the important differences in pleading between *Van Colle* and *Smith* – it is worthwhile to ruminate on whether the claimant in *Smith* may have succeeded had he been able to pursue a HRA claim invoking Article 2 ECHR. Of their Lordships who specifically addressed this question, Lord Bingham did not think it "profitable" to answer the question and Lord Hope expressed no opinion, but Lord Brown observed that "...the apparent strength of this case might well have brought it within the *Osman* principle so as to make a Human Rights Act claim here irresistible."[114] It may be that this obiter statement of Lord Brown will emerge as one of the more significant aspects of Van Colle from a vindication perspective, since concerns about the effective

[112] *Ibid.*, [86].
[113] *Ibid.*
[114] *Ibid.*, [135].

"raising of the bar" for the threshold of inquiry under article 2 may to some extent be alleviated by this express recognition of the standard under article 2 having been met.

Another very important feature of the approach in *Van Colle* in ensuring a separation between article 2 ECHR and the tort of negligence is the insistence by the House of Lords that the *Osman* test is "a constant, to be applied whatever the particular circumstances of the case"[115]: in this respect, the earlier judgment of the House of Lords in *Re Officer L*[116], discussed above in this Chapter, was affirmed and the approach of the Court of Appeal below in its construction of its earlier decision in *R (A) v Lord Savile of Newdigate*[117] was disapproved. The significance of this point lies in the fact that it represents another attempt to underscore the stringency of the article 2 test – an interpretation which is "considerably more stringent than one of simple negligence".[118] The influence of this more stringent approach is arguably also to be seen in the later House of Lords ruling in *Mitchell v Glasgow City Council*[119]where Lord Hope again emphasised that the "real and immediate" threat to life tests sets a standard that is "exacting".[120] In so doing, the House of Lords has driven a further wedge between the two avenues of recovery, the HRA route and the negligence route.

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[115] *Ibid.*, [116].
[116] [2007] UKHL 36, [2007] 1 WLR 2135.
[117] [2001] EWCA Civ 2048, [2002] 1 WLR 1249.
[118] J.R. Spencer, "Suing the Police for Negligence: Orthodoxy Restored" [2009] *CLJ* 25, 26.
[119] [2009] UKHL 11, [2009] 2 WLR 481.
[120] *Ibid.*, [31].

**House of Lords Approach to *Smith*: the difference in approach between majority and minority judges and its implications for the relationship between Article 2 ECHR and common law negligence**

Lord Hope of Craighead referred to the core principle derived from *Hill*[121] and *Brooks*[122] that, in the absence of special circumstances, the police owed no common law duty of care to protect individuals against harm caused by criminals since such a duty would encourage defensive policing and would divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the general public interest. Lord Steyn, in *Brooks*, had warned against a retreat from that principle as potentially having detrimental effects for law enforcement. The risk that the application of ordinary delictual principles would tend to inhibit a robust approach in assessing a person as a possible suspect or victim (see *Brooks*) was directly relevant to so-called "domestic cases" such as *Smith*. Given the nature of such cases, the judgment as to whether more immediate action was required in one such case rather than another had to be left to the police. The present case did not fall within the category mentioned by Lord Nicholls of Birkenhead in *Brooks*[123] of exceptional cases where circumstances compelled the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlay the common law.

**Lord Bingham's dissenting call for the adoption of a "liability principle"**

Dissenting on the outcome of the appeal in *Smith*, Lord Bingham held that the Court of Appeal had been correct, but that he would go further: if the pleaded facts were

[121] [1989] AC 53.
[122] [2005] UKHL 24, [2005] 1 WLR 1495.
[123] *Brooks*, [6].

established, the Chief Constable did owe Mr Smith a duty of care. Lord Bingham articulated what he called a "liability principle" to be adopted in this area, as follows:

> I would hold that if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed. I shall for convenience of reference call this "the liability principle".[124]

Lord Bingham emphasised that he did not consider this newly articulated principle "to be in any way inconsistent with the ratio of either *Hill v Chief Constable of West Yorkshire* or *Brooks v Commissioner of Police of the Metropolis*".[125]

**The Approaches in *Smith* to the Infusion of Common Law Negligence with HRA vindicatory objectives**

Even before *Smith* went to the House of Lords, some commentators had expressed concern about the type of approach welcomed by the Court of Appeal in *Smith* and have warned that it "should be treated with caution".[126] Noting correctly that "[t]here is no *a priori* reason why every "HRA" claim should have a common law cousin", Steele argues,

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[124] *Smith*, [44].
[125] *Ibid.*, [45], internal citations omitted.
[126] Iain Steele, "Negligence Liability for Failing to Prevent Crime – The Human Rights Dimension" [2008] *CLJ* 238, 241.

for example, that the parliamentary intention in creating a free-standing cause of action pursuant to the human rights legislation could be frustrated by "invariably allowing claimants to fashion a parallel common law claim and thereby access tort law's more generous limitation periods and measure of damages."[127] In his view, the type of approach witnessed in the Court of Appeal's reasoning in *JD* – one of evincing a preparedness to re-evaluate policy arguments in light of the new human rights remedies available, and to expand the common law in the event (but only in the event) that those policy arguments no longer hold sufficient force – is to be preferred to a consistently parallel approach.

The majority and minority judgments in *Smith* contain a range of different views on the debate between "complementarity" and "divergence" of the ECHR avenue of rights vindication with common law redress. In his dissenting judgment in *Smith,* Lord Bingham, elaborating on the observations he had made in his earlier dissent judgment in *JD* – advocated a broadly harmonious approach. In response to the question of whether these two regimes remain entirely separate, or should the common law be developed to absorb Convention rights, Lord Bingham observed "I do not think that there is a simple, universally applicable answer."[128] Lord Bingham is surely correct to observe, as he does in *Van Colle*, that "the existence of a Convention right cannot call for instant manufacture of a corresponding common law right where none exists", a proposition which he supports by citing the House of Lords judgment in *Wainwright v Home Office*.[129] Equally convincing, however, is Lord Bingham's qualifying statement to the effect that "one

[127] *Ibid.*
[128] *Smith*, [58].
[129] [2003] UKHL 53, [2004] 2 AC 406 analysed above in this chapter.

would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law, and it is demonstrable that the common law in some areas has evolved in a direction signalled by the Convention".[130] The harmony-favouring approaches of Pill and Rimer LJJ in the Court of Appeal judgment, analysed above in this Chapter, were expressly approved by Lord Bingham.

Thus, whilst acknowledging that there were "likely to be persisting differences between the two regimes[131], Lord Bingham's approach can be viewed as providing a strong endorsement for complementarity. By contrast, the majority judges in *Smith* displayed a far greater degree of caution about sanctioning complementarity. Their judgments lean instead towards divergence. Lord Hope, for example, (with whose opinion Lord Carswell agreed) considered that "the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy."[132] Lord Phillips recognised that "[t]he existence of a positive duty under Article 2 has not destroyed the reasoning that underlies the principle in *Hill*"[133], and Lord Brown considered it "...quite simply unnecessary now to develop the common law to provide a parallel cause of action."[134] Unpacking these statements, a number of distinct attitudes towards divergence emerge. One is a plea for systemic integrity: Lord Hope's express reference to the procedural constraints of tort law in terms of limitation periods, and its

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[130] Referring to the judgment of the Court of Appeal in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, [55] – [88].
[131] *Ibid.*, [58].
[132] *Ibid.*, [82].
[133] *Ibid.*, [99].
[134] *Ibid.*, [136].

unique remedial rôle, is to be distinguished from Lord Phillips's emphasis on substantive policy positions of the common law being preserved. Lord Brown appears to have recourse to a necessity test and concludes that there is simply no *need* for alignment of the two systems, but does not consider the distinct question of the *desirability* of such a process.

There are a number of reasons why this infusion is inherently desirable. The first is the undeniable need to ensure that the common law can follow its own noble tradition of adapting to modern standards and contemporary values. In monitoring and safeguarding such development, the ability to learn from and indeed draw upon the ECHR cannot but promote this (already inherently vindicatory) objective. Evidence of judicial endorsement of this argument is to be found in *Ashley*, discussed above in Chapter 1. At the Court of Appeal level[135], a key issue before the Court was the nature of the test for mistaken self defence in the tort of trespass to the person. In drawing attention to the similarities between the common law approach and that under Article 2 ECHR, Arden LJ observed:

> There is of course no reason why the common law of battery should be the same as the jurisprudence of the Strasbourg court under article 2. But the co-incidence of jurisprudence affords some assurance that the common law remains up to date and in accordance with the standards to be expected of a modern democratic society. It provides a useful benchmark

[135] [2007] 1 WLR 398.

> against which our common law can be tested, and against which it can be asked whether the rights of the parties are appropriately balanced.[136]

Perhaps an even stronger argument in favour of infusion is the forceful pull of arguments of pragmatism. For, reflecting again on the diametrically opposed positions taken by the Court of Appeal and the House of Lords in *Van Colle* and *Smith* on the question of whether the common law claim in negligence against the police should be influenced by the ECHR, it is submitted that it was the Court of Appeal whose approach is far more realistic in terms of the practical management of police liability cases. To explain this, it is necessary to return once more to the policy arguments mounted by the Law Lords in Hill's case, explored in detail in Chapter 2, as to why a duty of care in negligence should not be imposed on the police force. It will be recalled that amongst the main reasons for rejecting the imposition of a duty was the concern that time-consuming, resource-draining investigations would be put in place which would divert resources and impede the police force from getting on with its rôle of detecting and preventing crime. In light, however, of the significant strides made in vindicating rights under the jurisprudence of Article 2 ECHR, these concerns have essentially been emptied of force, since regardless of the common law position, the very procedures deprecated by the House of Lords in *Hill* will be required where an applicant invokes s. 3(2) of the ECHRA 2003, for example, or the equivalent provision under the HRA 1998. Accordingly, because the position is now such that no common law rule can absolve public authorities from

[136] *Ibid.*, [214].

properly respecting human rights, it is "impossible to insulate [public authorities] from the alleged chilling effects of ...litigation".[137]

This perceptive point was argued in detail by Interveners in the *Van Colle/Smith* litigation[138], but regrettably did not persuade the Appellate Committee.

Quite apart from these two arguments of desirability and pragmatism, there is the argument that the approach of Lord Bingham in *Smith* is one which vindicates rights through the very process of seeking to fashion approaches to the negligence action with such human rights principles.[139] Lord Bingham's judgment thus demonstrates "how human rights norms can challenge the traditional compensatory nature of negligence law and can be used to put the tort to a vindicatory rather than purely compensatory purpose."[140]

The most direct acknowledgement of the implications for the vindication of rights of this divergent approach is to be found in the judgment of Lord Brown in *Van Colle*. Lord Brown observed that "[w]here civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights".[141] Whilst this appears to posit a fundamental separation between vindication (a matter for the ECHR) and compensation

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[137] Kevin Williams, "Abusing Parents and Children: *JD V East Berkshire Community NHS Trust*" [2005] *PN* 196, 200.

[138] See Submissions on behalf of interveners (Case for INQUEST, JUSTICE, LIBERTY AND MIND) in *Van Colle* and *Smith* (submissions of Dinah Rose QC, Paul Bowen, Richard Hermer, Alison Gerry and Anna Edmundson) 2 May 2008, [78] – [81], available at http://www.justice.org.uk. ((last visited 23 August 2009).

[139] More detailed consideration to such an approach in negligence actions is contained in Chapter 2.

[140] Jason N. E. Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 72 *MLR* 750, 770, n 133.

[141] *Per* Lord Brown in *Van Colle*, [138].

(the purview of tort), the apparently clear blue water drawn between the two may not in fact exist even in Lord Brown's analysis. For it is significant that, as Steele has perceptively noted[142], Lord Brown in this passage immediately goes on to liken the limitation period under the HRA with the one year limitation period in the United Kingdom permitted for defamation actions "intended, analogously, to vindicate a claimant's reputation"[143].

## H. THE IRISH COURTS' APPROACHES TO RIGHTS VINDICATION UNDER ECHRA 2003: AN EXAMPLE OF TORT LAW INFLUENCING RIGHTS VINDICATION AS DISTINCT FROM RIGHTS VINDICATION INFLUENCING TORT LAW?

### Vindication and the Wording of ECHRA

Thus far, the analysis of this Chapter has been concerned with a thematic scrutiny of the extent to which the tortious liability of public authorities is being influenced by the pressure to vindicate rights. At this stage, however, it is proposed to engage in an analysis that will demonstrate that the inversion of this trend is also perceptible in developing Irish jurisprudence in which the superior courts have been called on to interpret the ambit of rights vindication provided for in the 2003 Act. In particular, the approach taken to date to the question of the types of remedies available under the 2003 Act is one which, paradoxically, demonstrates not the expansion of tortious liability by reference to rights vindication, but arguably the contrary trend: the diminution of rights vindication owing to the influence of orthodox tortious (and other private law) principles. In this way, this

[142] Jenny Steele, "Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?" [2008] *CLJ* 606, 607.
[143] *Ibid.*, [139].

section seeks to identify and appraise what can ultimately be viewed as further layer in the continuing "conversation" between tort law and human rights law.

A detailed study of the nature of the rights vindication regime enshrined in the ECHRA 2003 is beyond the scope of the present thesis and has, in any event been comprehensively provided elsewhere.[144] Suffice it to note for present purposes two factors relating to the ECHRA 2003 which have served to weaken the degree to which it can be said to effect greater vindication of rights at the domestic level.

First, the provisions of ECHRA 2003 itself – amongst them the in-built qualifications attaching to the availability of remedies[145], for example – include several "obstinate structural obstacles to enhancing the ECHR's effectiveness in Ireland".[146] In addition, it is submitted that the approaches taken by the superior courts to date have indicated an approach to the ECHRA 2003 that has been less than entirely successful in securing optimal rights vindication within this legislative framework. A clear example of this is the procedural approach directed by the High Court in *Carmody v Minister for Justice*[147] whereby Laffoy J held that ECHR-compatibility issues should be considered before

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[144] For in-depth recent treatment see, for example, Colm O'Cinneide, "The European Convention on Human Rights and the Irish Constitutional System of Rights Protection: Complementary or Divergent?", Chapter 29 in Eoin Carolan and Oran Doyle eds, *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008), 507; Donncha O'Connell, "Watched Kettles Boil (Slowly): The Impact of the ECHR Act 2003", Chapter 1 in Ursula Kilkelly ed, *ECHR and Irish Law* (2nd ed, Bristol, Jordans, 2009).

[145] ECHRA 2003, s. 3 (remedy in damages where no other remedy in damages is available, discussed below); s. 5 (declaration of incompatibility, also discussed immediately below, available only where no other remedy is adequate or available).

[146] Samantha Besson, "The Reception Process in Ireland and the United Kingdom" in Helen Keller and Alec Stone Sweet eds, *The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008), 31, 56.

[147] [2005] IEHC 10, [2005] 2 ILRM 1. *Cf Law Society of Ireland v Competition Authority* [2005] IEHC 455 (21 December 2005). For insightful criticism of *Carmody* see Gerard Hogan, "The Value of Declarations of Incompatibility and the Rules of Avoidance" (2006) 28 *DULJ* 408.

constitutionality issues owing both to the rule that Constitutional issues should be considered last, and that s. 5 ECHRA 2003 makes provision for a declaration of incompatibility only where no other remedy is adequate and available. This judgment is currently under appeal to the Supreme Court[148]; if the approach of the High Court is upheld, it is submitted that the already limited capacity of the declaration of incompatibility to enhance rights vindication will be further undermined.

Against this backdrop of a largely weak model of statutory and common law approaches to vindicating rights under the ECHRA 2003, it is instructive to have regard to one specific emerging development which, it is submitted, signals the influence of the common law being exerted on the ECHRA 2003, as opposed to the *vice versa*. This involves the emerging approach of the courts to interpreting s. 3 ECHRA 2003. This section provides:

> (1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the

[148] The Irish Human Rights Commission has been joined as an *amicus curiae* in this appeal.

> Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

Thus, s. 3(2) clearly makes provision for the availability of a new type of damages remedy in the Irish courts: an award of damages may be made if no other remedy in damages is available. This is, in and of itself, an important development for rights vindication in terms of providing concrete remedies for breach of the State's Convention obligations. A good deal less certain, however, is the question of whether this section allows a court to grant a remedy other than damages in circumstances where s. 3(1) has been breached causing injury, loss or damage to a person. On one construction of the wording of s. 3(2), non-damages remedies are excluded: all that the section allows is for a court to award damages, and this is only allowed if no other remedy in damages is available. This construction can be referred to as "the exclusive position" in relation to s. 3(2). On this construction, it is not permissible for a court to grant, for example, injunctive or declaratory relief to a person who has suffered as a result of the breach of s. 3(1).[149]

**Arguments for and against "Inclusive Approach" to Remedies under ECHRA**

It is submitted that such a construction is unduly narrow and that, while not entirely free of doubt, the better interpretation of this section is that it is possible for a court to award a non-damages remedy in these circumstances. This can be referred to as "the inclusive

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[149] This interpretation is evidently that taken by Donncha O'Connell when he observes of the Act of 2003 that:

> The exclusion of remedies of an injunctive nature...marginalises the Convention as a human rights or public law litigation instrument in the domestic legal system.

(Donncha O'Connell, "The ECHR Act 2003: A Critical Perspective", in Ursula Kilkelly, ed, *ECHR and Irish Law* (1st ed, Jordans, 2004), 8).

position" in relation to s. 3(2). A number of arguments can be advanced in support of this inclusive position.

The first of these arguments is sourced in the wording of s. 3(2): it is significant that the section expressly refers to there being "no other remedy in damages" available. This confirms that the key purpose of the section is to institutionalise on a statutory footing the availability of monetary compensation: the Oireachtas was expressly contemplating situations in which no *damages* remedy (and not no other remedy at all) would be available, and explicitly taking steps to fill that particular lacuna.

In this regard, it is submitted that the reference to the suffering of "injury, loss or damage" is significant. These terms are redolent of the private law concept of actionable damage in the law of negligence[150], for example, and provide support for the proposition that the Oireachtas in enacting s. 3(2) was specifically concerned with ensuring that persons who had suffered injury, loss or damage flowing from the contravention of s. 3(1) should in appropriate cases have the potential for monetary compensation through an award of damages open to them. This focus leaves unaffected the availability of non-damages remedies such as, for example, the potential availability of injunctive relief to remedy a contravention of s. 3(1) – regardless of whether or not same had caused "injury, loss or damage" as stipulated in s. 3(2). As Collins and O'Reilly observe, "[n]otwithstanding that s.3(2) expressly refers to damages only, it is intended to

[150] Discussed in detail in Chapter 2.

complement other remedies available to combat a contravention of the Convention's provisions such as injunctions and declarations".[151]

Two specific points of statutory construction are relevant in advancing this argument. First, it is submitted that the use of the word "other" is revealing: the section does not speak of the non-availability of any other remedy, but instead it speaks of the non-availability of any other remedy *in damages*. On an application of the orthodox *expressio unius est exclusio alterius* principle of statutory interpretation, then, the express reference to other remedies in damages not being available supports the proposition that the Oireachtas was not attempting to rule out the availability of other types of remedy for breach of s. 3(1). This is, moreover, entirely consistent with the conception of the s. 3(1) obligation as a public law obligation, susceptible of engendering the usual range of public law remedies where appropriate.

The second principle of statutory interpretation relevant here is the broader principle of internal consistency, under which individual provisions of the same piece of legislation ought to be read alongside one another so as to ensure a consistent and commonsense interpretation of terms used in different sections of the same Act. Applying this principle to s.3(2) and in particular to the phrase "no other remedy in damages", it is instructive to contrast this wording with that used in s. 5 of the Act of 2003, already referred to above in the context of the High Court decision in *Carmody*. This latter section concerns the remedy of the declaration of incompatibility, and allows this remedy to be granted "where no other legal remedy is adequate and available". This difference of wording is

[151] Anthony M. Collins and James O'Reilly, *Civil Proceedings and the State* (2nd ed, Thomson Round Hall, 2004), 344, referring to Select Committee, 19 February 2003, p. 178 (Minister for Justice, Equality and Law Reform).

significant: it clearly shows that had the Oireachtas wished to confine the availability of damages to circumstances in which no legal remedy whatsoever would be available in the context of s. 3, nothing could have been easier than for it expressly to do so – a course it in fact adopted in the context of making provision for another new remedy (the declaration of incompatibility) in s. 5. By contrast, in restricting the nature of the other available remedy to a "remedy in damages" in s. 3(2), the Oireachtas left open the possibility that other, non-monetary, remedies could be available in the context of a breach of s. 3(1), but wished nonetheless to supplement these by introducing the fresh cause of action in damages under s. 3(2).

What are the arguments against such a construction and in favour of the exclusive position? First, it might be contended that the *expressio unius est exclusio alterius* maxim referred to above itself undermines such a construction. Had the Oireachtas wished to allow for non-damages remedies to be available, it could plainly have done so in s.3(2); because it was silent on the point, in a section in which it expressly referred to one type of remedy, it is to be taken that the Oireachtas did not envisage the availability of any other remedies. Support for such a construction might be drawn from the equivalent provision in the HRA 1998 in the United Kingdom.[152] which provides:

> In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

[152] HRA, s. 8(1).

Clearly far broader than the wording of s. 3(2) of ECHRA 2003, the equivalent UK legislation thus unambiguously permits the granting of "public law" remedies such as injunctive or declaratory relief in the context of a breach of the obligation on public authorities laid down in that legislation. Whilst it is accepted that such wording is preferable in avoiding ambiguity in this context, this difference between the incorporating legislation in the two jurisdictions cannot be determinative in identifying the correct construction of the Irish legislation as between the exclusive and inclusive position.

**Judicial Consideration of Remedies Available under ECHRA**

Until recently, limited judicial consideration had been given to this issue of construction in the context of claims under s. 3(2) of the Act of 2003, and such consideration as existed presented conflicting judicial views on the question of whether non-damages remedies were available under that section. Thus in *O'Donnell (a minor) v South Dublin County Council*[153], Laffoy J appeared to indicate with firmness her acceptance of the exclusive approach, whereby the only remedy available under the section was an award of damages. Laffoy J observed:

> Sub-section (2) of s. 3 provides for a remedy in damages for a person who has suffered injury, loss or damage as a result of a contravention of sub-s. (1), where no other remedy is available. On the basis of the plaintiffs' claim as formulated, the only remedy which the court can provide for the breach it has found of article 8 of the Convention is an award of damages.

[153] [2007] IEHC 204 (unreported, High Court, 22 May 2007).

With respect, as emphasised above, it is not correct to say that s. 3(2) provides for a damages remedy where no other remedy is available. Instead, it provides for a damages remedy where no other damages remedy is available.

In contrast with the approach taken in *O'Donnell* is that signalled less than a week earlier by the High Court in *O'C (a minor) v The Minister for Education and Science*[154] where the applicants sought, *inter alia*:

> If necessary, a mandatory injunction requiring the first named defendant and the third and fourth named defendants to comply with their statutory duty pursuant to section 3 of the European Convention on Human Rights Act, 2003 to discharge their functions... thereby providing the plaintiff with [the provision of services such as applied behaviour analysis, speech and occupational therapy].

