

THE NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES: WAS THE OLD LAW THE RIGHT LAW?

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Introduction

This is an article about three recent House of Lords judgments on the vexed issue of public authority liability in negligence and the performance of public, or governmental, functions.¹ The judgments – *Gorringe v Calderdale M.B.C.*,² *D v East Berkshire Community Health N.H.S. Trust*,³ and *Brooks v Metropolitan Police Commissioner*⁴ – centred on whether the defendant authorities owed common law duties of care to individuals who suffered injury as a result of, respectively: a car accident that was argued to have been caused by an absence of road markings; erroneous accusations that parents had abused their children; and the manner in which the police had treated the victim of a crime. In holding that no duties were owed, the House of Lords has seemingly moved the tort liability of public authorities away from the more “consumerist” model of negligence that had underscored its earlier judgments in child welfare and education cases such as *Barrett v Enfield L.B.C.*⁵ and *Phelps v Hillingdon L.B.C.*⁶ The prospect of increased liability in those cases has, instead, ceded in the more recent cases to an emphasis on the wider public/community interest as better served when there is limited scope for damages actions against public authorities (whether as directly or vicariously liable).⁷ While the child welfare and education cases thus remain as important precedents – they were expressly considered and reaffirmed in *Gorringe* and *D*⁸ – their reasoning does not appear to extend

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¹ On the long-standing complexity in the case law see, e.g. R.A. Buckley, ‘Negligence in the Public Sphere: Is Clarity Possible?’ (2000) 51 N.I.L.Q. 25 and C. Booth and D. Squires, *The Negligence Liability of Public Authorities*, chap.1. On public/governmental functions P. Cane, *Administrative Law* (4th ed., 2004) chaps.1 & 3.

² [2004] 1 W.L.R. 1057.

³ [2005] 2 A.C. 373.

⁴ [2005] 2 All E.R. 489.

⁵ [2001] 2 A.C. 550.

⁶ [2001] 2 A.C. 619. The term “consumerist” was used by Duncan Fairgrieve when analysing *Phelps*: see ‘Pushing Back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom’ [2002] P.L. 288 at 307. See also J. Bell, ‘Introduction’ in D. Fairgrieve, M. Andenas and J. Bell (eds.) *Tort Liability of Public Authorities in Comparative Perspective* p.xv.

⁷ On the (increasing) appeal of notions of community in legal reasoning see P. Seters (ed), *Communitarianism in Law and Society*.

⁸ See, in *Gorringe*, e.g. [2004] 1 W.L.R. 1057 at 1968, para.39 (Lord Hoffmann) and [2004] 1 W.L.R. 1057 at 1079, para.73 (Lord Scott). And in *D* see, [2005] 2 A.C.

beyond immediately analogous disputes. The consumerist cases have, in that sense, arguably become exceptions to a more general rule that militates against increased liability for public service providers such as highway authorities, social welfare agencies, and the police.

The purpose of this article is to consider how far *Gorringe, D*, and *Brooks* thereby mark a return to what may be termed the “old” common law approach to the negligence liability of public authorities. The “old” approach can for these purposes be taken as that which pre-dominated pre-*Barrett* and which entailed that duties of care were rarely owed by public authorities when they were acting under statutory powers and duties or, in the case of the police, investigating crime.⁹ The corresponding pre-*Barrett* rationale was, again, that the interests of the wider public/community were better served when public service providers with limited resources were not subject to the ready threat of litigation;¹⁰ and the approach took form in practice in the striking-out of negligence actions at a preliminary stage on the ground that the proceedings disclosed no reasonable cause of action.¹¹ While *Barrett* in turn represented a departure from striking-out – a change that was part prompted by the European Court of Human Rights (ECtHR) finding in *Osman* that striking-out in that case had violated Article 6 ECHR¹² – the fact that both *D* and *Brooks* were appeals against striking-out orders on the grounds of no duty suggests a return to a practice that was previously regarded as problematic. The fact that *Gorringe, D*, and *Brooks* have drawn upon essentially the same arguments of public policy that guided the pre-*Barrett* case law also suggests a continuance in reasoning that transcends any wider change that *Barrett* was thought to signify.¹³

A related point of enquiry concerns the extent and nature of any interaction between the ECHR and the common law in the cases,¹⁴ as was addressed in a number of *obiter* comments (the disputes each arose prior to the coming into force of the Human Rights Act 1998 and the ECHR was not directly in issue¹⁵). Although the decision in *Barrett* was part influenced by *Osman*, the ECtHR subsequently held, in the light of domestic judicial criticism of *Osman*, that its finding on Article 6 ECHR had been misguided and that striking-out should instead be considered under the Article 13 ECHR right to

373 at 391-2 (Lord Bingham, dissenting) and [2005] 2 A.C. 373 at 417, para.124 (Lord Brown).