This formulation was not criticised by Peart J in the course of his judgment. It thus appears that there exists judicial support for each of the opposing constructions set out above of the scope and meaning of s. 3(2). This matter has been considered in far greater detail by the High Court in two more recent cases[155]: *Byrne v Dublin City Council*[156], and *Pullen v Dublin City Council*[157] In the former case, Murphy J afforded extensive consideration to arguments both for and against the construction which has been contended for above, ultimately deciding that the matter could only be determined at a

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[154] [2007] IEHC 170 (unreported, High Court, 16 May 2007).
[155] The author is grateful to Dr. Oran Doyle for supplying him with copies of these judgments at an early stage.
[156] [2009] IEHC 122 (Unreported, Murphy J, 18 March 2009).
[157] (HC, Irvine J, 28 May 2009). At the time of writing, no neutral citation reference is available for this judgment: see above, n 155.

full hearing. In the subsequent case of *Pullen*, however, Irvine J ruled that s. 3(2) precludes the availability of any remedy other than damages. In so holding, Irvine J drew support from a number of well-established common law precedents concerning the availability of injunctive relief vis-à-vis a damages remedy that has been specially provided for by statute. With respect, the decision may well be readily understood on the basis of the argument (emphasised by Irvine J) that the relevant statutory housing regime at issue in *Pullen* (and in *Byrne*) would be undermined by the availability of injunctive relief under s. 3(2) ECHRA 2003 in such a case. It is to be hoped that this point may, in the future, be sufficient to confine the approach taken in *Pullen* to this specific statutory regime point, but it is submitted that there is a strong possibility that the approach in *Pullen* will disincline other superior court judges from considering whether non-damages remedies are available under s. 3(2) of the ECHRA 2003. Such a development would, it is submitted, be unfortunate, failing as it would to promote vindication under the 2003 Act and doubtless justifying the rather doleful conclusion of one commentator that the this section of the Act "makes for a suboptimal alternative to traditional remedies".[158]

Accordingly, this analysis of a discrete aspect of how ECHRA 2003 is being applied in the Irish courts arguably indicates the converse of the trend analysed in greater detail in this Chapter, manifesting as it does the courts approach to the ECHRA vindication of rights through the prism of established common law rules concerning remedies. This trend is, it is submitted, unfortunate, for the reasons explained above, but if provides further support for the proposition that the two separate regimes of the ECHR and the

[158] Samantha Besson, "The Reception Process in Ireland and the United Kingdom" in Helen Keller and Alec Stone Sweet eds, *The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008), 31, 86.

common law can and do influence one another in terms of judicial development of their ambit and potential.

## I. CONCLUSIONS

In this Chapter, the considerable tension between the common law public authority liability principles and the rights vindication of the ECHR has been explored and analysed. There emerges a depiction of a complicated and frequently volatile inter-relationship between the two. Thus, speaking of the approach of the House of Lords in *Ashley v Chief Constable of Sussex Police*[159], discussed in Chapter 1 of this thesis, to the vindicatory function of tort law, Spencer describes as "obvious"[160] the tension between that decision and the approach of the House of Lords in the (almost contemporaneous) *Van Colle* and *Smith* decisions analysed above. The approach of the majority in the latter cases has been described as confirming a "restrictive approach to the development of common law principles in the light of the Human Rights Act".[161] And yet the likely longevity of such an approach remains a matter of doubt. Certainly, in surveying developments in the UK jurisprudence in the last decade alone, a number of highly distinctive and mutually rather inconsistent phases can be identified. As indicated early on in the Chapter, for example, with discussion of dicta such as those of Lord Woolf CJ, in *A v B and C*[162], it initially seemed to be tolerably clear that the common law position would rapidly adapt in order to encode the vindication of ECHR rights under the influence of the incorporating legislation. More recent case law, however, demonstrates

[159] [2008] UKHL 25, [2008] 1 AC 962.
[160] J.R. Spencer, "Suing the Police for Negligence: Orthodoxy Restored" [2009] *CLJ* 25, 27.
[161] John Morrell and HH.J. Richard Foster, *Local Authority Liability* (4th ed, Jordans, 2009), 61.
[162] [2002] EWCA Civ 337, [2002] 2 All ER 545.

the existence at present of a cautious reluctance to see this development continue, which regrettably may be regarded by some as "veering ... toward scepticism about the role of tort in the human rights arena."[163] Given the very recent and firm approaches displayed by the Law Lords in *Smith* of a marked reluctance to extend the parameters of the common law by reference to vindicatory concerns – and thereby underlining the common law's "perennial need...to appear not to be doing anything for the first time"[164] – there is perhaps a concern that the separation between the two regimes will now be over-stated in a reactionary manner, perpetuating an "exaggerated separation" that is "driven in part by an artificially narrow understanding of the functions both of tort, and of the HRA itself".[165]

A similar degree of oscillation is discernible in assessing the influence of landmark rights vindication developments taken by the European Court of Human Rights, such as the judgment in *Osman*. As the analysis in this Chapter reveals, the perceived influence of *Osman* has been sharply inconsistent, verging from the type of adjustment-ensuring strategy of decisions such as that of the House of Lords in *Barrett*[166] to the approaches in cases such as *Brooks*, analysed in Chapter 2, or the more recent *Mitchell v Glasgow City Council*[167] in which strike-out applications have succeeded. This latter example of flux in the case law, however, as has been argued above, is attributable more the perceived impact of the Article 6 finding of a violation by the *Osman* court: in light of the decision

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[163] Jenny Steele, "Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?" [2008] *CLJ* 606, 634.
[164] *Per* Sedley LJ in *Douglas v Hello! Ltd* [2000] EWCA Civ 353, [2001] 2 WLR 992, [111].
[165] Jenny Steele, "Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?" [2008] *CLJ* 606, 634.
[166] *Barrett v Enfield London Borough Council* [2001] 2 AC 550.
[167] [2009] UKHL 11, [2009] 2 WLR 481.

in *Z* analysed above, it is understandable that there should have been a corresponding increase in judicial willingness to strike out hopeless claims. By contrast, the real significance of *Osman* in terms of article 2, has, it has been argued, the potential meaningfully to alter and re-invigorate the common law negligence action. Whilst it is true that the most recent developments on this inter-relationship analysed in this Chapter do not disclose a picture of complementarity or even strong judicial support for convergence, one important lesson from the case law in the past decade has been the alacrity with which judicial trends in this area can and do change. As has recently been observed in this context, "this is a debate that is far from over"[168] Accordingly, it is submitted that it is overly-pessimistic to claim, as Mullender claims in a 2009 commentary, that

> ...[A] decade on ... negligence law (as it applies to public bodies) looks much as it did before the European Court's decision in *Osman* and the coming into force of the Human Rights Act 1998.[169]

Notwithstanding either this concern or the apparent scepticism indicated in approaches such as those of the majority in *Smith*, however, it has been argued throughout this Chapter that the vindicatory function of the ECHR can meaningfully influence and shape the development of the common law. Although there have been prominent instances of the courts recoiling from and seeking to limit this occurrence – such as this most recent approach of the House of Lords in *Van Colle* – it has been argued that a total separation

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[168] Alastair Mullis and Donal Nolan [2008] *All ER Annual Rev* 492, 498.
[169] Richard Mullender, "Negligence, Human Rights and Public Bodies" (2009) 125 *LQR* 384, 384.

between the two regimes is neither tenable nor desirable. Indeed, the discrete analysis of approaches in this jurisdiction to the reliefs available under the ECHRA 2003 and the influence therein of the common law is persuasive evidence of the inevitability of the one regime affecting how the courts approach the other. As against this, of course, it must be emphasised that that the integrity of each system *qua* stand-alone legal regime must be respected. Just as the House of Lords in *Van Colle* emphasised the procedural and substantive differences between tort law claims and HRA claims, so too must it be accepted that that a watertight separation between the two regimes is not realistic. The approach to be taken in a given context is thus one of nuanced balance. As Steele concludes:

> [W]e should not accept the caricature of tort as aimed uniquely at compensation for material losses; but neither should it be assumed that because both tort and the HRA could be said to "vindicate rights" their functions and remedies must be wholly equivalent.[170]

In the final analysis, it is salutary to reflect upon the comments made by Lord Bingham in another of his powerful dissenting judgments – that in the *D v East Berkshire*[171] case discussed in Chapter 2 to which, as seen earlier, Lord Bingham referred in his more recent dissent in *Smith*. Lord Bingham provided an eloquent synopsis of the challenges facing the law of torts as public law and tort claims become ever more enmeshed. Rejecting the contention that courts should be slow to sanction the evolution of well-

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[170] *Ibid.*
[171] [2005] UKHL 23, [2005] 2 AC 373.

established principles of tort law merely because the European Convention on Human Rights now amplifies and augments the protection afforded to individuals under domestic tort regimes. Lord Bingham posed (and answered) the following question, upon which it is instructive to ruminate in the context of the ongoing convergence debate:

> But the question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution.[172]

[172] *Ibid.*, [50].

# PART IV

# VINDICATING RIGHTS THROUGH TORT LAW OUTCOMES: EXEMPLARY DAMAGES AND VICARIOUS LIABILITY

# Chapter 6

# EXEMPLARY DAMAGES AS A MEANS OF VINDICATION IN THE TORTIOUS LIABILITY OF PUBLIC AUTHORITIES

> The discretion of a court to award exemplary damages in the vindication of rights and as a mark of its disapproval of the conduct of a defendant, should not be constrained...but exercised according to the circumstances of each case... [1]

## Chapter Overview

*The focus of this Chapter is on the availability of exemplary damages in the context of tort litigation against public authorities. It is argued that the readiness of the courts in this jurisdiction and elsewhere to award exemplary damages is yet another manifestation of the principal theme under scrutiny in this thesis: the vindicatory function of tort law being emphasised over its corrective function, resulting in a recasting of the remedies available to plaintiffs that does not sit easily with the conventional "loss model" of the law of torts. The Chapter begins with an analysis of the tension traditionally evinced in the jurisprudence determining the availability of exemplary damages between the vindicatory and corrective functions of tort law, before engaging in a detailed assessment of the latest and most authoritative Irish Supreme Court decision on point,* Shortt v Commissioner of An Garda Síochána[2], *involving the highest award ever of exemplary damages in this jurisdiction, and one made against a public authority defendant. Through analysing this and other recent case law from other jurisdictions, the capacity of exemplary damages to effect the vindication of rights in tort law can be assessed.*

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[1] *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9, [2007] 4 IR 587, *per* Murray CJ, [117].
[2] [2007] IESC 9, [2007] 4 IR 587.

## A. INTRODUCTION: THE ROLE OF EXEMPLARY DAMAGES IN RIGHTS VINDICATION

### Exemplary Damages as Vindication

The availability of exemplary damages is yet another manifestation of how the law of torts is not solely concerned with compensating losses but strives to realise, *inter alia*, the distinct goal of the vindication of the rights. It has been judicially observed that exemplary damages are "an emphatic vindication of the claimant's rights"[3], with one prominent torts scholar describing vindication as the "best justification" for an award of exemplary damages.[4] As such, the very notion of exemplary damages pursuing vindicatory objectives is one that sits at odds with the corrective justice function of tort law discussed in Chapter 1.[5] Putting the topic in the context of previous Chapters in this thesis, it is important to emphasise that the potential for an award of exemplary damages represents a facet of the common law that opens up special possibilities of vindication not open in other regimes. The most obvious and important point to make here is that the practice in the European Court of Human Rights is not to award exemplary damages[6]; likewise in Ireland the ECHRA Act 2003 does not make any provision for exemplary damages to be awarded. Thus, paradoxically, the explicitly vindicatory rights regime is singularly lacking in this power to award exemplary damages, whilst tort law retains and

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[3] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122, *per* Lord Nicholls, [29].

[4] Robert Stevens, "Torts, Rights and Loss" (2006) 122 *LQR* 565, 568.

[5] Thus Weinrib, for example, considers that damages awarded to redress lack of respect for rights generally is impossible to reconcile with the tenets of corrective justice, falling instead within the sphere of the criminal law: Ernest J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000) 1 *Theoretical Inquires in Law* 1, 29. *Cf* P.W. Lee, "Contract Damages, Corrective Justice and Punishment" (2007) 70 *MLR* 887.

[6] *Wainwright v United Kingdom* [2006] ECHR 807, (2007) 44 EHRR 809 (discussed in detail in Chapter 5 herein), [60].

(it will be argued in this Chapter) indeed is at present increasing the possibility of their award as a mechanism of vindicating rights.

**Vindicatory power of exemplary damages emphasised in the *Rookes v Barnard* Watershed**

As is very well known, the judgment of the House of Lords in *Rookes v Barnard*[7], delivered in 1964, marked "an important watershed"[8] in the development of the law of exemplary damages in English law. Delivering the leading judgment on the issue of exemplary damages, Lord Devlin drew the important distinction between aggravated and exemplary damages, confirming the status of aggravated damages as compensatory. Describing exemplary damages as an anomaly within the civil law[9], he held that, given the lengthy history of exemplary damages in English law, it would require a "complete disregard of precedent, and indeed of statute" were the House of Lords to abolish this species of damages.[10] Significantly for present purposes, Lord Devlin went on to stress that, in certain circumstances, an award of exemplary damages can serve the purpose of vindication, and that to that extent their anomalous nature could be justified.[11]

This vindication-based approach was, however, not without its qualifications and even hesitations. It will be recalled that what was novel about *Rookes* was that the House of Lords held that exemplary damages, as opposed to aggravated damages, should only be awarded in two specific types of case, unless they were expressly authorised by statute.[12]

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[7] [1964] AC 1129.
[8] Law Reform Commission, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages* (LRC CP 12-1998) [1998] IELRC 2 (April 1998), [3.12].
[9] [1964] AC 1129, *per* Lord Devlin, 1221.
[10] *Ibid.*, 1226.
[11] *Ibid.*
[12] In fact, virtually no pre-*Rookes* statute in England provided as such. In Ireland, a number of statutory provisions expressly confer on the courts in specific situations the power to award exemplary damages (see

The two categories were "oppressive, arbitrary or unconstitutional action by the servants of the government" and cases in which "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." This restrictive approach undoubtedly flowed from the fact that in *Rookes* exemplary damages were viewed with a degree of suspicion, with Lord Devlin insisting that the power to award exemplary damages was a weapon to be used with restraint. As one commentator has observed, "[t]he decision in *Rookes v Barnard* represented the furthest the House of Lords felt it could go, within the confines of precedent, in ridding the law of exemplary damages".[13]

In later cases in England it was made clear that even if the tort was one which was "caught" by the categories set out by Lord Devlin in *Rookes*, exemplary damages did not have to be awarded.[14]

Over forty years on, this anomalous status persists. Opposition to exemplary damages is widespread and trenchant, and from authority of the highest stature; the editors of

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for example, the Copyright and Related Rights Act, 2000, s. 128; Industrial Designs Act 2001, s. 59). But perhaps the most important statutory provision pertaining to exemplary damages is s.17 of the Personal Injuries Assessment Board Act 2003, which states that the Board shall not be required to arrange for the making of an assessment under s. 20 of the 2003 Act of the relevant claim concerned, "because aggravated or exemplary damages are *bona fide* (and not for the purpose of circumventing the operation of this Act) sought to be recovered in the relevant claim…".

Significantly from the perspective of rights vindication, s. 17 of the Personal Injuries Assessment Board Act 2003 goes on to make the same arrangements for a case in which "the relevant claim arises out of a trespass to the person, because the making of an assessment of the claim by the means to which assessors are limited to employing by this Act would not respect the dignity of the claimant". This is also important for exemplary damages, because cases involving shocking disregard of an individual's bodily integrity in a trespassory sense may very well be ones in which an award of exemplary damages might be appropriate and in which their purpose in vindicating plaintiffs' rights emerges as a clear objective of their being awarded.

[13] Andrew Burrows, "Reforming Exemplary Damages: Expansion or Abolition?", Chapter 7 in Peter Birks ed, *Wrongs and Remedies in the Twenty First Century* (Clarendon Press, Oxford, 1996), 153, 155.

[14] *Holden v Chief Constable of Lancashire* [1987] QB 380.

*McGregor on Damages* stating that "whether a modern legal system should recognise exemplary damages at all has been much debated, but it is thought that, all in all, the case for dispensing with them is made out."[15]

**Controversy over nature of and relationship between the objectives of exemplary damages**

Notwithstanding the clear disconnect between exemplary damages and the corrective justice paradigm, this does not mean that exemplary damages necessarily pursue an exclusively rights-driven agenda. Thus Stevens in advancing his rights model theory of the law of torts concedes that it may be objected that exemplary damages are equally inconsistent with the rights model, since in punishing the defendant they go beyond vindication of the plaintiff's rights: vindication is thus eclipsed by sanction. More trenchant opposition to the characterisation of exemplary damages as vindicatory is provided by Beever who argues that "as a matter of principle, exemplary damages are not vindicatory", since in awarding such damages, the courts are not concerned with plaintiffs' rights but instead with "expressing condemnation of the defendant".[16]

In response to such arguments, a number of points can be made. Stevens argues, for example, that punitive damages may be viewed as being in accordance with the rights or vindicatory model if they are viewed as a form of "substitutive damages for the rights

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[15] Harvey McGregor, *McGregor on Damages* (17th ed, London, Sweet & Maxwell, 2003), 365. For a contrary view see James Edelman, "In Defence of Exemplary Damages", Chapter 10 in Charles E.F. Rickett, ed, *Justifying Private Law Remedies* (Hart Publishing, Oxford-Portland Oregon, 2008), 225.
[16] Allan Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 *OJLS* 87, 98-99.

infringed".[17] Stevens builds this argument towards the conclusion that a better label may in fact be "retributory damages"[18], since this species of damages is directed at retribution – and retribution in a narrower sense than that term is often used in the criminal law. A more fundamental objection to Beever's argument may, however, be posed if it asked why punishment and vindication are to be regarded as mutually exclusive. As Witzleb and Carroll inquire, does Beever's distinction not present "a false dichotomy"?[19] They continue:

> While it is correct to say that exemplary damages are concerned with the condemnation of the defendant, it is through this condemnation that the plaintiff's rights are vindicated. The vindication of the plaintiff's rights is more emphatic than in a case of pure compensation because the legal response attaching to the wrong is more vigorous.[20]

There is, it is submitted, an undeniable overlap between punishing a wrongdoer and vindicating the rights of those wronged, since punishment of the defendant in and of itself imports heightened public endorsement of and validation for the position of the wronged

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[17] Murphy is critical of this attempt by Stevens to offer some justification for the presence of exemplary damages within tort law, on the basis that this attempt "actually proceeds from an understanding that confuses exemplary damages with aggravated damages by focusing upon the 'degrading' conduct involved (Robert Stevens, *Torts and Rights* (Oxford: OUP, 2007), 86). Murphy points to the account, which he describes as "compelling", of Allan Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 *OJLS* 87 in which aggravated, as opposed to exemplary damages, are said to cover this dignitary interest. See John Murphy, "Rights, Reductionism and Tort Law" (2008) 28 *OJLS* 407. See further James Edelman, "In Defence of Exemplary Damages", Chapter 10 in Charles E.F. Rickett, ed, *Justifying Private Law Remedies* (Hart Publishing, Oxford-Portland Oregon, 2008), 225.

[18] Robert Stevens, *Torts and Rights* (Oxford: OUP, 2007), 85, citing *Bell v Midland Railway Company* (1861) 10 CB (NS) 287, 308, 142 ER 462, 471.

[19] Normann Witzleb and Robyn Carroll, "The Role of Vindication in Torts Damages" (2009) 17 *Tort L Rev* 16, 27.

[20] *Ibid.*

plaintiff. This is well illustrated, for example, in the following response of a consultee in the context of the English Law Commission's consideration of the future of exemplary damages:

> [T]here is a clear need for exemplary damages in [Lord Devlin's first category in *Rookes v Barnard*[21] of oppressive, arbitrary or unconstitutional action by servants of government]. The role of the state (and especially the police) in the criminal justice system casts doubt on whether victims of oppressive state conduct will have their civil liberties vindicated in the criminal courts. The award of exemplary damages in a civil action may perhaps be no more than symbolic vindication of such interests but it is no less valuable for that.[22]

The above observation vividly illustrates the overlap between punishment and vindication that is characteristic of awards of exemplary damages. This tendency to recognise the objectives of punishment and vindication as dual goals in the awarding of exemplary damages is frequently seen in leading judgments across the common law world. Delivering the advice recently of a majority of the Privy Council on an appeal from New Zealand, for example, Lord Nicholls commented:

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[21] [1964] AC 1129.

[22] Quoted in Andrew Burrows, "Reforming Exemplary Damages: Expansion or Abolition?", Chapter 7 in Peter Birks ed, *Wrongs and Remedies in the Twenty First Century* (Clarendon Press, Oxford, 1996), 153, 168-169.

> Awards of exemplary damages differ from other monetary payment orders made in respect of tortious conduct. They serve a quite different function. Their function is not to compensate. Their primary function is to punish. *They also serve as an emphatic vindication of the plaintiff's rights* and as a deterrent.[23]

This clear reference to exemplary damages pursuing a secondary function of vindication recalls the analysis engaged in Chapter 1 of this thesis concerning the multifarious meanings to be ascribed to vindication in tort law. It will be recalled that whether vindication is regarded as a secondary purpose or as a result will frequently be difficult to determine; suffice it to note for the present analysis that vindication is not the primary purpose of exemplary damages and yet this area of the tort law demonstrates, as will now be analysed, a real potential for the vindication of plaintiffs' rights.

It is thus important to acknowledge that, although Lord Devlin in *Rookes* laid emphasis on the vindicatory power of exemplary damages, this species of damages pursues a multiplicity of other objectives as well. In particular, as noted in the work of commentators such as Stevens discussed above, their punitive function continues to be of relevance. Thus, in the leading Irish Supreme Court authority of *Conway v INTO*[24], Finlay CJ stated that exemplary damages

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[23] *A v Bottrill* [2002] UKPC 44; [2003] 2 NZLR 721, *per* Lord Nicholls, [29] (italics mine).
[24] [1991] 2 IR 305.

> are intended to mark the Court's particular disapproval of the defendant's conduct … [and the Court's] decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages …".[25]

In a separate judgment in *Conway* McCarthy J had identified the purpose of awarding exemplary damages as "truly to make an example of the wrongdoer so as to show others that such wrongdoing will not be tolerated and, more to the point, will not be relieved on payment of merely compensatory damages."[26]

In the latest Supreme Court authority, *Shortt v The Commissioner of An Garda Síochána*[27], Murray CJ stated that:

> Exemplary damages are not compensatory. They are, in a sense, a windfall for the plaintiff. Exemplary damages serve several potential purposes including to mark the Court's disapproval of outrageous conduct on the part of a defendant. In the case of a jury they may reflect the indignation of ordinary law abiding citizens at such conduct.[28]

Whilst it is obviously now beyond argument that exemplary damages form part of Irish law, the need for caution which has been much emphasised still has relevance. The power

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[25] *Ibid.*, 317.
[26] *Ibid.*, 326.
[27] [2007] IESC 9, [2007] 4 IR 587.
[28] *Ibid.*, [108].

to award exemplary damages is to be used with restraint. Indeed, an appropriate starting point when looking at the Irish position is the following passage from the judgment of Finlay CJ in *Conway*:

> Bearing in mind the reasons for the existence of a right to award exemplary damages and the purposes which in my opinion a court must be seeking to achieve in making an award of exemplary damages, as a general principle they should not be awarded if in the opinion of the court the amount necessarily payable by the wrongdoer in the form of compensatory damages constituted a sufficient public disapproval of and punishment for the particular form of his wrongdoing.[29]

**Complexity of Nomenclature further illustrates difficulties in providing an account of exemplary damages in a model other than the corrective justice paradigm**

The issue of the complexity of nomenclature in this area is one that arises also in the leading Irish case law. The Supreme Court has consistently held, for example, that the terms "punitive" and "exemplary" damages are interchangeable. Most recently for example, in the landmark decision in *Shortt* analysed below, Murray CJ emphasised that, as Finlay CJ had earlier pointed out in *Conway v INTO*[30], exemplary damages and punitive damages are synonymous. This is the position notwithstanding the decision of

[29] *Conway*, 321-322.
[30] [1991] 2 IR 305.

the High Court in *Kennedy v Ireland*[31], according to Murray CJ in *Shortt*. In *Conway*, Finlay CJ had explained that, as a matter both of the ordinary use of words and as a matter of common sense, it is "almost impossible to award damages for the purpose of making an example of a person without, to some extent, at least, punishing that person", and it "is equally impossible to award damages for the purpose of punishing a person without, to some extent, making an example of him".[32]

Notwithstanding this, however, the Supreme Court in *Shortt* stated its preference for the term "exemplary" instead of "punitive" to be used in relation to this heading of damages. Whilst the terms are indeed often used interchangeably, in *Conway v INTO* members of the Supreme Court had expressed their preference for the term "exemplary". Hardiman J stated that on the facts of *Shortt*, he would share this preference for the term "exemplary". Hardiman J's reasoning in this regard illustrates the special considerations which must be taken into account in the context of public authority defendants which render the term "exemplary" a more attractive label. He continued by stating that:

> Even if this plaintiff were awarded a truly enormous sum under this heading, I doubt if it could be described in any real sense as "punitive". The money would not come from the pocket of any individual or even from any individual company or other business entity. It would in the end be levied on the tax payer and neither the gardaí who committed the tort,

[31] [1987] IR 587. It will be recalled that in *Kennedy*, Hamilton P was of the view that there existed a "clear difference" between punitive and exemplary damages owing to the contrasting wording of ss. 7(2) and 14(4) of the Civil Liability Act 1961. For detailed treatment of this point, see Bryan M.E. McMahon and William Binchy, *Law of Torts* (3rd ed, Butterworths, 2000), 1127.
[32] [1991] 2 IR 305, 318.

> or any individual member of the force, would be one cent the worse for the award. Such an award cannot truly be described as punitive. On the other hand it seems quite possible to make an award which will "make an example of' the wrongdoers here and the legal entities responsible for them by marking in terms that everyone can understand the sheer evil of what was done and the detestation which the Courts, speaking for civil society in general, must feel and express for it.[33]

Emphasising that the public interest may demand that an award of exemplary damages be made, Hardiman J noted that in the case of *Cooper v O'Connell*[34], Keane J had stated that "in developing the law of exemplary damages the Courts had been concerned with principles of public policy and with the need, in accordance with these principles, to make an example of the defendant".

For present purposes, this analysis is significant in that it further supports the proposition that, at least in the context of the awarding of exemplary damages in tort litigation against public authorities, the idea of punishment being the primary objective becomes difficult to sustain. Once this is accepted, the vindicatory purpose of exemplary damages can more readily be accepted.

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[33] *Shortt*, [229].
[34] Unreported, Supreme Court, 5 June 1997.

## B. THE VINDICATORY POWER OF EXEMPLARY DAMAGES IN TORT LITIGATION AGAINST PUBLIC AUTHORITIES: THE SUPREME COURT JUDGMENT IN *SHORTT*

### A landmark judgment

The Supreme Court judgment in *Shortt v The Commissioner of An Garda Síochána*[35] is of considerable importance at a number of levels in the context of the tortious liability of public authorities in Ireland, but for the purposes of this Chapter the discrete area in which it is of special significance is that of the attitude it evinced towards the vindicatory rôle of exemplary damages. The decision "represents the most thorough analysis of the law on aggravated and exemplary damages that the Court has made for many years."[36] The Supreme Court concluded that this was a case in which an award of exemplary damages was imperatively called for. In *Shortt*, egregious abuse of state power resulted in a serious miscarriage of justice. The plaintiff was framed by gardaí on drug offences in 1995, and given a three-year sentence. As Hardiman J stated in the course of his Supreme Court judgment, the plaintiff's

> ...life was almost totally ruined and he was reduced to a state of despair. At that nadir of his fortunes he found the strength to reject an offer of early release, on the condition that he dropped his appeal and thereby acknowledged his guilt.[37]

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[35] [2007] IESC 9, [2007] 4 IR 587.
[36] Raymond Byrne and William Binchy, *Annual Review of Irish Law 2007* (Thomson Round Hall, 2008), 569.
[37] *Shortt, per* Hardiman J, [141].

In argument before the Supreme Court, it was conceded on behalf of the State that Mr Shortt's case was the worst case of State oppression of an individual citizen of which the State defendants were aware.

**The Background**

The plaintiff instituted proceedings for damages pursuant to s 9 of the Criminal Procedure Act 1993 (which deals with "Compensation for miscarriage of justice"), and further or in the alternative sought "damages for breach of constitutional rights, conspiracy, negligence and breach of duty, malicious prosecution, false imprisonment, loss of reputation including but not confined to damages for libel and slander and damages for deliberate and conscious abuse of statutory power". In the High Court, Finnegan P explained that he did "not propose making awards under any of those headings in respect of anything which occurred after the plaintiff was charged notwithstanding that the evidence would entitle a claim on all or any of such bases to succeed in the alternative to the claim under s.9.", but emphasised that he would have regard by analogy to the common law in relation to such claims insofar as the plaintiff claimed damages including and aggravated and/or exemplary damages. This approach was followed in the Supreme Court.

The extraordinary facts of this case were deemed by the Supreme Court to warrant the awarding of one million euro by way of exemplary damages. This is the largest amount ever awarded in an Irish case for exemplary damages: indeed, the total of €1m for exemplary damages is substantially larger than the figures arrived at in every other earlier

case.[38] What is immediately striking is that the award is some twenty times larger than the €50,000 award that had been made for exemplary damages in the High Court in this case. In the Supreme Court, two separate judgments were delivered: one by Murray CJ[39], and another by Hardiman J.[40] The case is certain to emerge as one of the leading Irish authorities on exemplary damages, and for this reason is deserving of detailed treatment in assessing the current state of the law on exemplary damages insofar as this illuminates their rôle in vindicating plaintiffs' rights in tort actions against public authorities.. A number of discrete points may be taken from the judgments of both Murray CJ and Hardiman J in this case as to the extent of the rôle of exemplary damages in vindicating rights, and these are discussed in turn below. First, after *Shortt*, how has our understanding of the concept of exemplary damages in Irish law developed? Secondly, what principles can be extrapolated from the judgments about the assessment of quantum in exemplary damages, and how is this relater to vindication? Finally, and particularly significantly from a vindication perspective, the circumstances in which exemplary can be awarded for vicarious liability emerges as one of the key questions following from

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[38] In *Conway v INTO* [1991] 2 IR 305, for example, the High Court, having regard to the 70 or so related claims arising out of the same conspiracy, assessed exemplary damages at £1,500. It is to be remembered that the defendant in *Shortt* was the State, whereas the defendant in *Conway* was a private party. In *McIntyre v Lewis* [1991] 1 IR 121, decided in December 1990, the award made by the Supreme Court for exemplary damages was £20,000 in a case in which the plaintiff had been falsely imprisoned, brutally assaulted and then the subject of a malicious prosecution. More recently, In *L O'K v LH* [2006] IEHC 13 (High Court, unreported, 20 January 2006) de Valera J awarded €50,000 exemplary damages against the defendant who as a teacher had sexually assaulted the plaintiff when she was a young pupil of his (the judgment on damages is available at [2006] IEHC 393). The Supreme Court appeal on the substantive issue of vicarious liability in this case, discussed in detail in Chapter 7 herein, did not affect this point. In *Crofter Properties Ltd. v Genport Ltd. (No. 2)* [2005] 4 IR 28 an award of £250,000 exemplary damages in respect of a defamation was reduced by the Supreme Court to £100,000. The Court emphasised that an award of exemplary damages "should not be excessive but should be sufficient to punish the behaviour on behalf of the defendant..." ([2005] 4 IR 28, *per* Denham J, 37 (Geoghegan and Kearns JJ concurring)).

[39] Denham, Geoghegan and Fennelly JJ concurring.

[40] Geoghegan and Fennelly JJ concurring.

*Shortt*. In this context, a comparative survey of approaches taken in other jurisdictions is instructive.

**Likelihood that *Rookes v Barnard* is of no application in Irish law**

The following passage in the judgment of Murray CJ, though *obiter*, is important because it demonstrates the likelihood that *Rookes v Barnard* has no application in Irish law[41]:

> Although I agree with the views of McCarthy J. in *McIntyre v Lewis*, that the restriction of exemplary damages to certain categories of cases as stated by Lord Devlin in *Rookes v Barnard* has no application in our law, that question does not need to be addressed in this case, if it needs to be further addressed at all. Here we have conduct particularly necessitating condemnation.[42]

*Shortt* thus goes a long way to confirming a point that already was reasonably clear, that the categories[43] set out in *Rookes v Barnard* are of no (or at least no strong) application in Ireland. This is significant in signalling that the willingness of the Irish courts to develop principles in relation to the award of exemplary damages that extend beyond the *Rookes*

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[41] *Rookes* has been rejected in Australia (*Uren v John Fairfax and Sons Pty* (1966) 117 CLR 118, (1966) 40 ALJR 124; *Lamb v Cotogno* (1987) 164 CLR 1) and in Canada (*Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085, (1989) 58 DLR (4th) 193).

[42] *Shortt*, [121].

[43] This is not, of course, to suggest that all statements of principle made in *Rookes* do not apply in Ireland. To select just one example, it is perhaps significant that in *Rookes v Barnard* the House of Lords was clear that a consideration of the means of the defendant was relevant to the questions of exemplary damages and in Ireland it appears that this is also the case. In *Shortt*, Murray CJ stated in relation to exemplary damages that: "In their purely punitive dimension the means of a defendant may be relevant in order to ensure that the punishment is proportionate. (*Shortt, per* Murray CJ, [109]).

ideology, an approach that promote and strengthens rights vindication in the context of this species of damages.

**Evidence of vindicatory approach in the context of assessing Quantum of Exemplary Damages**

A separate point that requires analysis concerning vindication is the approach being taken by the courts to the question of arriving at quantum of exemplary damages. The basis for making an award of exemplary damages is rooted in public policy and the court's desire to make an example of the defendant and register its indignation at the outrageous nature of the wrong committed. As such, there is obviously a danger that a court might instinctively be so repulsed by an instance of such behaviour, that the exercise of an unrestrained discretion, might lead to an awarding of a sum by way of exemplary damages that is too large. Accordingly, the key question remains as to how the court should approach the issue of quantum in these cases. In this regard, the judgment in *Shortt* provides important guidance on approaching this question of quantum, and in so doing also casts light on the vindicatory powers of such awards.

Murray CJ in *Shortt* noted that in "awarding exemplary or punitive damages a Court is at large as to the amount which it considers appropriate to express its disapproval and therefore it must exercise any such power with restraint."[44]

[44] *Per* Murray CJ, [111].

The conclusion arrived at by Hardiman J in *Shortt* was that in a case such as *Shortt* where the defendants were public authorities, the principal consideration in calculating the amount of an award of exemplary damages must be the amount necessary

> ... truly to make an example of the wrongdoer so as to show others that such wrong will not be tolerated and more to the point will not be relieved on the payment of merely compensatory damages.[45]

The "merely" is of course significant: it underlines how far is the distance at which exemplary damages sit when compared with compensatory damages, and how distinct is their function. On this point, it is instructive to note that an error which had been made in the High Court in *Shortt* was to consider the risk of double compensation as a factor capable of reducing the award of exemplary damages. In the appeal, the State conceded that the High Court had fallen into error in considering this, since exemplary damages were not at all compensatory in nature. [46] Rather, exemplary damages were punitive in nature, and thus there was no element of overlap between exemplary damages and damages which aimed to compensate the plaintiff for the wrongs which had been done to him. Two basic but important preliminary points follow from this: first, a plaintiff is never *entitled* to exemplary damages. Secondly, one key distinction between exemplary damages and, for example, aggravated damages is that aggravated damages must always be justifiable in compensatory terms, whereas exemplary damages have nothing at all to do with compensation.

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[45] *Per* Hardiman J, [222], quoting a passage from the judgment of McCarthy J in *Conway*, 327.
[46] *Ibid.*, *per* Hardiman J, [205].

As against this, however, the fact that the notion of double compensation is irrelevant here does not mean that the total awarded by way of compensatory damages is irrelevant when considering exemplary damages. The quantum of compensatory damages may well be very relevant to the issue of whether any award of exemplary damages should be made.[47] The pivotal question for the court is whether the size of the figure being awarded for compensatory damages is sufficient to mark the court's disapproval of the defendant's behaviour. As the Chief Justice stated in *Shortt*:

> ...[I]n certain circumstances the substantial level of compensatory damages may be a factor to be taken into account when the Court is exercising its discretion as to the exemplary damages necessitated by the need to mark its disapproval of the defendant's conduct but the notion of double compensation has nothing to do with that.[48]

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[47] An instructive example in this regard is the approach taken by Kelly J in *O'Donnell v O'Donnell* [2005] IEHC 216, a case involving sexual abuse. Refusing to make an award of exemplary damages, Kelly J concluded as follows:

> It is contended that as the wrongdoing of the defendant here was carried out on a minor who was to a considerable extent placed in the defendant's charge and as his conduct was quite disgraceful exemplary damages should be awarded. His conduct was disgraceful but that alone is not determinative of the question. In *Conway's* case Finlay CJ pointed out that as a general principle exemplary damages should not be awarded if in the opinion of the court the amount necessarily payable by the wrongdoer in the form of compensatory damages constitutes a sufficient public disapproval of and punishment for the particular form of his wrongdoing.
>
> ... I am satisfied that the substantial award of compensatory damages made to the plaintiff here constitutes a sufficient disapproval of and punishment for the form of wrongdoing engaged upon by the defendant. I will not award exemplary damages.

[48] *Per* Murray CJ, [116].

What is significant about the Supreme Court's rejection of the High Court's approach in this regard is that this rejection also has its roots in the vindication of the rights of plaintiffs. That this is so is seen very clearly in the following passage of Murray CJ's judgment:

> The discretion of a court to award exemplary damages in the vindication of rights and as a mark of its disapproval of the conduct of a defendant, should not be constrained...but exercised according to the circumstances of each case... [49]

The conclusion on quantum arrived at in *Shortt* (€1m) might be compared with the approach taken ten years ago by the Court of Appeal in England in two cases heard together involving false imprisonment and malicious prosecution, accompanied by wrongful arrest and assault. In the conjoined cases of *Thompson v Commissioner of the Police of the Metropolis and Hsu v Commissioner of Police of the Metropolis*[50], the Court of Appeal greatly reduced exemplary damages awards which had been made by a jury. Delivering the judgment of the Court of Appeal, Lord Woolf stated that:

> In this class of action, the conduct must be particularly deserving of punishment for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum...[51]

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[49] *Ibid.*, [117].
[50] [1998] QB 498.
[51] [1998] QB 498, 517.

In the 2006 case of *Rowlands v Chief Constable of Merseyside Police* (discussed below in this Chapter in the context of vicarious liability) the Court of Appeal awarded the sum of £7,000 exemplary damages in a case in which a woman had been wrongly arrested, assaulted, forcibly handcuffed in front of her children, with the handcuffs manipulated to inflict pain, falsely detained and maliciously prosecuted.

In terms of the vindication analysis being conducted here, it is revealing that, speaking of other English judgments on quantum in *Shortt*, Hardiman J stated that he deemed the awards in these cases to be inadequate by Irish standards. The "cap" on exemplary damages that effectively applies in England has no counterpart in Ireland and in any event, it is highly doubtful whether even if any such cap had been in place, it would have been deemed appropriate to apply it to exemplary damages to a case with facts as extraordinary and disturbing as *Shortt*. This strong opposition to a court being fettered in terms of the scale of an award of exemplary damages comprises, it is submitted, a very important example of safeguarding and promoting the vindicatory aspect of their purpose. Similarly, a separate point of some interest and significance in the context of the inquiry in the herein thesis is the nature of the relationship between the vindicatory (and any other "non-corrective") function of exemplary damages, and the corrective function of other species of damages, such as compensatory damages. In this regard, another key point to emerge from *Shortt* on the question of exemplary damages is that it is not necessarily correct to say that exemplary damages must always be less, and substantially less, than compensatory damages. In the earlier Supreme Court decision of *McIntyre v*

*Lewis*[52], O'Flaherty J stated that an award of exemplary damages "should properly be a fraction rather than multiple of the amount awarded by way of compensatory damages". But in *Shortt*, Hardiman J stressed that he could not agree with this statement. In the view of Hardiman J the above statement by O'Flaherty J was contrary to the core principle underpinning an award of exemplary damages against the State, namely that such an award "be sufficient "truly to make an example" of the wrongdoers and that it be effective to deter a repetition."

This, too, is a very important point from the perspective of vindication, and it is submitted that this conclusion arrived at by Hardiman J is compelling. Whilst in the great majority of cases it will not be appropriate to make an award of exemplary damages that is greater than that awarded for compensatory damages, there will be cases in which this is appropriate. Examples here would be cases of misfeasance in public office, where state agents behave in an entirely unacceptable manner. Although a serious wrong might well have been done to an individual in such circumstances, that individual may only be entitled to compensatory damages which are insubstantial, or indeed to none at all. An example of the latter situation occurred in the important English case of *Watkins v Home Office*[53], already analysed in detail in Chapter 3. Briefly, it will be recalled that, since Mr Watkins could not show that he had sustained damage, which the House of Lords held to be a constituent ingredient complete the cause of action in misfeasance, compensatory damages were not available. Notwithstanding this, the claimant contended that it was still appropriate to make an award of exemplary damages so as to reflect the wrongfulness of

[52] [1991] IR 121.
[53] [2006] UKHL 17, [2006] 2 AC 395.

the conduct of certain of the prison officers. This argument proved unsuccessful in the House of Lords.[54] On the question of the availability of exemplary damages where no compensatory award can be made, it can be argued that since exemplary damages focus on the wrongdoing of the defendant, and are exclusively concerned with marking the law's disapprobation of the oppressive, arbitrary or unconstitutional nature of that wrongdoing, the availability or otherwise of a compensatory function is irrelevant.[55] This argument has particular appeal in the context of misfeasance in public office, a tort that is – as is argued in detail in Chapter 2 – peculiarly concerned with deprecating and providing redress for the unlawful exercise or abuse of public power.[56] It is, moreover, an approach which would apparently have flowed naturally from the judgment of the House of Lords in *Kuddus* v *Chief Constable of Leicestershire*.[57] Accordingly, the minority approach of Lord Walker on this point in the *Watkins* case seems compelling.[58] Furthermore, as noted in Chapter 4 herein, there exists there exists superior court jurisprudence in this jurisdiction, the focus of which is on vindication, to the effect that exemplary damages can be awarded even where no compensatory award is being made.[59]

By way of further integrating this point with material already covered in previous Chapters, a further example of a potential case where exemplary damages could be appropriate in this context might be a case where a strip search is unlawfully performed.

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[54] See the judgment of Lord Bingham, [26], discussed in detail in Chapter 2.
[55] See further Robert Stevens, "Torts, Rights and Loss" (2006) 122 *LQR* 565.
[56] See further Cherie Booth QC and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006) 286-287 (citing at fn. 61 the judgment of the Court of Appeal in *Watkins*). Recent case law from other jurisdictions also supports this argument. For Kenyan authority, for example, for the proposition that exemplary damages can be awarded for misfeasance in public office see for example *Murgani v Kenya Revenue Authority* [2008] eKLR (High Court of Kenya at Nairobi, Civil Case 1139 of 2002).
[57] [2001] UKHL 29, [2002] 2 AC 122.
[58] *Watkins* [2006] UKHL 17, [2006] 2 AC 395, [75].
[59] See *Kearney v Minister for Justice* [1986] IR 116 and the analysis of this case in Chapter 4 herein.

The person subjected to this may suffer distress and feel degraded, and yet may only be entitled to relatively small compensatory damages. However, such a case might well be one in which it is appropriate to make a far larger award for exemplary damages.[60]

In *Shortt*, Murray CJ had:

> ...no doubt that in this case the grounds for exemplary damages are compelling. Although the grounds of the plaintiff's claims in this case were not laid as, or characterised as, breaches of constitutional rights *per se*, the conduct of the Garda officers involved set at nought core constitutional rights of the plaintiff to due process and a fair trial. However they are characterised he is entitled to such damages.[61]

The effectiveness of the deterrent power of awarding exemplary damages was referred to by the Chief Justice, when he noted that the power to award such damages "is a power which must be available to the Court where there is serious abuse of power by or on behalf of the State. The Chief Justice emphasised that such an award against the State, in appropriate cases, marks the Court's public disapproval of abuse of power so as to demonstrate that such wrongdoing will not be tolerated.

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[60] *Wainwright v United Kingdom* [2006] ECHR 807, (2007) 44 EHRR 809, discussed in detail in Chapter 5 herein.
[61] *Shortt, per* Murray CJ, [105].

Whilst simultaneously stressing that the courts should exercise restraint in approaching the question of exemplary damages, Murray CJ noted that the courts nonetheless enjoy wide discretion in determining whether such an award should be made.

**Exemplary Damages for breaches of rights post-*Shortt*: Will a restrictive approach be taken?**

It is important to acknowledge that not every abuse of public power, or every act of outrageous wrongdoing, makes it imperative that exemplary damages be awarded. Interestingly, Hardiman J in *Shortt* stated that a finding that a particular conviction was a miscarriage of justice will not automatically call for an award of exemplary damages. Hardiman J gave an example of a case where a new scientific discovery undermined forensic evidence which was advanced at the time of the trial in good faith. Hardiman J added that this example was "not intended to be exhaustive on the circumstances where no exemplary damages were called for". In a similar vein, the Chief Justice stated that

> ...it is far from the case that every claim brought pursuant to s.9 [of the Criminal Procedure Act 1993] would attract aggravated or exemplary damages.[62]

Significantly, the Chief Justice went further and stated that "Not every aggravated or even malicious breach of rights requires an award of exemplary damages".[63]

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[62] *Ibid.*, [74].
[63] *Ibid.*, [120].

In assessing the contribution to the vindication of rights being made by the developing case law in this area, an important question to be considered is that of when the courts are likely to say that an abuse of public power, though unacceptable, does *not* require that an award of exemplary damages be made. Useful guidance can be obtained from a consideration of the English case of *Kuddus v Chief Constable of Leicestershire*.[64] The plaintiff in that case was the victim of a burglary. His signature was forged by a police officer on a document which purported to be a withdrawal his complaint about the burglary. The question before the House of Lords was whether exemplary damages could be awarded for a claim of misfeasance in public office, and this was answered in the affirmative. But there were interesting *obiter* remarks as to whether this type of behaviour would warrant an award of exemplary damages. Lord Hutton stated his view that this was some way short of the type of case in which it would be appropriate to award exemplary damages. Such an approach is indicative of how high threshold is being set for the award of exemplary damages in the context of breach of rights.

## C. EXEMPLARY DAMAGES AND VICARIOUS LIABILITY

### Exemplary Damages in the Context of Vicarious Liability and Implications for Rights Vindication

A further important point to be examined in the context of the vindicatory power of exemplary damages – and one of particular relevance to public authority tort litigation – is the question of whether exemplary damages can be awarded when vicarious, as opposed to primary, liability has been imposed on a public authority defendant. Clearly, if exemplary damages can be imposed in the context of vicarious liability, their status as a

[64] [2002] 2 AC 122.

tool for rights vindication is enhanced, particularly given the frequency with which vicarious liability claims will be made in relation to public authority defendants. Because of the importance of this point for assessing the practical possibility of vindicating rights through exemplary damages, a brief comparative survey will now be undertaken of four jurisdictions: Ireland, the United Kingdom, Australia, and Canada.

First, in the Irish context, a key point to emerge from the Supreme Court decision in *Shortt* is that it is incorrect and unprincipled to award a lesser sum for exemplary damages in cases where the liability is vicarious as distinct from primary.[65] In the analysis that follows, the difficult question of the circumstances in which exemplary damages can be awarded where the liability in question is vicarious, is explored.

As acknowledged above in this Chapter, exemplary damages do serve a punitive purpose, Because of this, the nature of an award of exemplary damages raises difficult questions in the context of vicarious liability. One key concern is that very often the party against whom an award of exemplary damages is sought is not personally at fault at all.

In *Broome v Cassell & Co Ltd*[66] Lord Hailsham LC expressed the view that awards of exemplary damages in respect of joint torts should reflect the lowest figure for which any individual defendant could be held liable. Lord Reid (who, it will be recalled, considered the whole doctrine of exemplary damages anomalous and indefensible) said:

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[65] *Shortt, per* Murray CJ, [119], referring to the earlier Supreme Court judgments in *McIntyre v Lewis* [1991] 1 IR 121 and *Conway v Irish National Teachers Organisation* [1991] 2 IR 305.
[66] [1972] AC 1027.

> . . . . the jury should be directed that, when they come to consider what if any addition is to be made to the compensatory damages by way of punitive damages, they must consider each defendant separately. If any one of the defendants does not deserve punishment or if the compensatory damages are in themselves sufficient punishment for any one of the defendants, then they must not make any addition to the compensatory damages. If each of the defendants deserves more punishment than is involved in payment of the compensatory damages then they must determine which deserves the least punishment and only add to the compensatory damages such additional sum as that defendant ought to pay by way of punishment.[67]

In a similar vein, as the Irish Law Reform Commission noted nine years ago in its Report on the subject[68], it is more problematic to justify exemplary damages where liability is vicarious than where they are imposed directly on the wrongdoer. The justification for vicarious liability in respect of compensatory damages, that it is a means of ensuring proper compensation of the plaintiff, does not apply in relation to exemplary damages.[69] Notwithstanding this, an argument can be made – also acknowledged by the Commission in its report – that an award of exemplary damages against a vicariously liable employer or other principal serves the important function of deterrence.

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[67] *Ibid.*, 1090.
[68] Law Reform Commission *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000) [2000] IELRC 1.
[69] *Ibid.*, [3.17].

In assessing the various options open to Irish law on this issue, the Commission identified three options:

1) To apply the same rules of vicarious liability to liability for exemplary damages as apply to compensatory damages;

2) To exclude vicarious liability for exemplary damages; or

3) To provide for vicarious liability on the basis of an intermediate standard which would require some measure of fault, complicity or recklessness on the part of the principal.

In the final analysis, the Law Reform Commission recommended the retention of the normal rules of vicarious liability in respect of exemplary damages.[70] Now, nine years on and in light of the *Shortt* judgment, it is worth considering anew the various competing approaches outlined above so as to better understand the position that has now been taken in *Shortt* and its implications for future cases.

Prior to *Shortt*, the leading Irish authority on point was the decision of the Supreme Court in *McIntyre v Lewis*[71], the facts of which are well known. The third and fourth defendants, Ireland and the Attorney General respectively, argued that they were not vicariously liable for either the compensatory or the exemplary damages awarded. Their argument was based on the contention that the actions of the defendants were outside the

[70] A similar conclusion was reached by the English Law Commission which noted that an employer who knew that it might be held vicariously liable for both compensatory and punitive damages would have an even stronger incentive to control and educate its employees to deter wrongful conduct (see *Report on Aggravated, Exemplary and Restitutionary Damages* (1997) (Law Com No.247) at [1.218] *et seq.*).
[71] [1991] 1 IR 121.

scope of their employment. The defendants were police officers who had been found to have assaulted and falsely imprisoned the plaintiff, and to have pursued a malicious prosecution against him. The Supreme Court held there was vicarious liability for the wrongs committed, since the first two defendants had carried them out in the course of their duties. McCarthy J, speaking in the context of an award for exemplary damages stated that:

> If the liability to damages be vicarious, as the employer of the primary tortfeasor, then the liability is for the entire of the damages.

In *Shortt*, counsel for the State had at one point submitted that where outrageous conduct for which exemplary or punitive damages may be awarded is conduct for which the State is only vicariously liable, then the level of exemplary damages payable by the State should be mitigated or restricted by reason of the vicarious nature of the liability.

Murray CJ was satisfied that this was not "an argument that requires great scrutiny". He explained:

> As McCarthy J. also said in *McIntyre v Lewis*, in the context of an award of punitive damages, *"If the liability to damages be vicarious, as the employer of the primary tortfeasor, then the liability is for the entire of the damages."* Moreover, the State acts through its servants or agents and its responsibility is only engaged when wrongs are committed by its servants or agents. If counsel's proposition was correct the Court would be

> circumscribed in its jurisdiction to award exemplary or punitive damages appropriate for deliberate and outrageous abuse of public powers by servants of the State. The power of the Court to make an award for exemplary or punitive damages was clearly set out in *Conway –v- INTO*. The statement of McCarthy J. is patently correct. There is no basis in law for limiting the liability of the State to pay exemplary damages by reason of the vicarious nature of its liability. To do so would be absurd and contrary to the well-established principles and purpose of such damages. Indeed in exercising its constitutional function to defend and vindicate the rights of individuals the power of the Court to award exemplary or punitive damages against the State in appropriate circumstances is, as the decisions of this Court demonstrate, of fundamental importance.[72]

In decisively rejecting the proposition that the vicarious nature of the liability would justify a lesser sum in exemplary damages, the Court noted that the State can only commit egregious wrongs through its servants or agents, and thus can only ever be vicariously liable for such wrongs. The Chief Justice rejected this argument in robust terms, stating:

> There is no basis in law for limiting the liability of the State to pay exemplary damages by reason of the vicarious nature of its liability. To do so would be absurd and contrary to the well-established principles and purpose of such damages. Indeed in exercising its constitutional function

[72] *Shortt*, [119].

> to defend and vindicate the rights of individuals the power of the Court to award exemplary or punitive damages against the State in appropriate circumstances is, as the decisions of this Court demonstrate, of fundamental importance.

As the Law Reform Commission had noted in its analysis in 2000, this approach is consistent with that adopted by the majority of common law jurisdictions. Since the publication of the Commission's Report, however, there have been a number of significant developments in the UK, Canada, Australia and New Zealand and it is worth reflecting briefly on the significance of those recent developments in this context.

**The Position in England and Wales**

In *Racz v Home Office*[73] the House of Lords was prepared to allow a claim for exemplary damages to proceed where the Home Office was being sued as being vicariously liable for the acts of prison officers. This is fully in accordance with the approach taken by the Court of Appeal in England in late 2006 in *Rowlands v Chief Constable of Merseyside*[74] in which a woman, who was found to have been wrongly arrested, claimed damages for false arrest and pain and suffering, as well as exemplary and aggravated damages for the affront to her dignity and the arbitrary treatment meted out to her by the police. The Court of Appeal in *Rowlands* took the view that as a matter of principle, exemplary damages could be awarded against the chief constable of a police force where the latter was held vicariously liable for torts committed by other police officers. Moore-Bick LJ observed:

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[73] [1994] 2 AC 45.
[74] [2006] EWCA Civ 1773, [2007] 1 WLR 1065.

> [S]ince the power to award exemplary damages rests on policy rather than principle, it seems to me that the question whether awards can be made against persons whose liability is vicarious only must also be answered by resort to considerations of policy rather than strict principle. While the common law continues to recognise a power to award exemplary damages in respect of wrongdoing by servants of the government of a kind that has a direct effect on civil liberties, which for my own part I think it should, I think that it is desirable as a matter of policy that the courts should be able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question. Only by this means can awards of an adequate amount be made against those who bear public responsibility for the conduct of the officers concerned.[75]

Whether this approach will be upheld by the House of Lords is, however, a matter of debate.[76]

By contrast, however, the Supreme Court of Canada, which has been at the forefront of developments in relation to vicarious liability generally[77], takes a contrary view to that adopted in *Shortt*. We now turn to examine the position that prevails in a number of jurisdictions before considering the implications of this debate from an Irish perspective and how the landscape has now been affected by *Shortt*.

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[75] *Ibid.*, [47].

[76] In *Kuddus,* Lord Scott stated his clear view that an award of exemplary damages is never to be made against a defendant who is guilty of merely vicarious liability.

[77] See, for example, *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570, discussed in detail in Chapter 7 herein.

**The Position in Canada, Australia and New Zealand**

*(i) Canada*

In *Peeters v Canada*[78], it was held that lack of adequate training was sufficient to justify making an employer pay exemplary damages for the acts of an employee. However, more recent developments in Canada indicate that this position must now be doubted.

In its important recent decision in the case of *Blackwater v Plint*[79] the Supreme Court of Canada held, *inter alia*, that an employer could not be held vicariously liable for punitive damages. The court stated that punitive damages require "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour" and that neither defendant had acted in this manner. Consequently, neither could be vicariously liable for punitive damages.

*(ii)Australia*

By contrast with the position adopted in Canada, it appears that in Australia exemplary damages can be awarded in the vicarious liability context. Two judgments of the New South Wales Court of Appeal in late 2005 would appear to bear this out: *New South Wales v Bryant*[80] and *New South Wales v Ibbett*[81], although these cases do not entirely rid the law of doubt. Thus in *Ibbett,* Ipp JA observed that the law as to whether vicarious liability will support a claim for exemplary damages is "not yet finally settled".[82] Rather curiously, the court in *Ibbett* made no reference to the only slightly earlier judgment in

[78] (1993) 108 DLR (4th) 471, [1994] 1 FC 562.
[79] 2005 SCC 58, [2005] 3 SCR 3. For comment see Jason W. Neyers, "Joint Vicarious Liability in the Supreme Court of Canada" (2006) 122 *LQR* 195.
[80] [2005] NSWCA 293.
[81] [2005] NSWCA 445.
[82] *Ibid.*, [139].

*Bryant* and it may be that the question will ultimately require resolution by the High Court of Australia.

*(i)New Zealand*

In the course of its decision in *S v Attorney General*[83], the New Zealand Court of Appeal accepted that there was one "argument of cogency" which can be advanced for awarding exemplary damages on a vicarious basis:

> [T]he punishment and denunciation of outrageous conduct within an enterprise controlled or supervised by the defendant may provide additional deterrence for the defendant and others, including its employees and agents, from behaving in such a grossly improper manner. It can be said that, particularly in a jurisdiction where ordinary damages for personal injury cannot be awarded save in an exceptional case, it is desirable, even necessary, to make an example of the principal or employer whose agent or employee has behaved disgracefully and thereby encourage people in their position to take even greater precautions to avoid such behaviour or to detect and stop it at an early stage. But it is debatable, in our view, whether in very many cases a principal whose own conduct has not been found to be negligent, or other principals who are already observing their legal duties, will be thereby provided with an additional incentive to take, on an economically sensible basis, further and

[83] [2003] 3 NZLR 450.

effective precautions going beyond those required by an ordinary duty of care.[84]

**Consideration of Competing Approaches**

A number of arguments can be advanced in opposition to the approach of the Supreme Court of Canada and in favour of the approach taken by, *inter alia*, the Irish Supreme Court in *Shortt*. First, the arguments that might be deployed in support of the approach taken in *Shortt* include the fact that such an award would incentivise defendant employers to seek insofar as possible to ensure that best practices are adhered to by their employees, an incentive which in and of itself can be seen as fulfilling a vindicatory purpose in that it is more likely to safeguard an promote rights protection. Quite apart from this, however, the normative argument for vindication is also persuasive in supporting the Irish approach in this context: if, as argued above in this Chapter, the functions of exemplary damages include the vindication of the plaintiff's rights, then it is submitted that imposing vicarious liability on an employer for exemplary damages is consistent with the furtherance of this purpose.

**Vindication paradigm in context of vicarious liability for exemplary damages complicated in context of concurrent wrongdoers**

This purely vindicatory approach is, however, rendered somewhat more complicated when one reflects on a point made by Lord Scott in *Kuddus v Chief Constable of Leicestershire*.[85] Lord Scott, with respect, fastened on a point of impeccable logic, in

[84] *Ibid.*, [91].
[85] [2001] UKHL 29, [2002] 2 AC 122, [128].

highlighting the rule that against joint tortfeasors sued together there can be no exemplary damages if one of them was innocent of improper conduct (the relevant Irish rule in this regard being that laid down in s. 14(4) of the Civil Liability Act, 1961, discussed below). Lord Scott built on this by saying that quite clearly this has to be equally true where the innocent wrongdoer is sued alone as the sole defendant.

There is a further complication in this context, which is that regard must of course be had to the provisions of the Civil Liability Act 1961.

Section 2, the definition section, provides that "'wrongdoer' means a person who commits or who is otherwise responsible for a wrong". Significantly, there is no definition of "tortfeasor".

Section 11, sub-ss. 1 and 2, provide:

> . . . for the purpose of this Part two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.
> (2) Without prejudice to the generality of subsection (1) of this section —
>
> 1. (a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage . . .

Section 14, sub-ss. 4 and 5 provide:

> (4) Where the court would be prepared to award punitive damages against one of concurrent tortfeasors, punitive damages shall not be awarded against another of such tortfeasors merely because he is a concurrent tortfeasor,

but a judgment for an additional sum by way of punitive damages may be given against the first-mentioned tortfeasor.

(5) The judgment mentioned in sub-section (4) of this section may specify that such additional sum is awarded by way of punitive damages, and no contribution shall be payable in respect thereof by a tortfeasor against whom such judgment could not properly have been given.

The clear meaning to be accorded to the above subsection is that it constitutes an exception to the general rule regarding "concurrent wrongdoers" covered in Part III of the 1961 Act. However, a difficulty arises since the above section refers not to "concurrent wrongdoers", but to "concurrent tortfeasors", a term which, as noted above, is not defined in the Act. This accordingly raises the question of whether s. 14(4) applies to where the liability of concurrent tortfeasors is vicarious.

The point was the subject of *obiter* discussion in the judgment of McCarthy J in *McIntyre v Lewis*[86] where McCarthy J stated that he "would incline to the view that it is not relevant to circumstances where the liability of the concurrent tortfeasor is vicarious. If the liability to damages be vicarious, as the employer of the primary tortfeasor, then the liability is for the entire of the damages."

In complete contrast, however, in the House of Lords *Kuddus* case discussed above, Lord Scott, in strenuously refusing to countenance the awarding of exemplary damages in the context of vicarious liability, drew support for this proposition by highlighting the equivalent English rule that against joint tortfeasors sued together there can be no exemplary damages if one of them was innocent of improper conduct. Lord Scott built on

[86] [1991] 1 IR 121, 139.

this by saying that quite clearly this has to be equally true where the innocent wrongdoer is sued alone as the sole defendant.

In the face of such impeccable logic, however, it is still possible to argue as a matter of principle that, notwithstanding the rule in s. 14(4), exemplary damages ought still be available against a vicariously liable defendant on the bases of the policy arguments in support of vindication considered above. In this regard, it is salutary to recall the observation made over forty years ago in one of the leading English cases on vicarious liability, that "the doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice".[87] The doctrine of vicarious liability and its capacity for vindicating rights is the subject of detailed treatment in the next Chapter.

## D. CONCLUSIONS

In this Chapter, the capacity of exemplary damages to vindicate plaintiffs' rights has been assessed, with the argument being advanced that exemplary damages comprise a significant and indeed unique way in which tort law can vindicate rights. Beginning with a reflection on the rationale for exemplary damages, it was argued that such damages, although they do indeed represent a break with the corrective justice paradigm, enable rights vindication to be pursued. The Chapter then proceeded to further this argument through the prism of the significant landmark Irish Supreme Court judgment in *Shortt*, which comprises an extremely significant development confirming the vindicatory power

[87] *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 *per* Lord Pearce, 685.

of exemplary damages. The judgment does this on a number of different levels. First, the sheer size of the sum awarded for exemplary damages is striking; the analysis above of the approach taken by the Supreme Court to the relationship between compensatory and exemplary damages reveals that the Court was at pains to reserve for itself a power to vindicate rights through the use of exemplary damages, regardless of the extent to which a compensatory function had been met by other damages. At a broad philosophical level, the award may be viewed as necessary to properly vindicate the plaintiff's constitutional rights, and to register the disgust and indignation of the courts when confronted with a wrongdoer who has engaged in such contumelious and unacceptable breaches of fundamental rights.

In addition, the judgments delivered in *Shortt* treat of important discrete issues pertaining to the extent of vindication possible through an award of exemplary damages. Thus, the Supreme Court has clarified that it is not a rule of law that the figure awarded for exemplary damages must be merely a fraction of the sum awarded for compensatory damages; although in reality it is likely that in the normal run of cases the figure awarded for compensatory damages will be greater than that awarded by way of exemplary damages.

Moreover, *Shortt* provides yet further evidence that the Irish courts will have little enthusiasm for following the *Rookes v Barnard* limitations on when exemplary damages may be awarded, thus confirming the latitude enjoyed by the courts to vindicate rights through their use.

After *Shortt*, new possibilities and new difficulties arise in the context of the imposition of vicarious liability and the availability in those circumstances of exemplary damages. This is particularly significant given that the law relating to vicarious liability has undergone such development and expansion in recent years and that in several areas the scope for its application seems capable of considerable growth. It is the question of vicarious liability and its use as a vindicatory tool in public authority tort litigation that the final Chapter now addresses.

# Chapter 7

# VICARIOUS LIABILITY OF PUBLIC AUTHORITIES: VINDICATING THE RIGHTS OF THE VULNERABLE AS "A MATTER OF COURSE"?

> The theoretical underpinnings of the doctrine of vicarious liability are much debated but no clear conclusion emerges.[1]

### Chapter Overview

*The focus of this final Chapter is on the doctrine of vicarious liability as it applies to public authority defendants. A detailed comparative survey is undertaken in which the significant changes in the vicarious liability "course of employment" test are identified and analysed from the standpoint of the vindicatory function of tort law, culminating in a detailed treatment of emerging Irish Supreme Court jurisprudence in this area. It is argued that this case law analysis reveals a fundamental tension between the values of tort law being pursued in the context of judicial approaches to the imposition of vicarious liability, a tension that is of special relevance for public authority liability in tort.*

## A. INTRODUCTION: VICARIOUS LIABILITY AND VINDICATION

### Relevance of Vicarious Liability to Present Inquiry

The doctrine of vicarious liability has already emerged in several distinct contexts thus far in this thesis. It has, for example, been identified as fundamentally anomalous[2] when viewed through the prism of the corrective justice paradigm explored in Chapter 1; similarly, the imposition of vicarious liability for breach of constitutional rights has been

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[1] *O'Keeffe v Hickey* [2008] IESC 72, [2009] 1 ILRM 490, 541 *per* Fennelly J. The author wishes to thank Patricia Brazil, Editor of the Irish Law Reports Monthly, for having supplied him with a copy of this report of the judgment. All subsequent references herein to *O'Keeffe* are to this ILRM citation.

[2] See above, Chapter 1. On the conceptually elusive nature of vicarious liability see generally Elizabeth Adjin-Tettey, "Accountability of Public Authorities through Contextualised Determinations of Vicarious Liability and Non-Delegable Duties" (2007) 57 *UNBLJ* 46; Jennifer H. Arlen and W. Bentley MacLeod, "Beyond Master-Servant: A Critique of Vicarious Liability", Chapter 4 in M. Stuart Madden, ed, *Exploring Tort Law* (Cambridge University Press, 2005), 111; Jason W. Neyers, "A Theory of Vicarious Liability" (2005) 43 *Alberta Law Rev* 1; Attila Ataner, "How Strict is Vicarious Liability? Reassessing the Enterprise Risk Theory" (2006) 64(2) *UTFLR* 63.

shown to pursue a purpose that is clearly vindicatory in nature and as such the doctrine of vicarious liability graphically engages questions about the rôle of vindication in tort law. In the earlier Chapter on the vindication of rights through the "Constitutional" tort[3], the readiness of the courts to impose vicarious liability for breach of such rights was emphasised.[4] The significance of such a trend is the support it evinces for an understanding of vicarious liability that incorporates an element of vindication. The doctrine also arose in the context of Chapter 6 in analysing the vindicatory power of exemplary damages. Equally, in Chapter 2, the influence of vulnerability concerns upon the core constituent ingredient of the duty of care in negligence was analysed: in this Chapter, it will be argued that concerns about protecting the rights of the vulnerable have driven the courts in many jurisdictions to alter significantly vicarious liability doctrine. As with Chapters 2 and 3, then, tensions emerge between the need to bow to vindicatory pressures and to preserve the orthodox contours of the constituent ingredients of tort law doctrine. In this Chapter, the profound developments to have taken and currently taking place in the law relating to the imposition of vicarious liability are analysed to further explore these and related themes and tensions.

**Vicarious Liability at present in state of considerable transition**

Given the frequency with which it will be public authority defendants who will be subjected to vicarious liability, the question of the extent to which vicarious liability can be used as an instrument of rights vindication is one that is particularly significant in relation to public authority defendants. The doctrine is at present undergoing considerable and

[3] See above, Chapter 4.
[4] In particular, the cases of *Kearney v Minister for Justice* [1986] IR 116 and *Gray v Minister for Justice* [2007] 2 IR 654 are recalled in this regard: for discussion, see Chapter 4.

rapid transition: recent years have witnessed many remarkable judicial developments in the application of vicarious liability in tort law throughout the common law world. Even confining the survey to developments so far in the first decade of the twenty-first century, the breadth and range of these changes are striking. Some have embodied swift and radical development of hitherto firmly embedded assumptions, with apparently entrenched orthodoxies spanning many decades and even centuries of case law being rejected;[5] other developments have been less dramatic, but have served to clarify, for example, an aspect of vicarious liability that was previously the subject of uncertainty or confusion.[6]

Still other examples of landmark change have countenanced the imposition of vicarious liability in entirely new contexts,[7] including those[8] in which tort lawyers might hitherto have confidently predicted that vicarious liability would be of no application, with the result that an "ever increasing number of torts are becoming subject to its reach."[9] Whilst many of the developments have undoubtedly brought enhanced clarity to the law, there are,

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[5] As, for example, in the approach taken to dual vicarious liability in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510, [2006] 2 WLR 428.

[6] An example of such a development is the extensive analysis of the Irish High Court (Kelly J) in *Byrne v Ryan* [2007] IEHC 207 (discussed in a different context in Chapter 2 herein) on the question of whether a public hospital could be held vicariously liable for the negligence of a consultant doctor on its staff in treating a public patient, with detailed analysis being accorded to the status in Irish law of authorities such as *Cassidy v Ministry of Health* [1951] 2 KB 343 (CA) and *Roe v Minister of Health* [1954] 2 QB 66 (CA). For analysis see Neville Cox, "Suing Hospitals and Health Boards", Chapter 3 in Ciarán Craven and William Binchy eds, *Medical Negligence Litigation: Emerging Issues* (First Law, 2008), 83, 88.

[7] Such as, for example, that of its potential application to equitable wrongs: see *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2002] 3 WLR 1913. On the importance of context in judicial approaches to vicarious liability see generally Elizabeth Adjin-Tettey, "Accountability of Public Authorities through Contextualised Determinations of Vicarious Liability and Non-Delegable Duties" (2007) 57 *UNBLJ* 46.

[8] Perhaps the most prominent recent example is the judgment of the House of Lords, endorsing the approach taken by a majority in the Court of Appeal, in *Majrowski v Guy's & St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [2006] 3 WLR 125.

[9] Paula Case, "Developments in vicarious liability: shifting sands and slippery slopes" (2006) 22 *PN* 161, 175.

also, examples of recent cases which themselves seem certain to provoke more litigation.[10] One further example to be added to the above (by no means exhaustive) list is the profound change which has taken place in many jurisdictions in applying the classic "scope" or "course" of employment test. More than any other aspect of vicarious liability doctrine, the meaning of this "infelicitous but time-honoured phrase"[11] has been the subject of an intense level of judicial scrutiny in approximately the last ten years. Amidst rapid development in the appellate courts of many common law jurisdictions, the test has been reassessed in a contemporary context and reformulated in ways that diverge significantly from conventional applications of that test. Much of the rationale for this change, it will be argued here, is rooted in vindicatory concerns: in particular, with the need to protect the rights of vulnerable plaintiffs. This abandonment of the traditional understanding of the "course of employment" concept has not, however, been universally endorsed by the courts.[12] So too have academic commentators expressed concerns about the implications for both tort law generally and vicarious liability in particular of such wholesale changes.[13]

In this Chapter, it is argued that the dramatic shifts which have taken place in many common law jurisdictions in the last decade – most notably in Canada and the United Kingdom, but also supported by certain judges in Australia and Ireland – in countenancing the adoption of a more generous "close connection" test for the establishment of vicarious

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[10] A topical example is the availability of exemplary damages in the context of vicarious liability, discussed in Chapter 6 herein.

[11] *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 (CA) *per* Diplock LJ, 737.

[12] See, for example, the different opinions of the members of the High Court of Australia in *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412.

[13] For incisive criticism of the case law see, for example, Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 *Comm L World Rev* 268; Paula Giliker, "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 *Torts L J* 35. For broader theoretical discussion see Jason W. Neyers, "A Theory of Vicarious Liability" (2005) 43 *Alberta Law Rev* 1.

liability can be explained by reference to the vindicatory analysis of this thesis. The developments, it will be argued, represent tort law's (albeit largely unstated) response to the pressure to vindicate the rights of vulnerable plaintiffs. In this way, the theme of vulnerability explored in the context of the duty of care analysis in Chapter 2 is here further unified to the vindicatory analysis informing this thesis. So too can observations be ventured as to likely future developments in this jurisdiction. This inquiry is timely in light of two recent – and highly controversial – decisions of the Supreme Court which, it will be argued, brings to prominence the question of the capacity of vicarious liability to vindicate rights.

**The Salmond Course of Employment Test**

Under the traditional interpretation of the "course of employment" test – which was first articulated in a student tort text just over one hundred years ago[14] and was rapidly to become the most frequently cited touchstone for determining vicarious liability[15] – an employer could be held vicariously liable both for employee acts authorised by the employer and for unauthorised acts so connected with authorised acts that they could be regarded as modes (albeit improper modes) of performing authorised acts.[16]

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[14] Sir John Salmond, *Salmond on Torts* (1st ed, Sweet & Maxwell, 1907), 83-84.

[15] Lord Millett in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, said of the Salmond test that it "has probably been cited more often than any other single passage in a legal textbook" ([67]). Early examples of its approval in the English courts include the judgment of Bankes LJ in *Poland v Parr (John) & Sons* [1927] 1 KB 236 (CA), 240 and that of Lord Thankerton in *Canadian Pacific Railway v Lockhart* [1942] AC 591 (PC), 599. Express judicial endorsements of the Salmond test in an Irish context include the judgment of Blayney J in *Reilly v Ryan* [1991] 2 IR 247 (HC), 249 and the judgments of Hardiman and Fennelly JJ in the Supreme Court decision in *O'Keeffe v Hickey O'Keeffe v Hickey* [2008] IESC 72, [2009] 1 ILRM 490.

[16] As has frequently been observed, the first branch of the Salmond test in reality amounts to primary as opposed to vicarious liability. See C.A. Hopkins, "What is the Course of Employment?" [2001] *CLJ* 458, 458; see also the judgment of Lord Millett in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, [67].

The limits of the practical utility of the Salmond test – "an apparently simple test whose simplicity is largely deceptive"[17] – have long been acknowledged in the context of intentional torts, particularly when compared with its attractiveness in the context of the tort of negligence. Thus, in his still leading work on the subject of vicarious liability published over forty years ago,[18] Patrick Atiyah rightly emphasised the attractiveness of the test in the negligence sphere, observing "[t]here can be no question but that [the Salmond] test works best when applied to acts of negligence because in many circumstances negligence is a way of doing something rather than an act in itself."[19] By contrast, Atiyah accepted that the test gave rise to much greater difficulty in the case of a wilful act than in the case of a negligent act, going so far as to declare "[i]n dealing with such wilful acts there is no doubt that the Salmond test really ceases to be of much help."[20] In the last decade, the courts in many common law jurisdictions, against the grim backdrop of a growing number of tort claims flowing from institutional child sexual abuse, have been called upon to acknowledge this limitation of the Salmond test as traditionally applied and to shift the emphasis to the reference in Salmond's classic formulation to unauthorised acts *connected* with authorised acts. In the recent cases under consideration below, this "connection" aspect of the Salmond test has now been brought sharply into focus.

Although the factual backgrounds to the particular cases contain many important differences that will require analysis later in this Chapter, all of the cases concern the following broad factual background of vulnerability. A child is sexually abused by an

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[17] Patrick Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967), 172.
[18] *Ibid.*, 257.
[19] On this point see further *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 (PC), 472 *per* Lord Wilberforce.
[20] Patrick Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967), 263.

authority figure who is employed at a school. The abuser's conduct clearly constitutes intentional wrongdoing, which could never be authorised by any employer. In these cases, the question that has exercised the courts in relation to the potential imposition of vicarious liability is whether the acts of the employee can properly be characterised as having been committed in the course of that individual's employment.

Under the Salmond test as it has been traditionally applied by the courts, vicarious liability cannot apply in such a situation. The wrongful acts in question are the very antithesis[21] of what their employment responsibilities require of teachers: teachers are employed to teach children and to promote their welfare and development. Acts of sexual abuse are thus totally inconsistent with what their employment responsibilities require of such employees; they are abhorrent criminal acts to which opprobrium and notoriety attach and can in no sense be said to be committed in furtherance of the employer's enterprise. Because of this, until very recently, attempts at imposing vicarious liability upon employers in such circumstances appeared to lack any prospect of success whatsoever. A paradigmatic example of judicial acceptance of this position is to be found in the statement in the late 1990s of a senior judge of the English Court of Appeal to the following effect:

> [I]n the field of serious sexual misconduct, I find it difficult to visualise circumstances in which an act of the teacher can be an unauthorised mode

[21] This term is used frequently in the case law: see for example the judgment of Lord Millett in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, [68] and the joint judgment of Gummow and Hayne JJ in *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412, [204]. See also Robert Stevens, *Torts and Rights* (Oxford, OUP, 2007), 270; Cherie Booth QC and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford, OUP, 2006), 259.

> of carrying out an authorised act, although I would not wish to close the door on the possibility.[22]

It is, at the time of writing, barely just ten years since this – now decisively over-ruled[23] – statement could be articulated with confidence by the Court of Appeal in England and Wales as representing an insurmountable obstacle in the path of imposing vicarious liability for intentional sexual abuse. This serves as a stark reminder of the profound significance of the change which has taken place in that decade to the application of the Salmond test. Developments since that time will now be analysed with reference to each of the jurisdictions under analysis in this Chapter.

## B. VICARIOUS LIABILITY AS AN INTRUMENT FOR VINDICATING THE RIGHTS OF THE VULNERABLE: THE CANADIAN INNOVATION

### Reformulating the Salmond Test: The "Enterprise Risk" Approach in *Bazley v Curry*

Just ten years ago – and less than one year after the Court of Appeal decision in *Trotman* – the Supreme Court of Canada rendered two separate judgments on the same day in companion cases concerning vicarious liability. The first was that delivered in *Bazley v Curry*,[24] where the Supreme Court of Canada essentially abandoned the orthodox interpretation of the Salmond test and substituted for it the concept of "enterprise risk."[25] *Bazley* was the first of the seminal cases in the past decade involving vicarious liability for

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[22] *Trotman v North Yorkshire County Council* [1998] EWCA Civ 1208, [1999] LGR 584, *per* Butler-Sloss LJ, [18].
[23] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311.
[24] [1999] 2 SCR 534.
[25] For detailed analysis of the significance of *Bazley* in this respect see Douglas Brodie, "Justifying Vicarious liability" (2007) 27 *OJLS* 493; David R. Wingfield, "Perish Vicarious Liability?" in Jason W. Neyers, Erika Chamberlain and Stephen G.A. Pitel eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007), 393, 399.

child sexual abuse. The judgment would soon afterwards be referred to as the "starting point" for consideration of these problems "in the common law world."[26] It thus merits close analysis.

The defendant in *Bazley*, a non-profit organisation, operated residential care facilities for the treatment of emotionally troubled – and thus highly vulnerable –children. Operating a "substitute parent" system, it was based on a policy of "total intervention" in all aspects of the lives of the children in its care. Accordingly, the organisation required its employees to perform parental duties in acting as parent figures for the children, ranging from general supervision to intimate functions like bathing and tucking in at bedtime. The organisation employed a man who was a paedophile, and who sexually abused a child. The question was whether the organisation was vicariously liable for his wrongdoing. According to McLachlin J, who delivered the judgment of the Supreme Court, the Salmond test was to be approached in a number of stages. First, the court should assess whether precedent unambiguously determined that the tort was within or outside the course of employment. Secondly, the court should decide whether liability ought to be imposed on the employer given the policy rationales underlying the law of vicarious liability. As there were no decisive precedents on the issue of sexual abuse, the outcome in *Bazley* depended upon the Supreme Court's application of the second stage of this test. McLachlin J conducted a

[26] *Per* Lord Steyn in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, [27]. The significance of *Bazley* as a precedent influencing other superior courts in the common law world was specifically commented upon in the remarks of the Honourable Claire L'Heureux-Dubé at the ceremony to mark her retirement on 10 June 2002 (available at http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/CeremonyCLHD_e.asp, last visited 13 August 2009).

detailed examination of the policy considerations underlying the concept of vicarious liability, and observed:

> Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.[27]

McLachlin J then applied this analysis to the issue of institutional child sexual abuse, emphasising the requirement that trial judges investigate the employee's specific duties so as to determine whether they gave rise to special opportunities for wrongdoing.[28] Amongst the factors to be taken into account, relevant to sexual abuse, were said to include the opportunity for abuse afforded to the employee; relationships of power and intimacy; and the vulnerability of potential victims. Thus, the question of vulnerability was explicitly

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[27] [1999] 2 SCR 534, [37].
[28] *Ibid.*, [46].

accepted as a criterion for determining whether vicarious liability could be imposed. In considering these factors, the focus of the test for vicarious liability for an employee's sexual abuse was said to be "whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm". McLachlin J explained:

> The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires.[29]

***Bazley* difficulties evident from day one: *Jacobi v Griffiths***

Few cases are distinguished on the very same day as they are decided: that this occurred in relation to *Bazley* is a salutary reminder of the difficulties raised – because of the fact-specificity of vicarious liability cases – by judicial attempts at laying down bright line principles. In the companion case of *Jacobi v Griffiths*,[30] the Supreme Court of Canada, by a bare majority, did not accept that a charitable organisation providing recreational activities to children was vicariously liable for the criminal sexual assaults committed by one of its employees. In this case, the employee came into contact with the children through his work with the organisation, but the acts of abuse he later perpetrated were

[29] *Ibid.*, [41] (emphasis in original).
[30] [1999] 2 SCR 570.

committed at his private residence outside working hours. The Court was divided on the question of whether there existed a sufficiently close connection between the acts of abuse and the employer's enterprise to justify the imposition of vicarious liability in these circumstances. Four judges held that vicarious liability should not be imposed; three held that it should.

Speaking for the majority, Binnie J said that the *Bazley* enterprise risk approach imposed vicarious liability on an employer because "it introduced the seeds of the potential problem into the community, or aggravated the risks that were already there, but only if its enterprise *materially* increased the risk of the harm that happened".[31] *Bazley* was distinguished as a case where the sexual abuse occurred in a special environment that involved intimate private control, and quasi-parental relationship and power. In *Jacobi*, on the other hand, the club offered group recreational activities in the presence of volunteers and other members. Those activities were not of such a kind as to create a relationship of power and intimacy; they merely provided the offender with an opportunity to meet children. There was no close connection between the employee's duties and his wrongful acts.[32] Further, the club did not act *in loco parentis* toward the children, and it was therefore not at the "same end of the spectrum of risk" as the *Bazley* case.[33]

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[31] *Ibid.*, [67] (emphasis in original).
[32] *Ibid.*, [80]– [86].
[33] It is significant that one factor relied upon by the majority as a ground for denying vicarious liability was the fact that because the defendant was a charitable organisation, it could not pass on the costs of any vicarious liability to the users of its charitable missions and thus it could not be said that the policy of efficient compensation would be met in this instance. Although the majority in *Jacobi* recognised that non-profit status could never be determinative of whether vicarious liability should be imposed, the relevance of this point being made at all must now be doubted in light of the subsequent decisions of the Supreme Court of Canada. See in particular *Doe v Bennett* 2004 SCC 17, [2004] 1 SCR 436, discussed below in this Chapter, n 52; *Blackwater v Plint* 2005 SCC 58, [2005] 3 SCR 3. This point is noted by Wingfield in the context of *Doe v Bennett*; see David R. Wingfield, "Perish Vicarious Liability?" in Jason W. Neyers, Erika Chamberlain

The dissenting judgment in *Jacobi* of L'Heureux-Dubé, McLachlin and Bastarache JJ should also be noted. For these members of the Court, *Jacobi* was a case in which the *Bazley* criteria explored above pointed to liability. Thus, the first *Bazley* criterion – the opportunity that the enterprise afforded to the wrongdoing employee to perpetrate his attacks – was said to support liability in the *Jacobi* environment into which children were entrusted not just for adult supervision, but for adult mentoring, an environment described as one "highly charged with potential for an abuse of that trust".[34] The dissenting judges in *Jacobi* also found that the defendant club went further in its nurturing activities than simply encouraging rapport with a rôle model: it positively encouraged an intimate relationship between the wrongdoer and the children in his care. The club, by making one of its goals "to provide behaviour guidance", and thus authorising the development of a trusting and intimate relationship, introduced the risks associated with such relationships between adults and children. This strengthened the argument that it should be held financially responsible for those risks when they materialised.[35]

Similarly, with respect to the extent of power conferred on the employee in relation to the victim, the minority in *Jacobi* held that the trial judge's finding that the wrongdoer exercised a "god-like" authority over his victims had shown that this factor also pointed toward liability. So too did the vulnerability of potential victims to the wrongful exercise of

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and Stephen G.A. Pitel eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007), 393, 400. More recently, the English Court of Appeal has indicated that the non-profit status of the defendant is irrelevant for the purposes of the vicarious liability inquiry: *Gravil v Carroll and Redruth Rugby Football Club* [2008] EWCA Civ 689, [2008] 1 ICR 1222 *per* Sir Anthony Clarke MR, [35].

[34] [1999] 2 SCR 570, *per* McLachlin J, [14].

[35] *Ibid.*, [16].

employees' power constitute a factor that pointed to liability. The wrongdoer had been put in a special position of trust and power over vulnerable people and he had used that position to carry out an abuse of that power. The *Bazley* policy rationales of fair compensation and deterrence thus supported the imposition of vicarious liability.

Finally, the dissenting judges in *Jacobi* disagreed with the majority's view that because the employee's wrongdoing had taken place mainly in a non-work setting this militated against the imposition of vicarious liability. The minority stressed that spatial and temporal factors such as when and where the torts occurred were not *per se* determinative: the key issue was whether a sufficient connection existed between the wrongful act and the employment. On this point, the minority in *Jacobi* emphasised that it was not the mere coincidence of location and interaction that led the wrongdoer to prey upon his victims – it was rather "that he worked at a job where he was put in a special position of trust and power over particularly vulnerable people and used that position to carry out an abuse of the power with which he was conferred to carry out his duties."[36]

**Evaluating the *Bazley* shift in the context of vulnerability**

As the differing outcomes in *Bazley* and *Jacobi* – and the different approaches in *Jacobi* alone – reveal, the considerations described by McLachlin J in *Bazley* "give no bright line test for deciding whether vicarious liability is to be found".[37] It is on this aspect of *Bazley* and related case that the majority of scholarly commentary has tended to focus. For present purposes, however, it is submitted that what was critical about the *Bazley* innovation was

[36] *Ibid.*, [21].
[37] *Per* Gummow and Hayne JJ in *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412, [212].

the express acknowledgement by the Supreme Court of Canada of the importance of the question of vulnerability in determining whether vicarious liability could be imposed. Before moving on to consider developments in the Supreme Court of Canada post-*Bazley*, it is instructive to reflect on the landmark nature of this change of focus evinced by the Supreme Court in that case, so as to appreciate the power of the vulnerability concern and to measure the influence of this vindicatory objective on the development of vicarious liability doctrine. The employee acts in *Bazley*, after all, constitute extremely serious criminal acts to which opprobrium and notoriety attach: they can in so sense be said to have been committed in furtherance of the employer's enterprise. Indeed, as Stevens has argued,[38] it appears somewhat strained to speak of the defendant in *Bazley* as having *increased* the risk of harm to children in circumstances where the very objective of the defendant was to provide care and support to otherwise at risk children, who may well otherwise have been at greater risk.

As against this, however, two arguments can be advanced. First, this is not the comparison that the Supreme Court of Canada in *Bazley* was making. Rather, the Court attached special emphasis to the nature of the services being provided to the victims, and to whether those services were of a kind that increased the danger of abuse from an employee with criminal propensities.[39] Thus, the comparison is not whether the plaintiffs were safer with the defendant than they would have been without its intervention; but rather whether the defendant in taking the children into its protection then put in place a system of care which exposed the plaintiff to a risk of abuse from an employee intent on exploiting such a risk.

[38] Robert Stevens, *Torts and Rights* (Oxford, OUP, 2007), 272.
[39] A point noted by Gleeson CJ in *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412, [73].

In such cases, regardless of how improper and wrongful the employee's actions are, the "abuse of his position and the abnegation of his duty does not sever the connection with his employment".[40]

A second, more general, point that can be advanced in response to Stevens's criticism is the reality that the particular vulnerability of children in general, and of children in care homes in particular, poses a special risk of abuse. As Hall has argued, the type of institutional settings that prevailed in the key cases in the common law world on this question serve as a "crucible" for paedophiles to prey upon children.[41] In light of the growing recognition of the heightened risks posed by such institutional settings, a strong argument can be made that it is indeed appropriate for the courts to speak in the language of "increased risk" in cases such as *Bazley*.

A number of observations may be made at this point about the implications of the *Bazley* approach since these will be important in analysing the other jurisdictions in which *Bazley* has been considered. The first is that the close connection test, whilst clearly broader than the Salmond test as traditionally understood, is itself a rather nebulous formula and, as Lord Nicholls in the House of Lords would later observe, the new test "affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third

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[40] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, *per* Lord Clyde, [50], after reviewing *Bazley* and *Jacobi*.

[41] Margaret Hall, "After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse" (2000) 22 *Journal of Social Welfare and Family Law* 159, 162.

party who was wronged".[42]

A second issue is the primacy of place accorded by the Supreme Court of Canada to the concept of risk creation. This point is particularly significant since this aspect of *Bazley* was not followed by the House of Lords in *Lister*. In *Bazley*, as we have seen, the basis for arriving at the close connection test was the stress laid upon this concept of risk creation. But it is not immediately obvious why this imperative is of such central importance in the context of vicarious liability. As one commentator has questioned of the approach to risk creation adopted in *Bazley*:

> Would [risk creation] not be a strong rationale for the introduction of strict liability in product liability cases, for example? Is McLachlin J (as she then was) signalling a willingness on the part of the Supreme Court to rethink Canadian tort law's commitment to negligence law and to move more aggressively towards strict liability...?[43]

A further point to be noted at this juncture is that the test as applied in *Bazley* involves the imbuing of the "course of employment" criterion with a heightened causal emphasis: the attention devoted to the nature of the employee's functions, in addition to the question of risk creation by the employer, combines to produce a causal inquiry that is stronger than had hitherto belonged in the course of employment test.[44]

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[42] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2002] 3 WLR 1913, [25].
[43] Lewis Klar, "Judicial Activism in Private Law" (2001) 80 *Can Bar Rev* 215, 238.
[44] Criticised by Gummow and Hayne JJ in *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412: see below in this Chapter, text preceding n 91.

In light of these and other difficulties the test articulated it is difficult to disagree with Giliker's prognosis that "the doctrine of vicarious liability is in danger of losing its way"[45]; her suggestion that the decision in *Bazley* (and the later decision of the House of Lords in *Lister*, analysed below) "was triggered not by a desire to reform the test, but by a sense of injustice at the inability of victims of abuse to access compensation when mistreated by a carer employed to safeguard their interests" seems compelling. It underlines the pivotal rôle played by the vulnerability concern in effecting a dramatic change in vicarious liability doctrine.

**Canadian authority post-*Bazley***

Indeed, the significance of *Bazley* for the development of vicarious liability doctrine is to be appreciated not only from a consideration of its application in subsequent Canadian authorities but also in the influence the decision has exerted in many other common law countries. From a doctrinal perspective, the judgment amounted to "a genuine advance on the unauthorised conduct/unauthorised mode distinction"[46], an advance later to be extended into other distinct and separate spheres of vicarious liability not involving sexual abuse. Thus, in the judgment of the Court of Appeal for British Columbia in *Yeung (Guardian ad litem of) v Au*[47], a case concerning the imposition of vicarious liability for the negligent operation of motor vehicles, Newbury J described *Bazley* as "the leading Canadian case on vicarious liability".[48] So too would Binnie J later describe *Bazley* as a "pioneering

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[45] Paula Giliker, "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 *Torts L J* 35, 36.
[46] Peter Cane, "Vicarious Liability for Sexual Abuse" (2000) 116 *LQR* 21, 24.
[47] 2006 BCCA 217, (2006) 269 DLR (4th) 727, [38]. The judgment of the Honourable Madam Justice Newbury was concurred in by the other members of the Court of Appeal.
[48] *Ibid.*, [38].

judgment that developed an approach to vicarious liability across a broad swath of social and economic relationships".[49] The accuracy of this comment is borne out by the fact that the Supreme Court of Canada has regarded the principles laid down in *Bazley* and *Jacobi* as being of application in the context of commercial relationships. Indeed, in *671122 Ontario Ltd v Sagaz Industries*[50], the Supreme Court of Canada appeared to proceed on the basis that these principles were of general application.[51]

**Rôle of Vulnerability Further Illuminated in *Oblates***

Since the decisions in *Bazley* and *Jacobi*, a number of more recent Canadian authorities have further explored the scope and meaning of the close connection test, identifying the particular factors that will militate either in favour of, or against, the finding of a sufficiently close connection between the wrongdoing and the employment enterprise.[52] In what is arguably the most important of the post-*Bazley* decisions to date for the rôle of

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[49] *EB v Order of Oblates of Mary Immaculate in the Province of British Columbia* 2005 SCC 60, [2005] 3 SCR 45, [47].

[50] 2001 SCC 59, [2001] 2 SCR 983.

[51] See, for example, the judgment of Major J in *671122 Ontario Ltd v Sagaz Industries* 2001 SCC 59, [2001] 2 SCR 983, [28]. On the question of the applicability of these principles to partnerships, see the different approaches of the members of the Supreme Court of Canada in *Strother v 3464920 Canada Inc.* 2007 SCC 24, [2007] 2 SCR 177.

[52] Examples include *KLB v British Columbia* 2003 SCC 51, [2003] 2 SCR 403, and *Doe v Bennett* 2004 SCC 17, [2004] 1 SCR 436. In *KLB* the majority of the Court held that vicarious liability should not be extended to the relationship between governments and foster parents for assaults on the children in their care. The highly independent manner in which foster parents discharge their duties meant that the connection between them and the government was too weak for foster parents to be reasonably perceived as acting on behalf of the government: *KLB*, [25].

In *Doe v Bennett*, above n 33, the Supreme Court of Canada held the appellant episcopal corporation vicariously liable for sexual assaults perpetrated over a period of almost two decades by a Roman Catholic priest in Newfoundland, on the basis that the evidence "overwhelmingly satisfie[d] the tests affirmed in *Bazley*, *Jacobi* and *KLB*" (*per* McLachlin CJ, [32]). The relationship between the diocesan enterprise and priest was sufficiently close; the necessary connection between the employer-created or enhanced risk and the wrong complained of had been established; the bishop provided the wrongdoing priest with the opportunity to abuse his power; the latter's wrongful acts were strongly related to the psychological intimacy inherent in his role as priest and the bishop conferred an enormous degree of power on him relative to his victims. *Doe* is also significant not only in confirming that non-profit status does not militate against the imposition of vicarious liability (see above n 33) but also in reserving the question of whether the Roman Catholic Church could be vicariously liable in such cases.

vulnerability, the Supreme Court in *EB v Order of Oblates of Mary Immaculate in the Province of British Columbia*[53] strongly rejected the contention that merely because an employer provides an opportunity for an employee to commit a tortious act there is a sufficiently strong connection to merit the imposition of vicarious liability. The judgment thus provides a very important counterpoint to *Bazley* in signalling a strong warning to trial judges that vicarious liability should not be imposed merely in the context of an opportunity having been provided to employees. The facts and judgments in *Oblates* thus warrant analysis in some detail.

The trial judge found that S, a lay employee at a First Nations school run by the Oblates, sexually assaulted the plaintiff over a period of approximately five years. All of the assaults took place in S's living quarters, which were in a building located on the school grounds. S worked in the school as a baker, boat driver and odd-job man. Based on his finding that the operational characteristics of the residential school created and materially enhanced the risk of the assaults, the trial judge found the defendants vicariously liable. The Court of Appeal for British Columbia set aside the trial judge's decision, holding that he had erred in overemphasising the question of job-created opportunity and in failing to have sufficient regard to the specific employment duties and responsibilities assigned to S and the connection, if any, between those duties and responsibilities and the wrongs of S.

The majority of the Supreme Court upheld the approach of the Court of Appeal. In a judgment delivered by Binnie J, the majority characterised as the "critical inquiry" a

[53] 2005 SCC 60, [2005] 3 SCR 45. For detailed analysis see Bruce Feldthusen, "Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It" (2007) 22 *Can J L & Soc* 61.

consideration of "the powers, duties and responsibilities conferred on [S] by the....Oblates in relation to students...keeping in mind of course the general environment of the school to the extent it can be said to have contributed to [S']s predatory activities."[54] The majority held that in order for vicarious liability to be imposed, a strong connection was required between what the employer was asking the employee to do and the wrongful conduct in question.

Very significantly, one of the chief reasons for declining to impose liability on the defendant in *Oblates* appears to have been the concern about a potential elision between primary and vicarious liability principles. According to the majority, the plaintiff's contention that the way in which the school was organised and operated created a significant risk to every student by every employee regardless of the particulars of his or her job, "would argue for *direct* liability rather than *vicarious* liability".[55] By contrast, what was required for the imposition of vicarious liability was a demonstration that school-created features of the employment relationship of S contributed to his ability to do what he did in this case. The majority took pains to emphasise that a "mere opportunity" to commit the wrongful act does not suffice in this regard, and held that the *Bazley* "strong connection" test was not met in this case.[56] This is significant in underscoring one of the tensions permeating the inquiry in this thesis: the concern that an emphasis on vindicatory objectives such as protecting the vulnerable will lead to an erosion of the key doctrinal components of tort law.

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[54] *Ibid.*, [2].
[55] *Ibid.*, [4] (emphasis in original).
[56] *Ibid.*, [52].

It is illuminating to analyse the reasoning of the Court in applying the different *Bazley* factors discussed above – not least because there was a strong dissenting judgment in *Oblates* which disagreed with the majority's application of those factors. On its analysis of these *Bazley* factors, the majority held that while the residential setting in which the abuse took place would favour a finding of vicarious liability under *Bazley*, the limited duties and rôle of S at the school were conclusive against it. Significantly, the various factors pointed to by the majority in this regard all concern the issue of the vulnerability of the victim vis-à-vis the wrongdoer, having reference to the latter's status.

Thus, the majority emphasised that S did not have authority to insinuate himself into the intimate life of the plaintiff; S was not "permitted or required" to be with the children, apart from trips in his motorboat which were supervised by one of the religious brothers. Moreover, in the context of the defendant's school in *Oblates*, intimacy was prohibited. S was expected to devote himself to baking, doing maintenance work and driving a motorboat, and his quarters were located in an area that was off-limits to students. The majority further stressed that the employer did not confer any power on S in relation to the plaintiff. Whilst there was a rather loose operational structure in the school, S's position was not one involving regular or meaningful contact with the students. And while the students were vulnerable, their vulnerability resulted from the nature of the institution, and not from the power conferred by the employer on S. Accordingly, the majority determined that the Court of Appeal had been correct in concluding that while the employment relationship provided S with the opportunity to commit the wrongful acts, his assigned rôle in relation to the students fell short of what was required to attract vicarious liability. A

strong connection between what the Oblates were asking S to do and the wrongful acts was not established.[57]

In analysing *Jacobi* above, it was observed that the marked disagreement between members of the Supreme Court in that case as to the applicability of *Bazley* starkly illustrates the difficulty of predicting whether that test will enable a court to arrive at a finding of vicarious liability. This significant point is further amplified by the strong dissenting judgment of Abella J in *Oblates*, where the issue of vulnerability was presented somewhat differently so as to arrive at a finding that vicarious liability was made out.

Whilst Abella J accepted the holding of the majority that mere opportunity was insufficient to support a finding of vicarious liability, she found the link between the opportunity and the torts committed in this case "particularly strong"[58], observing that S had been given quarters in the middle of the school property, was permitted to form relationships with vulnerable children, and could not have been unaware of the lax supervision prevalent at the residential school.[59] Moreover, the power structure inherent in the employer's enterprise contributed to the creation of conditions that led to the sexual assault of the plaintiff. Abella J drew attention not only to the evidence that the discipline was strict and harsh, and children were ordered to obey all staff members, but also to the trial judge's conclusion that the plaintiff viewed S as a person of power and authority. Abella J accorded particular attention to the loose and ambiguous nature of the wrongdoer's employment rôle, noting the judge's finding that S had responsibility for helping the

[57] *Ibid.*, [47]-[52].
[58] *Ibid.*, [78].
[59] *Ibid.*

religious staff with all school-related tasks, including child care and supervision. As Abella J explained, "[t]he breadth and amorphous nature of the employment duties given to him, and the way in which those duties were allocated by the school's administration, gave him both actual and perceived power over the students".[60]

Finally, Abella J stressed the profound vulnerability of the children at the residential school. They were separated from their parents for long periods of time. This geographic and personal isolation, combined with a harsh disciplinary regime consisting of routine corporal punishment, threats of punishment, and repeated orders to obey all staff members resulted in an extremely vulnerable group of potential victims. Clearly, then, the thrust of Abella J's approach is one that is rooted in the vindicatory concern about vulnerability.

Two key points can be made about the very significant judgment of the Supreme Court of Canada in *Oblates*. First, the strong dissenting judgment of Abella J is indicative of the difficulties that attend the application of the *Bazley* test. The disagreement thus mirrors that already examined in *Jacobi* and illustrates how elusive the close connection test can prove when being applied in a given case. As such, it supports the view put forward by Giliker[61] to the effect that the close connection test can be better understood if its origins in the vulnerability paradigm are fully appreciated.

Secondly, the vulnerability paradigm as envisaged in *Bazley* and later cases is of particular relevance in assessing the rôle of vicarious liability in vindicating rights in an Irish context,

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[60] *Ibid.*, [88].
[61] Paula Giliker, "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 *Torts L J* 35.

since the issue of vulnerability would be relied upon by the plaintiff in the 2009 Supreme Court case of *Reilly v Devereux*[62], considered below in this Chapter.

## C. UNITED KINGDOM EMBRACES MODERN TEST FOR VICARIOUS LIABILITY

### The Approach of the House of Lords in *Lister*

The leading authority in the United Kingdom on the reformulation of the Salmond test is the decision of the House of Lords just eight years ago in *Lister v Hesley Hall Limited*.[63] In the course of their judgments in *Lister*, the Law Lords accorded extensive consideration to the approach of the Supreme Court of Canada in *Bazley*: it is thus important not only to consider the analysis provided of that judgment but also to comment on the ways in which the approach in *Lister* differs from that in *Bazley*.

The wrongful acts in *Lister* consisted of sexual abuse of schoolboys residing in a boarding house annexed to their school, which catered for maladjusted boys. The perpetrator of those acts was a person employed by the school as a warden to care for the boys. His responsibilities included disciplining the boys, supervision duties and intimate daily tasks such as putting the boys to bed and getting them up for school. In particular, emphasis was placed upon the fact that the warden had capitalised on the opportunities for committing his transgressions by implementing what appeared to be a very relaxed system of discipline that included the use of gifts and undeserved leniency.

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[62] [2009] IESC 22.

[63] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311. See Paula Giliker, "Rough Justice in an Unjust World" (2002) 65 *MLR* 269.

At both the first instance and Court of Appeal level, the Court of Appeal ruling in *Trotman*, discussed above[64], was regarded as precluding the imposition of vicarious liability.[65] On appeal by the plaintiffs, the House of Lords overruled *Trotman* and unanimously held that the acts were sufficiently connected with the work that the warden was employed to do such that they could be described as being done in the course of employment. Like the Supreme Court of Canada in *Bazley*, the House of Lords emphasised that component of the Salmond test which was traditionally often overlooked, that is, the emphasis on closeness of connection. However, the Law Lords in *Lister* offered different reasoning justifying the finding of a sufficiently close connection. A number of distinct strands can be discerned from the judgments.

First, the "nature of the employment" was regarded as so closely connected with the wrongful acts as to make it just to hold the employer liable. Lord Steyn[66] isolated the relevant question as being "whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable".[67] Noting that this articulation was the "germ of the close connection test adumbrated by the Canadian Supreme Court in *Bazley*"[68] Lord Steyn, in a similar vein to that adopted by McLachlin J in *Bazley*, cautioned against an unduly narrow or restrictive approach to the Salmond test on the basis that it can lead to artificial conceptions of what an employee is employed to do. Instead, Lord Steyn preferred a broad approach that concentrated on the

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[64] See above, text preceding n 22.
[65] The Court of Appeal ruling in *Lister* (7 October 1999, reported *The Times*, 13 October 1999) had not referred to the then very recent judgment in *Bazley*, discussed above.
[66] With whose judgment Lords Hutton and Hobhouse agreed.
[67] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, [28].
[68] *Ibid.*, [15].

"relative closeness of the connection between the nature of the employment and the particular tort."[69] He found the wrongdoing in *Lister* to be "inextricably interwoven" with the warden's employment duties.[70] Lord Clyde also identified as the key question the closeness of the connection between the employee's act and the employment.

Lord Hobhouse expressly declined to follow *Bazley*, on the basis that the articulation in *Bazley* of the different policy bases for vicarious liability being imposed lacked clarity. This clarity, according to Lord Hobhouse, was better provided by the application of the close connection test in English law.[71] Both Lord Hobhouse and Lord Millett placed chief emphasis on the employer's duty to the child being to care for and protect the child. The employer delegated performance of that duty to the employee who, in breach of his contractual duties to his employer, assaulted the child entrusted to his care. In this regard, however, analysis might have been expected to focus more heavily on the existence of a non-delegable duty of care rather than vicarious liability and criticism of *Lister* has included the contention that the non-delegable duty analysis was conflated with vicarious liability analysis.[72]

In an important closing observation, Lord Hobhouse was of the view that vicarious liability would also attach if the warden had not been the perpetrator but had discovered the fact of abuse by a fellow employee and had negligently failed to report it – here again, there

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[69] *Ibid.*, [24].
[70] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, [28].
[71] *Ibid.*, [60].
[72] For this and other criticism of *Lister* see Robert Stevens, *Torts and Rights* (Oxford, OUP, 2007), 273; Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 *Comm L World Rev* 268, 295.

would have existed a sufficiently close connection between the tort and the employment status of the wrongdoer.[73] It is submitted that the choice of example is significant – the tort of negligence as distinct from the intentional torts which were in fact at issue in *Lister*. This would suggest that, at least according to Lord Hobhouse, the *Lister* approach is of equal application to the non-intentional torts as it is to the intentional torts, an issue which is far from clear in the case law to date in the jurisdictions under focus in this Chapter.

***Lister*: The Search for Principle**

It can be seen, then, that no one principle can be identified as underpinning the decision in *Lister*. In a number of the judgments, it is unclear as to what extent the Law Lords are applying *Bazley*. Thus Lord Millett described *Bazley* as an authority providing "many helpful insights into this branch of the law and from which I have derived much assistance",[74] but did not pursue his analysis of the Canadian judgment. This is somewhat confusing, particularly since Lord Millett later expressly grounded his imposition of vicarious liability in the "inherent risk" to persons in places of care that "assaults will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust."[75] Similarly, as already noted above, Lord Steyn heralded *Bazley* as the starting point for judicial analysis of vicarious liability in such cases, but did not adopt the "enterprise risk" theoretical foundations for the expanded close connection test in that case. Because of this, it has been said of the Law Lords' approaches in *Lister* that they "dismissed the theoretical reasoning that formed the

[73] By contrast, vicarious liability would not have attached for acts of abuse by a groundsman whose duties had nothing to do with the tortious conduct.
[74] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, [70].
[75] *Ibid.*, [83].

basis of the [*Bazley*] test and offered nothing in its place".[76] The result has been described as a legal test that is "too amorphous to supply lower courts with any tangible framework to decide future cases".[77]

Secondly, as other commentators have also emphasised[78], the recourse to the terminology of "fair, just and reasonable" in the context of imposing vicarious liability is revealing. This hallowed trinity of epithets is, of course, best known for belonging in the duty of care inquiry in negligence;[79] in the context of the strict liability philosophy of vicarious liability doctrine it seems to sit somewhat uneasily. In light of the concerns which have already been noted, for example, in the Canadian jurisprudence post-*Bazley* about the potential conflation of the concepts of primary and vicarious liability, it seems unfortunate that this awkward overlap has been created. As Case has remarked of this aspect of *Lister*,[80] "their Lordships could be regarded as having confused the streams of primary and secondary liability".[81] A recurrence in the use of this language of primary liability in the vicarious liability context is, however, manifested by an analysis of subsequent English case law. So, in its later judgment in *Dubai Aluminium*[82] where the House of Lords again examined the principles of vicarious liability, and where further consideration was given to what

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[76] Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 *Comm L World Rev* 268, 276.

[77] Po Jen Yap, "Enlisting close connections: a matter of course for vicarious liability?" (2008) 28 *LS* 197, 202.

[78] See in particular Paula Case, *Compensating Child Abuse in England and Wales* (Cambridge University Press, 2007), 115 and Paula Case, "Developments in vicarious liability: shifting sands and slippery slopes" (2006) 22 *PN* 161, 175.

[79] *Caparo Industries plc v Dickman and others* [1990] 2 AC 605; *Glencar Explorations plc v Mayo County Council (No.2)* [2002] 1 IR 84. Detailed discussion of the duty component in negligence is provided in Chapter 2.

[80] And other cases, among them *Phelps v Hillingdon Borough Council* [2001] 2 AC 619 (HL), discussed in another context in Chapter 2: see Paula Case, *Compensating Child Abuse in England and Wales* (Cambridge University Press, 2007), 115.

[81] *Ibid.*

[82] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2002] 3 WLR 1913.

connection was necessary between a wrongful act or omission and the employment relationship, Lord Nicholls observed:

> Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment.[83]

Considering the significance of *Lister* generally, it has recently been observed in the House of Lords that as a result of that decision the law in the United Kingdom was "radically changed".[84] As Lord Hoffmann said in January 2008 of the *Lister* decision, "[a]fter that, claims against the operators of schools, detention centres and similar institutions for sexual abuse by employees came thick and fast."[85] Just as occurred in Canada after the ruling in *Bazley*, the influence of *Lister* on the law relating to vicarious liability in the United Kingdom has extended far beyond the question of vicarious liability for employee sexual abuse.[86] Following on from both *Bazley* and *Lister* was a judgment of the High Court of

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[83] *Ibid.*, [23] (emphasis in original).
[84] *A v Hoare* [2008] UKHL 6, [2008] 2 WLR 311, [22].
[85] *Ibid.*
[86] Examples include *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2002] 3 WLR 1913*Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158, and *Majrowski v Guy's & St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [2006] 3 WLR 125. For analysis of these and other post-*Lister* cases see Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 *Comm L World Rev* 268. The ramifications of *Lister* continue to be explored: see *A v Hoare*, above n 84, and *A v Hoare* [2008] EWHC 1573 (QB). See also *Robertson v The Scottish Ministers* [2007] CSOH 186 where Lord Emslie remarked at [11]: "Given the breadth of the test affirmed in *Lister* and followed in various circumstances since then … I do not consider that the possibility of a finding of vicarious liability here can at

Australia that stands in marked contrast to both approaches, but which again focuses attention sharply on the question of vulnerability.

## D. AUSTRALIAN APPROACCHES EVINCE LACK OF UNITY OVER NEW TEST

### Contrasting *Bazley* and *Lister* with *Lepore*

Although *Bazley* had been cited with apparent approval by the High Court of Australia in 2001[87], it was not until appeals on facts similar to *Bazley* and *Lister* presented themselves that the Canadian and English approaches could be considered in detail by the High Court of Australia. This opportunity arose in 2003, when the High Court handed down judgments in the case of *New South Wales v Lepore*[88], a set of three appeals with similar factual backgrounds in which the question arose as to whether the cases should be remitted to the lower courts for retrials on the basis of vicarious liability being pleaded. In this regard, the Australian court was invited to follow the lead of the Supreme Court of Canada in *Bazley* and that of the House of Lords in *Lister*.

The six different judgments delivered in *Lepore*, however, form a rather confusing set of responses to the *Bazley* and *Lister* developments. No common ground was arrived at by the different members of the High Court of Australia.[89] Gleeson CJ and Kirby J appeared generally to favour the approaches taken in *Bazley* and *Lister*, while Gummow and Hayne

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this stage be excluded." See further *McE. (A.P.) v The Reverend Joseph Hendron and Others* [2007] CSIH 27.

[87] *Hollis v Vabu Pty Ltd* [2001] HCA 44, (2001) 207 CLR 21, (2001) 75 ALJR 1356.

[88] *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412. For comment see Jane Wangmann "Liability for Institutional Child Sexual Assault: Where does *Lepore* leave Australia?" [2004] *Melb ULR* 5.

[89] For further discussion on this and other aspects of the Australian case law see Joshua Teague, "Vicarious liability: A comparative review of the common law after *Ffrench*" (2008) 16 *Tort L Rev* 39; for comment on post-*Lepore* decisions of the inferior courts in Australia, see Yap, above n 77, 204.

JJ did not. Callinan J rejected altogether the application of vicarious liability to situations of intentional wrongdoing by employees. Gaudron J's analysis was based on estoppel, whilst McHugh J did not find it necessary to discuss the question of vicarious liability at all. Notwithstanding this level of disagreement, it is instructive to reflect upon certain aspects of the different approaches taken in *Lepore*, as in a number of ways these approaches ventilate concerns about *Bazley* and *Lister* which prompt further reflection as to the approaches discussed thus far in this Chapter.

In their joint judgment, for example, Gummow and Hayne JJ, whilst accepting that the closeness of connection test was "an important element in considering the underlying policy questions in cases such as the present"[90], expressly rejected the enterprise risk test propounded in *Bazley*. Instead, their Honours favoured a test of course of employment rooted in the contractual analysis of the individual employee's obligations:

> Creation and enhancement of risk, and the various subsidiary considerations to which McLachlin J referred in *Bazley*, may distract attention from what meaning should be given to course of employment, especially when the test is one concerning intentional wrongdoing rather than negligence. ...[T]he approach adopted in *Bazley* requires a court to ask whether a school authority creates a risk of sexual assault (or enhances that risk) by operating a school. That inquiry shifts attention from the risks which conducting the enterprise brings with it (through employees doing the tasks they are employed to do) to the risk that individuals will break the law and their

[90] *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412, [213].

> employment contract while they are at work. The inquiry about risk becomes an inquiry about liability for wrongdoing.[91]

It should be emphasised that a key concern expressed here by Gummow and Hayne JJ was that the *Bazley* material risk inquiry was apt to become a "but for" causation inquiry, thus addressing the point made earlier in this Chapter in the context of *Bazley*. Such an inquiry would be concerned with asking *how* the wrongdoer carried out the wrong, regardless of what he or she was employed to do. According to Gummow and Hayne JJ, "[t]o adopt this approach would represent a radical departure from what hitherto has been accepted as an essential aspect of the rules about vicarious liability: the requirement that the wrongdoing be legally characterised as having been done in the course of employment."[92] For present purposes, the relevance of this concern lies in the criticism it articulates of approaches such as *Bazley*, where the vindicatory concern effectively led to a "readjustment" of the constituent ingredient of causation in the tort law inquiry. As such, this concern strongly echoes that considered at length in Chapter 2, and sounds a note of caution about the effect of vindicatory concerns on the application of tort law doctrine.

Another significant concern expressed in *Lepore* about the *Bazley* approach is contained in the judgment of Gaudron J. One of the key reservations expressed by Gaudron J about following *Bazley* was based on the concern, discussed above, that the *Bazley* material risk approach may encourage confusion between primary and vicarious liability. She further

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[91] *Ibid.*, [214].
[92] *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412, [223].

pointed to the disagreement amongst the Supreme Court in *Jacobi* considered above.[93] Gaudron J also found it difficult to state that a deliberate criminal act had occurred in the course of employment, describing this as a "misuse of language".[94] However, instead of dismissing the possibility of vicarious liability altogether, Gaudron J identified estoppel as another approach to vicarious liability, describing this mechanism as "[t]he only principled basis upon which vicarious liability can be imposed for the deliberate criminal acts of another".[95] Under this model, a person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred. Gaudron J went on to explain that a person is normally so estopped where there is a "close connection between what was done and what that person was engaged to do'".[96] Thus, although the approach is not that taken in *Bazley* or *Lister*, Gaudron J's estoppel-based approach does draw on the language of "close connection" used in both cases.

Callinan J would have rejected any possibility of an employer being vicariously liable for torts of assault. Callinan J observed that a "connection" as required by *Lister* could be found in any case, thus highlighting the concern expressed above that the "close connection" test, in just the same way as the orthodox construction of the Salmond test, turns on the level of generality with which the employment in question is described. Callinan J explained his concerns in the following passage:

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[93] *Ibid.*, [126].
[94] *Ibid.*, [117].
[95] *Ibid.*, [130].
[96] *Ibid.*, [131].

> Distinguishing between "opportunity" which would almost always be available to any teacher, and a "connexion" of the kind referred to by their Lordships [in *Lister*] would be very difficult. Cases would, as a practical matter, be decided according to whether the judge or jury thought it "fair and just" to hold the employer liable. Perceptions of fairness vary greatly. The law in consequence would be thrown into a state of uncertainty.[97]

As already seen in the context of the Canadian cases of *Jacobi* and *Oblates*, it is true that the close connection test requires a fact-specific inquiry on a case by case basis, but it is not, with respect, easy to see why this difficulty alone should militate against acceptance of the close connection test.

Gleeson CJ, by contrast, premised his judgment on the "close connection" test. He emphasised that this test was distinct from the material risk test of *Bazley* – although Gleeson CJ observed that "in practice, in most cases, the considerations that would justify a conclusion as to whether an enterprise materially increases the risk of an employee's offending would also bear upon an examination of the nature of the employee's responsibilities".[98]

Kirby J was the only member of the *Lepore* court to adopt unambiguously the approaches in both *Bazley* and *Lister*, proclaiming that "the common law of Australia on this subject marches in step with that pronounced by the final courts of the United Kingdom and

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[97] *Ibid.*, [345].
[98] *Ibid.*, [65].

Canada".[99] It is significant to note that Kirby J in his analysis distilled the close connection test down to the question of "whether, in the particular circumstances, it is just and reasonable to impose on the enterprise in question legal liability for the particular civil wrong done by its employee".[100] This language, as we have seen above, raises the question of the desirability of having recourse to fairness and reasonableness in the context of this exceptional species of no-fault liability, as distinct from the negligence inquiry.

Thus, from an analysis of those judgments in *Lepore* in which the question of vicarious liability was dealt with[101], a starkly contrasting range of responses was elicited. Significantly, the rejection of the enterprise risk theory of *Bazley* by a majority of judges, and the degree of caution with which *Lister* was received, indicate the controversial nature of these approaches when viewed against the backdrop of vicarious liability. That their status in the common law world is far from settled is again illustrated by a consideration of Irish law: recent Irish jurisprudence indicates that in this area of tortious liability the vindicatory trends witnessed in other jurisdictions may not be supported here.

## E. THWARTING THE VINDICATION OF RIGHTS THROUGH VICARIOUS LIABILITY: THE RESTRICTIVE APPROACH EMERGING IN IRISH LAW

### The Approach of the Irish High Court in *Delahunty*

The Irish Supreme Court has recently addressed for the first time the question of the application of the Salmond test in cases of intentional wrongdoing, with two important

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[99] *Ibid.*, [277].
[100] *Ibid.*, [320].
[101] It should be noted that McHugh J did not regard vicarious liability as relevant in *Lepore* and based his judgment entirely on the school authority's breach of a non-delegable duty of care owed to the pupils.

judgments delivered in late 2008[102] and Spring 2009[103] respectively explicitly analysing the approaches in *Bazley*, *Lister* and *Lepore* and the extent of their applicability in Ireland.

Before turning to analyse these very recent cases, it is necessary first to consider the significant decision of the Irish High Court five years ago, in which the approaches in both *Bazley* and *Lister* were considered. *Delahunty v South Eastern Health Board*[104] involved, *inter alia*, a claim that vicarious liability be imposed upon an industrial school and upon the Minister for Education and Science for a sexual assault perpetrated upon a visitor to the school by a member of staff at the school. Significantly, counsel for the defendants submitted that *Lister* constituted "a departure in the law which had not been adopted in this country" – a proposition that O'Higgins J said "might perhaps be open to question".[105] Referring to *Lister* as "the leading United Kingdom [a]uthority", O'Higgins J did not regard it necessary to consider whether *Lister* was good law in Ireland, since the "strong connection" argument could not assist the plaintiff in *Delahunty*, who was only a visitor at the school. Accordingly, the Court held that, even if *Lister* were applicable in Ireland – a point not determined in *Delahunty* – this would not have availed the plaintiff. Having determined that the defendant school could not be held vicariously liable for the acts of the employee, O'Higgins J went on to note that, *a fortiori*, the Minister for Education and Science could not be held vicariously liable either since its connection was "quite remote".[106]

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[102] *O'Keeffe v Hickey* [2008] IESC 72, [2009] 1 ILRM 490.
[103] *Reilly v Devereux* [2009] IESC 22.
[104] [2003] 4 IR 361.
[105] *Ibid.*, 377.
[106] *Ibid.*

A number of points can be made about *Delahunty* and its significance in the context of the potential application of the modified Salmond test in Irish law. First, O'Higgins J made reference in his judgment to the earlier High Court decision in *The Health Board v BC*[107], a case which was referred to as being in direct conflict with the *Lister* approach.

The High Court in *BC* had rejected the contention made by an employee that her employer could be vicariously liable for acts of sexual harassment perpetrated by her fellow employees. The relevant statutory framework was then the Employment Equality Act 1977, which made no reference to the possible vicarious liability of an employer when such conduct was committed by an employee. Costello J in that case had stated:

> An employer may, of course, be vicariously liable when his employee is acting negligently or even criminally ... [b]ut I cannot envisage any employment in which they were engaged in respect of which a sexual assault could be regarded as so connected with it as to amount to an act within its scope.[108]

This reference to *BC* is significant, since it underlines the policy choice in terms of vindication now facing the Irish courts in this area: to follow *BC* or to follow *Lister*. The two approaches are diametrically opposed and mirror the bipolarity evidenced in English

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[107] [1994] ELR 27.

[108] *Ibid.*, 34. In the context of a claim for sexual harassment or discrimination of an employee at work, the landscape in this jurisdiction was significantly altered by the coming into force of s.15 of the Employment Equality Act 1998. See further Ray Ryan and Des Ryan, "Vicarious Liability: Emerging Themes and Trends and their Potential Implications for Irish law" (2007) 4 *IELJ* 1; Marguerite Bolger and Clíona Kimber, *Sex Discrimination Law* (Thomson Round Hall, 2000), 278.

law between *Trotman* and *Lister*: as O'Higgins J observed, the approach taken by the High Court in *BC* was couched in "strikingly similar terms" to that in *Trotman*.[109]

That the ruling in *BC* should no longer be followed by the Irish courts has been argued elsewhere[110]; for present purposes it is important to emphasise that in *Delahunty* the opposition between *BC* and *Lister*, although recognised by the High Court, was not resolved. Because of this, the judgment of O'Higgins J cannot be construed as either rejecting or accepting the *Lister* approach. O'Higgins J merely found that the requisite degree of connection, necessary under *Lister* to establish vicarious liability, was not satisfied in *Delahunty*. This was because there

> was not such a connection between the employment of [the housemaster responsible for the assault] and the assault on the plaintiff as to fix liability on his employers. The plaintiff in this case was a visitor in respect of whom [the housemaster] had no particular duties.... This is in contrast to *Lister* ... where the abuser was a warden and the close contact with the pupils and inherent risks that it involved were important factors in the decision.[111]

It was against this backdrop of considerable uncertainty as to the status of the comparative authorities examined above in this Chapter that the Supreme Court delivered

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[109] [2003] 4 IR 361, 376.
[110] Ray Ryan and Des Ryan, "Vicarious Liability: Emerging Themes and Trends and their Potential Implications for Irish law" (2007) 4 *IELJ* 1, 5.
[111] [2003] 4 IR 361, 377.

its judgment in December 2008 in *O'Keeffe v Hickey*[112], "a test case governing a significant number of pending cases".[113] The case comprised the first occasion on which judicial consideration was given at Supreme Court level to the status in Irish law of decisions such as that of the Supreme Court of Canada in *Bazley v Curry*[114] and that of the House of Lords in *Lister v Hesley Hall Ltd.*[115] *O'Keeffe* is also deserving of analysis in that it reveals a significant level of disagreement amongst the judges of the Supreme Court as to whether this modern approach to vicarious liability espoused in other common law jurisdictions should be adopted as a matter of Irish law. At a broader level, the difference between the approaches taken in *O'Keeffe* signals a fundamental unease on the part of some judges of the Supreme Court with the application of vicarious liability generally in tort law. As such, the judgment raises broader questions about the rôle of redress in tort law and the status of the vicarious liability principle within that rôle. Each of these aspects of *O'Keeffe* is analysed below. In addition, analysis is given to the subsequent Supreme Court decision in *Reilly v Devereux*.[116] Delivered in March 2009, the judgment in *Reilly* includes reference to *O'Keeffe*, but it is submitted that *Reilly* further illustrates the degree of uncertainty that now surrounds the circumstances in which vicarious liability will arise in Irish law.

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[112] *O'Keeffe v Hickey* [2008] IESC 72, [2009] 1 ILRM 490, analysed by Conor Feeney, "The Supreme Court and Vicarious Liability – Implications for Employers" (2009) 6 *IELJ* 43.
[113] *O'Keeffe v Hickey* [2009] IESC 39 (Ruling of the Supreme Court on the Question of Costs) (Supreme Court, unreported, 6 May 2009), *per* Murray CJ, [6].
[114] [1999] 2 SCR 534.
[115] [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311.
[116] [2009] IESC 22.

***O'Keeffe*: Background and High Court Judgment**

In common with the leading recent cases to reach other appellate courts around the common law world on the question of vicarious liability, *O'Keeffe* arose out of sexual assaults of a school pupil committed by a teacher. In separate proceedings, Ms O'Keeffe had successfully sued the teacher personally, as well as taking a successful claim to the Criminal Injuries Compensation Tribunal. In the proceedings under consideration in this Chapter, Ms O'Keeffe sued the Minister for Education and Science. At first instance, she sought to have both primary and vicarious liability imposed, but the primary negligence claim was non-suited at an early stage by order of the trial judge (de Valera J) before he went on to deliver judgment rejecting the claim in vicarious liability.[117] Accordingly, the sole issue in the case at Supreme Court level was whether vicarious liability could be imposed upon the Minister for the wrongs committed by the teacher. This vicarious liability claim was itself composed of two independent strands: that the Minister was vicariously liable not only for the criminal and plainly unauthorised acts of the offending teacher, but also for the alleged negligence of a curate, who was the *de facto* acting manager of the school. On the issue of negligence, it was alleged that the Minister was vicariously liable for the curate's negligent failure to take any steps following a complaint made to him in relation to another child at the school close in time to the incidents involving Ms O'Keeffe.

The anatomy of the claim in *O'Keeffe* was rendered more complicated still as a result of the complex nature of the relationship between the Department of Education, the school's management system and the wrongdoing teacher. This complex feature of the case

[117] [2006] IEHC 13.

presented distinct and formidable difficulties for the plaintiff: it was on the basis of this "triangular" relationship that the High Court and the majority of the Supreme Court held that vicarious liability could not be imposed. This aspect of the case is not the subject of consideration in this Chapter; instead, the focus here is on the approach taken by the Supreme Court in *O'Keeffe* to vicarious liability principles in Irish law in light of the recent developments which have taken place in other jurisdictions. For, notwithstanding the majority's view that the "triangular" nature of the relationship in question precluded the imposition of vicarious liability on the Minister, the Supreme Court judges afforded consideration to whether these international developments represented the law in this jurisdiction.[118]

Before proceeding to analyse the different approaches in the Supreme Court appeal in *O'Keeffe*, it may be helpful to indicate at the outset how the judgments were organised. In the Supreme Court, three separate judgments were delivered: one by Hardiman J and one by Fennelly J, each of whom dismissed the appeal, and a dissenting judgment from Geoghegan J who would have allowed the appeal.[119] Notwithstanding that both Hardiman and Fennelly JJ were in agreement as to the result of the appeal, however, their separate judgments embody markedly different approaches to the broader question of vicarious

[118] In this way, the Supreme Court's approach to the case differed from that taken in the High Court, above n 117, where de Valera J did not consider that the case required a determination as to whether authorities such as *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311 represented the law in this jurisdiction.

[119] A memo to the Court file (available at www.courts.ie) states that Murray CJ agreed with Hardiman and Fennelly JJ on the absence of the employer/employee relationship and with Fennelly J on the "subsidiary issue" of negligence; Denham J agreed with the judgment of Fennelly J on the issue of the absence of an employment relationship. The terminology used in this memo is somewhat confusing: the "subsidiary issue" of "negligence" appears to refer to the vicarious liability analysis, only part of which is concerned with negligence (see above, text following n 117).

liability principles in Irish law. Each of the three judgments delivered in *O'Keeffe* will now be analysed.

**The Approach of Hardiman J in *O'Keeffe***

At the outset of his judgment, Hardiman J described the plaintiff's case as requiring "an enormous revolution in the principles of vicarious liability as applied in Ireland."[120] While it appears that this statement was made in the context of the "triangular relationship" argument outlined above, the comment is significant in underlining a degree of caution about the expansion of vicarious liability principles. As the judgment progresses, this concern extends beyond the peculiar "triangular" situation of the *O'Keeffe* case and into Hardiman J's analysis of vicarious liability principles generally. In this latter context, it is submitted that there are three points of particular significance to be analysed from the judgment of Hardiman J. The first is the approach indicated therein to the earlier Supreme Court decision of *Moynihan v Moynihan*;[121] the second, the broader reflections contained in the judgment upon the nature of vicarious liability and concerns over its expansion; the third, the approach of Hardiman J to the recent innovations across the common law world in the context of the Salmond test. Each of these aspects of the judgment of Hardiman J is now analysed.

It will be recalled that the Supreme Court decision in *Moynihan v Moynihan*[122] concerned a two-year old plaintiff who sustained serious personal injuries when she upturned a teapot on herself in her grandmother's home. The trial judge withdrew the case from the

[120] *O'Keeffe*, 494.
[121] [1975] 1 IR 192.
[122] *Ibid.*

jury on the grounds that the defendant, the child's grandmother, could not be vicariously liable for the negligence of her daughter (the plaintiff's aunt) in leaving the child unattended. The plaintiff successfully appealed this point to the Supreme Court, which by a majority directed a new trial. Walsh J, delivering the judgment of the majority, identified the concept of control as the key guiding criterion in determining whether vicarious liability could be imposed.[123]

The majority approach in *Moynihan* has, over the years, been the subject of criticism. McMahon and Binchy, for example, observe that while the majority judgment laid down "defensible rules for determining vicarious liability," the application of these rules to the facts was "hardly convincing."[124] More recently, the former Chief Justice, Ronan Keane, has described the decision of the majority in *Moynihan* as "somewhat perplexing"[125] and involving a "radical extension of vicarious liability".[126] As Hardiman J observed in *O'Keeffe*, it seems an "inescapable"[127] conclusion that the case turned upon the existence of an insurance policy, presumably the grandmother's household insurance.[128]

In *O'Keeffe*, Hardiman J went much further in expressing his unease with what he described as the "elaborate," "legalistic" and "highly artificial" analysis by the majority in *Moynihan* of "the entirely casual relationship whereby the defendant's daughter had

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[123] *Ibid.*, 197.
[124] Bryan M.E. McMahon and William Binchy, *Law of Torts* (Dublin, Butterworths, 2000), 1093 fn. 10.
[125] Ronan Keane, "Judges as Lawmakers: The Irish Experience" (2004) 4(2) *JSIJ* 1, 4 at fn. 10.
[126] *Ibid.*
[127] *O'Keeffe*, 505.
[128] The issue of insurance was considered in both the majority (see especially p. 198) and (rather more forcefully) the dissenting (see pp. 202-203) judgments in *Moynihan*.

made a pot of tea in her mother's house, where she herself lived."[129] Hardiman J went on to state that he "much prefer[red] the more realistic analysis to be found in the dissenting judgment of Henchy J" in *Moynihan*. Noting that the plaintiff in *Moynihan* had not sued her aunt, the person alleged to be directly negligent, but only the grandmother, who was hoped to be a "deep pocket," Hardiman J continued:

> The case appears to me to be an early example of the dismantling or muddying of the long established boundaries or limits of vicarious liability. This was done for the very humane reason of helping an innocent injured party to recover compensation, but it was done at a very considerable social cost, not often considered or discussed...[130]

While taking pains to emphasise that the Supreme Court in *O'Keeffe* had not been invited to overrule *Moynihan*,[131] Hardiman J in this passage indicates very clearly an unease with the approach taken by the majority in the earlier case, and strong support for the alternative approach favoured in the dissenting judgment of the late Henchy J. From the point of view of the continued application of *Moynihan*, then, the approach of Hardiman J raises fundamental questions about the correctness of that judgment. Whilst from a *stare decisis* perspective the decision remains good law unless and until overruled by the Supreme Court in a future case, this aspect of *O'Keeffe* highlights the extent of disagreement surrounding even long-standing judicial approaches to vicarious liability.

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[129] *O'Keeffe*, 505.
[130] *Ibid.*
[131] A point also made in *O'Keeffe* by Fennelly J, who expressly declined to state any opinion on the decision in *Moynihan*.

Of broader significance for the purposes of a vicarious liability analysis is the manner in which Hardiman J in *O'Keeffe* employed an analysis of *Moynihan* in order to underscore a broader philosophical analysis of the contemporary rôle of tort law. This passage of the judgment is of interest and significance for tort law generally, and vicarious liability in particular. In it, Hardiman J described as "a perennial theme in this area"[132] the tension between the impulse to provide compensation to an injured plaintiff, on the one hand, and the concern about adverse economic and other consequences of such an approach, on the other. The tension is described as being captured by the starkly contrasting positions of the majority and dissenting approaches in *Moynihan*. In the latter context, Henchy J's reference in his dissenting judgment to "the redress of one wrong by the creation of another"[133] was cited by Hardiman J as a basis for declining to impose vicarious liability in *O'Keeffe*. To Hardiman J, *Moynihan*

> represented a significant step on the road to the situation in which it is widely believed that every misfortune must be compensatable and that if misfortune is caused by an insolvent person, or an unascertained person, or a person not amenable, it should be compensated by the nearest solvent mark, or in the last resort by the State itself.[134]

In a key passage of his judgment, Hardiman J set out a number of observations about tortious liability in general. While these are related to general concerns about the

[132] *O'Keeffe*, 506.
[133] *Moynihan*, 202-203 *per* Henchy J.
[134] *O'Keeffe*, 506-507.

emergence or expansion of a compensation culture, for the purposes of the present analysis, they can be summarised into two more specific, distinct concerns: first, that the stigma which attaches to being described as a wrongdoer should be reserved for those who are legally and morally at fault; and secondly, that vicarious liability is particularly burdensome on defendants and, as such, must be imposed sparingly.

As to the first point, Hardiman J stressed that a tortfeasor, whether joint or single, is referred to in the Civil Liability Acts as a "wrongdoer;" because of this, "the stigmatisation of the paying party as such is ... legally and morally a condition precedent to an order to compensate for one's own act."[135] Amongst the many significant implications of this statement is the commitment it evinces to the inclusion of fault as a criterion for the imposition of tortious liability. It is, of course, the no-fault nature of vicarious liability that renders this species of liability anomalous in the conception of tortious liability propounded in the passage above by Hardiman J. The strength of the language used in the passage – "legally and morally a condition precedent" – signals a fundamental opposition to vicarious liability having any place in such a system. As such, the passage obviously has implications for, *inter alia*, the discrete issue of exemplary damages being awarded in the context of vicarious liability. This aspect of Hardiman J's judgment in *O'Keeffe* may well, with respect, sit at odds with the approach taken by the Supreme Court in its recent judgment in *Shortt v Commissioner of An Garda Síochána*[136], discussed above in Chapter 6. In that case, Murray CJ emphasised that it was incorrect

[135] *O'Keeffe*, 507, *per* Hardiman J, referring to the Civil Liability Act 1961, s. 2.
[136] [2007] IESC 9, [2007] 4 IR 587. The decision in *Shortt* was referred to briefly by Fennelly J in his judgment in *O'Keeffe*, but Fennelly J did not regard *Shortt* as being relevant to a case such as *O'Keeffe*.

and unprincipled to automatically award a lesser sum for exemplary damages in cases where the liability was vicarious as distinct from primary.[137]

On the second of the concerns referred to by Hardiman J – the burdensome nature of vicarious liability – several distinct points are intertwined. Chief amongst these is how the unpredictable nature of tortious liability creates "huge social and economic problems"[138] including difficulties in estimating insurance needs and the occurrence of sudden, unanticipated liability. Hardiman J emphasised that, quite apart from any financial or reputational loss, the very potential of vicarious liability being imposed "constrains the legitimate actions of individuals, professions and other groups and even public authorities by what the American jurisprudence describes as a 'chilling effect.'"[139]

This concern prompts a number of observations. As to the burdensome nature of vicarious liability – and quite apart from the point that it is difficult to see why the familiar arguments of the potential for a chilling effect hold any greater degree of persuasiveness in the context of vicarious, as opposed to primary, liability – it is significant that Hardiman J regarded the unpredictable nature of liability as a cause of rendering this form of liability burdensome. It is, with respect, somewhat ironic that the lack of any clear position in Irish law concerning the approaches taken in other jurisdictions to modifications of the Salmond test itself contributes to unpredictability in this area of tort law. Whilst it is true that the courts in other jurisdictions, and particularly

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[137] *Shortt*, above n 136, *per* Murray CJ, [119], referring to the earlier Supreme Court judgments in *McIntyre v Lewis* [1991] 1 IR 121 and *Conway v Irish National Teachers Organisation* [1991] 2 IR 305. For more detailed treatment, see Chapter 6 above.
[138] *O'Keeffe*, 507.
[139] *Ibid.*

Canada,[140] have frequently disagreed as to whether the newly-fashioned test should give rise to liability in a particular case – thus creating unpredictability – the same can be said of any instance in which the parameters of tortious liability are developed. To this extent, the above argument does not provide a cogent basis on which to reject either the imposition of vicarious liability in a given case, or the extension of legal principle in this area generally.

**The Approach of Hardiman J to *Bazley*, *Lister* and *Lepore***

Although it was not necessary for the purposes of determining the appeal to do so, Hardiman J accorded detailed treatment to the arguments advanced on behalf of the plaintiff on the innovations that have taken place in other common law jurisdictions to the doctrine of vicarious liability. The judgment sounds a strong note of caution about following the lead from these other jurisdictions. Of the innovation in Canadian law, for example, Hardiman J described some of the key formulations of law by the Supreme Court of Canada in *Bazley* as "vague in the extreme and quite unhelpful."[141] Analysing the qualification sounded by McLachlin J in *Bazley* that "effective compensation must also be fair, in the sense that it must seem just to place liability for the wrong on the employer,"[142] Hardiman J described this passage as "utterly lacking in rigour, and

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[140] As seen for example in *Jacobi v Griffiths* [1999] 2 SCR 570, referred to by Hardiman J in *O'Keeffe* as an example of the uncertainty created by the test adopted in *Bazley*; see also *EB v Order of Oblates of Mary Immaculate in the Province of British Columbia* 2005 SCC 60, [2005] 3 SCR 45, discussed above in this Chapter (see above, text following n 53). For insightful discussion of the problems created by the "close connection" test generally see further Paula Giliker, "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 *Torts L J* 35.

[141] *O'Keeffe*, 525.

[142] *Bazley*, [31].

perhaps even in meaning" so that it was "utterly useless as a predictive tool" and "a modern version of the 'Chancellor's foot.'"[143]

The significance of the difference between the approach of Hardiman J in *O'Keeffe* and that taken both by the Supreme Court of Canada in *Bazley* and the House of Lords in *Lister* is perhaps best illustrated by Hardiman J's description as "firmly rooted in principle and in precedent"[144] the decision of the English Court of Appeal in *Trotman v North Yorkshire County Council.*[145] It will be recalled that in *Trotman*, the Court of Appeal indicated its strong view that vicarious liability could not be imposed on an employer for independent criminal acts of sexual assault committed by an employee.[146] Describing this approach as one which "is consistent with the established approach in Ireland," Hardiman J added that it "also accords with common sense."[147] *Trotman* was, of course, decisively overruled by the House of Lords in *Lister*: as such, Hardiman J's endorsement of this authority demonstrates his view that Irish law in this area is fundamentally at variance with that in other jurisdictions. That this difference is a marked one is put beyond doubt by Hardiman J's criticisms of *Lister*, which he described as comprising "no development of a coherent legal principle."[148] To cite just one example here, Hardiman J expressly articulated his strong disagreement with the approach of Lord Steyn in *Lister* where the Salmond test is described as "the germ of the close connection test adumbrated by the Canadian Supreme Court in *Bazley* v *Curry*".[149]

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[143] *O'Keeffe*, 517.
[144] *Ibid.*, 524.
[145] [1998] EWCA Civ 1208, [1999] LGR 584.
[146] *Ibid.*, *per* Butler-Sloss LJ, [18].
[147] *O'Keeffe*, 516.
[148] *Ibid.*, 518.
[149] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, *per* Lord Steyn, [15].

Hardiman J's judgment also included detailed treatment of the decision of the High Court of Australia in *New South Wales v Lepore*.[150] Of the various approaches espoused in the different judgments in that case, it was the approach of Callinan J in *Lepore* with which Hardiman J expressed agreement. As discussed earlier in this Chapter, in *Lepore*, Callinan J rejected altogether the application of vicarious liability to such situations of intentional wrongdoing by employees, on the basis that "nothing could be further from the due performance of a teacher's duty than for him to molest children in his care".[151] In *O'Keeffe*, Hardiman J expressed his strong endorsement of the Callinan position in unequivocal terms, stating "I believe this is the true position at common law, and is true in fact."[152]

In concluding his analysis and rejecting the approaches in *Bazley* and *Lister*, Hardiman J did so on the basis that the courts in these cases

> departed from anything resembling a coherent legal principle grounding vicarious liability. Not only that, but those who followed it in other jurisdictions also paid too much heed to the need to find a source of compensation even without principle and too much heed to the need as they perceived it for the common law jurisdictions to march in step

[150] [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412.
[151] *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511, (2003) 195 ALR 412, *per* Callinan J, [342].
[152] *O'Keeffe*, 523.

> together... It does not appear to me that the "close connection" test can be regarded as a principled one....[153]

**The Approaches of Fennelly and Geoghegan JJ in *O'Keeffe***

In contrast with the approach adopted by Hardiman J, Fennelly J – although also rejecting Ms O'Keeffe's claim – delivered a separate judgment which expresses far greater support for the international innovations in vicarious liability, in particular the "close connection" test as adopted in *Lister*.

In terms of attempting to identify the approach taken by Fennelly J to vicarious liability principles in Irish law, it is significant that Fennelly J referred to the judgment of the High Court in *The Health Board v BC*[154], discussed above in this Chapter. In *O'Keeffe*, Fennelly J emphasised that the *BC* case did not concern common law principles of liability but instead statutory provisions, namely those of employment equality legislation. Because of this, Fennelly J cautioned that the statement of Costello J referred to above must be treated as *obiter*. This is significant: given that – as O'Higgins J observed in *Delahunty v South Eastern Health Board*[155] – the approach taken by the High Court in *BC* was couched in "strikingly similar terms" to that in *Trotman*[156], this signalling of a move away from *BC* illustrates the difference of approach being taken in this judgment of Fennelly J when compared to that of Hardiman J in *O'Keeffe*. That this is so is put beyond doubt in the

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[153] *Ibid.*, 518 *per* Hardiman J, referring to the different results reached by the Supreme Court of Canada in *Bazley* and *Jacobi*, discussed above in this Chapter.
[154] [1994] ELR 27.
[155] [2003] 4 IR 361.
[156] *Ibid.*, *per* O'Higgins J, 376.

following passage of the judgment of Fennelly J, which summarises his acceptance of the close connection test as a matter of Irish law:

> Ultimately, I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made…
>
> The close-connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service. There is no reason, in principle, to exclude sexual abuse from this type of liability. That is very far, as I would emphasise, from saying that liability should be automatically imposed. The decision of O'Higgins J [in *Delahunty*] provides an excellent example of practical and balanced application of the test. All will depend on a careful and balanced analysis of the facts of the

> particular case. In *Bazley,* the employees of the care home were required to provide intimate physical care for the residents. The sexual abuse was held to be closely connected.
>
> In the present case, there is no claim against the manager or patron of the school. It is not, therefore, appropriate to decide whether vicarious liability should be imposed on the direct employer of the first-named defendant. In such a case, all the facts would have to be carefully considered or, to recall the words of Lord Steyn [in *Lister*], there must be "an intense focus on the connection between the nature of the employment and the tort of the employee...".[157]

Finally, Geoghegan J, in his strong dissenting judgment, would have allowed the appeal and would have imposed vicarious liability on the basis that in the circumstances of the relationship between Church and State at issue in *O'Keeffe*, to exempt the State from liability would not be just. On the question of the status in Irish law of *Lister* and *Bazley*, Geoghegan J described the Canadian innovation as perhaps "the leading modern case" and went on to conclude that he would have allowed Ms. O'Keeffe's appeal on the basis of an application of "the general modern principles underlying vicarious liability".[158]

There thus emerges from an analysis of the three judgments delivered in *O'Keeffe* a striking contrast in approach between Hardiman J, on the one hand, and Fennelly and Geoghegan JJ, on the other. This contrast not only displays disagreement as to whether

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[157] *O'Keeffe*, 543-544.
[158] *Ibid.*, 560.

innovative comparative authorities such as *Lister* and *Bazley* apply in Irish law, but, much more broadly, reveals a fundamental difference of view as to the theoretical bases for justifying the imposition of vicarious liability, and in particular on the rôle of vindication in its imposition.

A separate point of difficulty arising from the majority judgments is that – notwithstanding the significant differences in approach of Hardiman and Fennelly JJ – both judgments appear, with respect, to infuse the question of whether the Minister could be held vicariously liable *at all* for the wrongful acts of a teacher with the separate, and much more specific, question of whether the *Bazley* and *Lister* innovations concerning *intentional* acts should form part of Irish law. This approach is to be regretted, as it potentially conflates the separate questions of vicarious liability for negligence and vicarious liability for intentional wrongdoing.

### *O'Keeffe* Ambiguity Further Heightened in *Reilly v Devereux*

This ambiguity as to the status in Irish law of decisions such as *Bazley* and *Lister* has, if anything, arguably been compounded by the subsequent decision of the Supreme Court in March 2009 in *Reilly v Devereux*[159], of particular interest from the perspective of vindication and vulnerability concerns. This was an appeal from the High Court judgment in 2007[160] in which Johnson P proceeded on the basis that *Lister* represented the law in Ireland. Having referred to *Bazley* and *Jacobi* and then to the key passages from the judgments of both Lord Steyn and Lord Clyde in *Lister*, Johnson P continued:

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[159] [2009] IESC 22.
[160] [2007] IEHC 252.

> In the Irish case of *Delahunty v South Eastern Health Board* the [*Lister*] principles were adopted with approval by Mr. Justice O'Higgins. In that case it was decided on the facts that the young man assaulted had not been in the care of the defendants but had merely been a visitor to their establishment. However, the remainder of the principles were adopted and it is quite clear that law is now as stated in [the High Court judgment in *O'Keeffe*]. It would appear that the principles as stated by Mr. Justice Costello in *Health Board v BC* have now been moved such that, if the tort and/or indecent assault was conducted in the course of and within the scope of the employment, then there can be vicarious liability.[161]

A difficulty with the above analysis is, with respect, that neither the approach of the High Court in *Delahunty* nor its approach in *O'Keeffe* was as clear on this point as suggested by Johnson P. For, in *Delahunty*, O'Higgins J had expressly referred to the opposing approaches between *BC* and *Lister* and refrained from commenting as to which approach represented the law in this jurisdiction; nor did the High Court in *O'Keeffe* decide the status of *Lister*. In this regard it is significant that in delivering the judgment of the Supreme Court on appeal in *Reilly*, Kearns J[162] commenced his analysis of the vicarious liability point with the following statement:

> The learned trial judge conducted a thorough review of the relevant case law on this topic and it has not been suggested that he stated the legal

[161] Internal citations omitted.
[162] Denham and Finnegan JJ concurring.

> position incorrectly but only that he applied the legal principles incorrectly to the facts of the case. *The legal review may thus be brief.* [163]

Two points arise from this statement. First, given how unsettled the position was (and is) in relation to the status of *Lister*, it is not at all obvious why the defendant would not have taken issue with the approach to the law taken by Johnson P – particularly in light of the fact that more than a year after the judgment of the High Court in *Reilly* the Supreme Court had, of course, delivered its judgment in *O'Keeffe*. Further, it may be that this acceptance of the correctness of the legal position as identified by the High Court led the Supreme Court in *Reilly* to take the view that it should not explore at length the status of *Bazley* or *Lister* in this jurisdiction (as perhaps seen, for example, in the italicised last sentence of the statement of Kearns J in the passage quoted immediately above).

Kearns J emphasised how the plaintiff in the appeal in *Reilly v Devereux* relied "almost exclusively on the principles laid down in the *Bazley* case". In so doing, three parallels were sought to be drawn between the factual backgrounds in *Bazley* and *Reilly*. First, the environment of the Defence Forces was such that the normal rules of adult interaction did not apply, since the disparity in rank between the plaintiff, who was a gunner, and the perpetrator, a Sergeant Major, led to a situation where the latter "exercised great power over the plaintiff and could command unquestioning obedience from him". Secondly, it was argued that "an element of intimacy and camaraderie was encouraged in the Army in circumstances where employees worked in close quarters together". Finally, it was suggested that within a culture where complaining was both discouraged and "largely

[163] Italics added.

fruitless", a person in the plaintiff's position was particularly vulnerable to the wrongful exercise of power by a superior officer.

Rejecting the attempt to draw these parallels between the facts of *Bazley* and *Reilly*, Kearns J did not accept that the nature of the employment relationship in *Reilly* supported the imposition of vicarious liability. The relationship between the plaintiff and defendant "could hardly be more different" from that between a school teacher and a child at a residential school; nor was there intimacy or a quasi-parental rôle implicit in the relationship as had been the case in *Bazley*.

What is significant about the approach of Kearns J in *Reilly* in distinguishing *Bazley* is the strong suggestion in the judgment that, were the parallels with the latter case more strongly resounded on the facts of *Reilly*, then *Bazley* would govern the court's vicarious liability inquiry. With respect, this analysis is entirely question-begging since, as we have seen, the Supreme Court in *O'Keeffe* three months earlier not only did not resolve the status of *Bazley*, but indicated a sharp division of approach even amongst the members of the majority as to this fundamental question.

A further source of confusion arising from *Reilly* is a degree of inconsistency arguably apparent within the judgment of Kearns J. It is, for example, confusing that Kearns J in declining to impose vicarious liability in *Reilly* invoked the following passage from the judgment of Hardiman J in *O'Keeffe*:

> In my view, both justice and the basic requirements of an ordered society require that the imposition of strict liability on a no fault basis be done (if at all) only on the clearest and most readily understandable basis. I do not regard the Canadian cases cited as providing such a basis: quite the opposite, as the two conflicting decisions cited demonstrate, in my view. I do not believe that the expanded basis of vicarious liability represents the law in this jurisdiction, or can be made to do so except by legislation. The consequences of doing this, social as well economic, would be immense....[164]

Given Kearns J's emphasis on how *Bazley* could be distinguished in *Reilly*, it is difficult to see why support would then be drawn from that passage of Hardiman J's judgment in *O'Keeffe* which explicitly rejects the very notion that *Bazley* could represent the law in this jurisdiction.

This confusion is deepened in the following passage of Kearns J's analysis of the position of Hardiman J in *O'Keeffe*:

> Hardiman J. went on to note the "chilling effect" of any extension of the doctrine of vicarious liability whereby the State would become liable for criminal activities of those in their employment in circumstances where there was no fault attaching to the State. To do so would be not only to make the taxpayer liable for the criminal acts of employees of State

[164] *O'Keeffe*, 526-527.

> bodies, but it would also affect that body's actions in ways which would require to be considered as a matter of policy before such an extension of the law could be allowed.

On the basis of the above passage, it appears that Kearns J is signalling a strong note of caution about the acceptance of the *Bazley* and *Lister* approaches in Irish law. Once again, however, this is rendered less than clear by the passage immediately following this statement, in which Kearns J observes:

> While the able submissions advanced on behalf of the plaintiff make reference to the *Bazley* principles, they do so in a necessarily limited way and counsel was obliged to frankly concede that not all of the criteria elaborated by the Canadian Supreme Court were met in the instant case. I believe this case falls short by a considerable margin of establishing the prerequisites for a finding that the defendants should be held vicariously responsible for the criminal activities of the first named defendant in this case.

With respect, the references in this passage to the *Bazley* "criteria" being "met" and to the "prerequisites" for vicarious liability could be interpreted as suggesting that the *Bazley* approach applies in Ireland, and that the vindicatory approach based on vulnerability adopted in that case also represents the law in this jurisdiction. This view is, however, extremely difficult to reconcile either with the passages from Kearns J's judgment,

quoted above, in which reliance is placed on the Hardiman approach in *O'Keeffe*, or indeed with the complicated picture emerging from the various judgments in the latter case already analysed above.

## F. CONCLUSIONS

The doctrine of vicarious liability "has always troubled the law of tort".[165] Certainly, vicarious liability principles in Irish law are at present in a state of considerable uncertainty. The judgments in the landmark *O'Keeffe* ruling indicate not only that there is a lack of consensus amongst the judiciary as to the law in Ireland on vicarious liability principles generally, but also that Irish law may not embrace the vindicatory approach to protecting the rights of the vulnerable through the doctrine of vicarious liability adopted in jurisdictions such as Canada. Accordingly, the capacity of vicarious liability to vindicate rights in Irish tort law may be nullified, and this aspect of Irish tort law may differ markedly from that in other jurisdictions. If this ultimately proves to be the case, then individuals seeking damages in the courts for the exploitation of their vulnerability may stand in a far weaker position than persons seeking the same redress under, for example, English, Canadian and Australian law. Given that the core issue in *O'Keeffe* concerned the "triangular relationship" between the Department of Education, the school's management system and the wrongdoing teacher, however, the various comments made on these broader issues of principle will require clarification in subsequent cases. In light of the pace at which developments in vicarious liability have been emerging, it seems fair to predict that the different approaches in *O'Keeffe* will be

[165] Paula Giliker, "Rough Justice in an Unjust World" (2002) 65 *MLR* 269, 269.

further considered by the superior courts in the near future. The case has already been analysed by the Supreme Court in *Reilly v Devereux*, a decision that itself leaves open a number of key questions about the current status of the law on vicarious liability in this jurisdiction and, as analysed above, depicts an unclear picture about the rôle of vulnerability in this regard. Moreover, given the recent reports that Ms O'Keeffe has now instituted proceedings before the European Court of Human Rights, the full significance of the case in the context of rights vindication may be yet to unfold.[166]

At the crux of the differences of opinion manifested in *O'Keeffe* as to whether Irish law should follow the developments taken elsewhere is a tension between a number of competing values permeating tort law: those of ensuring rights vindication, fair compensation and deterrence, on the one hand, and those of limiting no-fault liability and of containing the so-called compensation culture, on the other. The tension between these values undoubtedly presents a constant struggle for tort law systems striving to deal with new problems in the law. The different approaches by the members of the Supreme Court in *O'Keeffe* illustrates just how difficult the resolution of this tension continues to be in the context of vicarious liability.

In the comparative analysis undertaken in this Chapter, the concern with vindicating the rights of the vulnerable has emerged as a key consideration in extending the parameters of vicarious liability. To this extent, it is true that vicarious liability now comprises a mechanism for vindicating rights. To this statement, however, there must be added a

[166] See "Woman abused as child by teacher to take case to Europe", *The Irish Times*, 24 June 2009.

number of qualifications. First, the stark disagreement revealed between the courts in this jurisdiction and elsewhere indicates that, as a matter of Irish law, such vindication may be extremely difficult to achieve via vicarious liability. Secondly, even in jurisdictions such as Canada where the vulnerability approach is clearly well established, a number of problematic knock-on effects of the new approaches to vicarious liability have been identified. These include the doctrinal concerns explored above in this Chapter, including the concern that approaches such as those taken in *Bazley* and *Lister* are apt to conflate distinct and fundamental principles such as the separation between primary and vicarious liability, and that the heightened causal emphasis with which the Salmond test is imbued under the *Bazley* material risk analysis may distract courts from the essential course of employment inquiry. Such concerns give rise to the charge that the doctrine of vicarious liability and the logic of the Salmond test has "expanded past its breaking point", [167] and to the fear that "the doctrine of vicarious liability is in danger of losing its way".[168] These concerns about the knock-on effects of such approaches as *Bazley* and *Lister* thus unify the thematic analysis permeating earlier Chapters in this thesis: the complex power balance between, and the consequences of, ensuring that orthodox ingredients of tortious liability remain intact whilst enabling tort doctrine to be used as a mechanism for securing the vindication of rights.

[167] David R. Wingfield, "Perish Vicarious Liability?" in Jason W. Neyers, Erika Chamberlain and Stephen G.A. Pitel eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007), 393, 398.
[168] Paula Giliker, "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 *Torts L J* 35, 36.

# CONCLUSIONS

This thesis has sought to identify and explore the complex inter-relationship between vindicatory and compensatory objectives in the contemporary legal framework governing the tortious liability of public authorities. The sustaining focus of the work has been the specific question of how the framework of tortious liability has been and continues to be influenced by the impact of rights vindication norms.

Part I, in examining a number of key thematic tensions permeating the tortious liability of public authorities, began with an acknowledgement of the difficulty of providing any one definitive "account" of tort law. Through analysing the work of theorists such as Weinrib and others, this section focused on the inability of the corrective justice paradigm to provide a convincing account of modern tort law. The section then considered the emerging emphasis being placed on the rôle of tort law in the vindication of rights. Various models of vindication were explained and analysed, including vindication as vengeance, vindication as the making available of a public forum in which to claim rights, and vindication through the provision of remedial relief. Up-to-date examples of judgments from senior appellate courts in which the vindicatory model of tort law has been acknowledged were then the subject of scrutiny. The main conclusions of Part I were that the corrective justice paradigm does not provide an all-encompassing account of tort law, which increasingly accommodates

vindicatory pressures in a number of distinct ways. This conclusion provided a lens or prism through which the focus of the remaining Chapters could be channelled.

Building on this broad conceptual framework in Part I, Part II sought to assess the extent to which key common law causes of action in the tortious liability of public authorities are undergoing fundamental change in response to the vindicatory pressures explored in Part I. In order to carry out this inquiry, two "quintessential" public authority causes of action in tort law were selected: negligence, the behemoth tort that dominates the common law landscape, and misfeasance in public office, the only truly public tort that has enjoyed a renaissance in recent years.

In separate Chapters, the evolving approaches of the courts to the constituent ingredients of each of these causes of action were analysed in comparative perspective. In relation to the tort of negligence, for example, it was argued that the pressure of rights vindication has resulted (and continues to result) in the constituent ingredients of the tort being refashioned by the courts. Thus, the duty, breach, causation and damage requirements are increasingly being modified so as to accommodate vindicatory pressures. This was vividly seen in the case of duty, for example, by assessing the characteristically restrictive approach of the 1980s House of Lords as evinced in *Hill v Chief Constable of West Yorkshire*[1], a claim which was shown to be problematic from a corrective justice standpoint. Throughout Chapter 2, and indeed later, in Chapters 4 and (especially) 5, the shifts that have taken place in the last two decades have been shown to have influenced

[1] [1989] AC 53.

how the courts today approach the duty and breach stages of the negligence inquiry in cases such as *Hill*. Similarly, Chapter 2 revealed very significant shifts which have taken place in the distinct contexts of the causation and damage requirements of the tort of negligence, again demonstrating how the infusion of negligence with rights vindication objectives effects an alteration in the internal organisational structure of these torts. A number of thematic tensions in this regard were identified through the various case studies examined. For example, in relation to causation, the conflict between allowing a loosening of causation rules so as to vindicate plaintiffs' autonomy and the need to maintain doctrinal integrity through the maintenance of firm causal rules was considered. Similarly, considerable shifts concerning the "gist" or damage requirement in the negligence action were explored. Whilst accepting that this gist requirement is indeed undergoing significant recalibration owing to vindicatory pressures, it was emphasised that these pressures have brought to the fore fresh tensions in terms of the policy choices facing the courts at the damage stage of the negligence inquiry (a phenomenon that itself comprises another example of the shift away from the duty stage). This latter trend is exemplified in the *McFarlane*[2], *Rees*[3] and *Byrne*[4] cases, with the distinctive approach in *Byrne* ironically underlining the potential for vindicatory concerns to pull in the opposite direction to that commanded in other jurisdictions by distinct and competing (and even including unsolicited) vindicatory pressures.

Similarly powerful effects of a vindication pressure were observed in Chapter 3 in the analysis of the tort of misfeasance in public office. A difference in this respect was that

[2] [2000] 2 AC 59.
[3] [2003] UKHL 52, [2004] 1 AC 309.
[4] [2007] IEHC 207.

the detailed historical survey conducted in that Chapter attempted to show that misfeasance was traditionally perceived as containing important vindicatory elements. The capacity of the tort in a contemporary setting to further achieve vindication was then explored, with numerous features of the tort as it is currently instantiated supporting the proposition that the tort can indeed serve an important stand-alone function as a vindicatory tool. In terms of the developments yet to take place in this jurisdiction concerning the tort's chief ingredients, it was argued in detail that the recent approach of the House of Lords in *Watkins v The Home Office*[5] ought not to be followed in this jurisdiction, with several arguments being advanced as to why such an approach would be inconsistent with the vindication of rights as enabled by this tort.

Part III progressed the focus of the argument on to the ways in which human rights instruments can and do exert an impact on common law causes of action in public authority tort litigation. Here, the influence of both the Constitution of Ireland and the European Convention on Human Rights was explored. In relation to each, the ongoing thematic tensions between convergence and separation were considered, and their impact in each context assessed. In relation to the Constitution of Ireland, it was argued that, after the heady days of *Meskell*[6], the potential for the constitutional tort to serve as a tool for vindication has gone largely untapped. Drawing on recent authorities from other Constitutional jurisdictions concerning the use of the constitutional tort action as a mechanism for effective rights vindication, the significance of such approaches was

[5] [2006] UKHL 17, [2006] 2 AC 395
[6] *Meskell v Córas Iompair Éireann* [1973] IR 121.

emphasised in the context of considering how the constitutional tort might be developed in this jurisdiction in the future.

In relation to the European Convention on Human Rights, a detailed analysis was conducted in Chapter 5 of the potential for the Convention to infuse and inform the common law with vindicatory norms. The most difficult and topical question in this regard was identified as being that of whether and to what extent the influence of human rights protection can serve as a catalyst for fundamental change in the constituent ingredients of causes of action in tort law generally, and the tort of negligence in particular. Detailed analysis was provided of the most recent international case law in this regard, particularly the recent judgments of the House of Lords in *Van Colle* and *Smith*[7], and a strong argument was put forward to the effect that the minority approach in such cases, advocating a greater degree of harmony between tort law and the ECHR, is to be preferred.

In the final Part of this thesis, attention returned to common law doctrine, focusing on the vindicatory power of "outcomes" in public authority tort litigation. The emphasis here was on two distinct areas of relevance: the awarding of exemplary damages against, and the imposition of vicarious liability upon, public authorities. In both contexts, it was argued that the objective of vindication has significantly affected how the courts approach such outcomes in public authority litigation. In relation to exemplary damages, it was argued that such damages do indeed pursue, *inter alia*, a vindicatory purpose.

[7] *Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225.

Indeed, one of the arguments made in that Chapter was that exemplary damages comprise an example of tort law enjoying a unique vindicatory power that is not available in more overly vindication-oriented regimes, most notably in the context of the European Convention of Human Rights. Analysed through the prism of the recent Supreme Court judgment in *Shortt*[8], this species of damages was revealed as having a number of significant implications for tort vindication, including issues such as their potential availability in the context of the doctrine of vicarious liability.

The latter doctrine was the subject of detailed study in the final Chapter of Part IV. There, a thorough comparative analysis was conducted of the landmark developments in the Salmond test in many jurisdictions over the last decade. In particular, care was taken to illustrate how the origins of this shift lay in the vindicatory concern that the rights of vulnerable plaintiffs would be respected. The effects of this shift, including both its implications for vicarious liability doctrine and the range of divergent responses elicited from other courts across the common law world, reveal an intensely controversial area of public authority liability that embodies a struggle between competing values within the tortious liability of public authorities, including that of vindication. From an Irish perspective, this struggle was seen most clearly in the Supreme Court decision in *O'Keeffe*[9], but the vindicatory objective also emerges, it was argued, in the later Supreme Court case of *Reilly*.[10]

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[8] [2007] IESC 9, [2007] 4 IR 587.
[9] *O'Keeffe v Hickey* [2008] IESC 72, [2009] 1 ILRM 490.
[10] [2009] IESC 22.

Reflecting on the emerging themes and tensions revealed in the various inquiries herein, a number of points can be made by way of conclusions. First, contemporary public authority tort law is concerned with, *inter alia*, the vindication of rights. As such, the corrective justice paradigm is inadequate as a touchstone for understanding the operation and rationale of tortious liability. Secondly, in relation to public authority claims, the vindicatory rationale has exerted clear pressure on the common law in recent years, as witnessed and analysed, for example, in the shifts brought about in key ingredients of both negligence and misfeasance in public office, but also in the contexts of exemplary damages and vicarious liability. In these areas, just as in the context of the controversial relationships between tort law and Constitution and the European Convention on Human Rights, the key tension to emerge is that between properly acknowledging these vindicatory pressures, on the one hand, and ensuring that the integrity of tort law doctrine remains intact, on the other. In every one of the discrete areas examined in this thesis, this tension is in evidence. The marked differences of opinion that have been analysed – whether these be differences between courts from distinct jurisdictions, between different judges on the same judicial panel, or between torts scholars – reveal the controversial nature of this tension. The vindication debate is intensifying. What this thesis has sought to do, in its own way, is to make a contribution towards ensuring that torts scholars are informing, contributing to, and ultimately improving, that debate.

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