⁹ See, most famously, *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53; *X v Bedfordshire C.C.* [1995] 2 A.C. 633; and *Stovin v Wise* [1996] A.C. 923, considered below. But for an exception to, in this instance, *Hill* see *Swinney v Chief Constable of Northumbria (No. 1)* [1997] Q.B. 64.

¹⁰ *Hill v Chief Constable* [1989] A.C. 53 at 63 (Lord Keith).

¹¹ On striking-out see, in England and Wales, CPR, r.3.4.

¹² *Osman v U.K.* (2000) 29 E.H.R.R. 245.

¹³ The leading discussion of *Barrett* remains P. Craig and D. Fairgrieve, ‘*Barrett*, Negligence and Discretionary Powers’ [1999] P.L. 626. See also D. Fairgrieve, *State Liability in Tort: A Comparative Perspective* p.68 ff.

¹⁴ See also J. Jackson, ‘Human Rights, Criminal Justice and the Future of the Common Law’, this issue.

¹⁵ The House of Lords has held consistently that the Human Rights Act 1998 does not have retrospective effect: see, in the context of tort proceedings, *Wainwright v Home Office* [2004] 2 A.C. 406.

an effective remedy.¹⁶ At one level, such judicial “dialogue” merely illustrates the point that national and international legal systems may approach the same issues from different and sometimes conflicting perspectives,¹⁷ but it can also be said to run prior to the much more profound challenge of merging the common law and European human rights standards in an era of globalisation and interlocking legal orders.¹⁸ For instance, Jane Wright argued at the time of the coming into force of the Human Rights Act 1998 that the common law was ill-suited to the challenge of absorbing the values and reasoning of the ECHR, largely because of the common law’s lack of familiarity with overarching principles that correspond to a more general rights consciousness.¹⁹ However, while there are statements in *Gorringe*, *D*, and *Brooks* that lend support to Wright’s disjuncture thesis – aspects of the judgments envisage that domestic tort law principles can exist at one remove from the ECHR and that they should be affected by the ECHR only insofar as is strictly necessary²⁰ – there are other statements that arguably parallel central features of the ECHR system. This is particularly true of judicial appeal to notions of community in *D* and *Brooks*,²¹ as such notions have been argued to resonate with the margin of appreciation doctrine and its emphasis on moral sentiment and related local values.²² So do the *dicta* in the cases suggest a compartmentalisation of the common law and ECHR as fundamentally distinct bodies of law, or do they reveal the common law as in any event at one with much of the ECHR and open to development in its light? And what, if anything, does the return to striking-

¹⁶ For criticism of *Osman* see *Barrett* [2001] 2 A.C. 550 at 558-60 (Lord Browne-Wilkinson) and Lord Hoffmann, ‘Human Rights and the House of Lords’ (1999) 62 M.L.R. 159 at 164. For the ECtHR’s acceptance of the some of the criticisms see *Z v U.K.* (2002) 34 E.H.R.R. 97 at 135, para.91 ff, referring to Lord Brown-Wilkinson’s opinion in *Barrett*; and for its corresponding finding in respect of Article 13 ECHR see *Z v U.K.* (2002) 34 E.H.R.R. 97 at 139, para.105 ff. For commentary see C. Gearty, ‘Unravelling Osman’ (2001) 64 M.L.R. 159 and ‘Osman Unravels’ (2002) 65 M.L.R. 86. But on the continuing and more generally problematic nature of Article 6 ECHR in the domestic setting see, e.g. *Matthews v Ministry of Defence* [2003] 1 A.C. 1163; and T. Hickman, ‘The “uncertain shadow”: Throwing Light on the Right to a Court Under Article 6(1)’ [2004] P.L. 122.

¹⁷ The term “dialogue” was used by A.C.L. Davies: see, ‘The European Convention and Negligence: Osman “Reviewed”’ (2001) 117 L.Q.R. 521 at 524. And on the sometimes problematic interaction of different legal orders see, e.g. J. Allison, ‘Transplantation and Cross-fertilisation’ in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* p.169.

¹⁸ See further M. Hunt, *Using Human Rights Law in English Courts* chpts. 1-3; G. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* chaps. 1, 7 & 8; and P. Birkinshaw, *European Public Law*, chaps. 1, 13 & 14.

¹⁹ *Tort Law and Human Rights*. Although for further analysis of the significance of the Act see T. Hickman, ‘Tort Law, Public Authorities, and the Human Rights Act 1998’ in Fairgrieve, Andenas and Bell (eds.) n.6 above, p.17.

²⁰ See, e.g. *D v East Berkshire* [2005] 2 A.C. 373 at 408-9, paras.92-5 (Lord Nicholls).

²¹ See also, e.g. in the context of nuisance proceedings against a public authority – in this instance a privatised utility – *Marcic v Thames Water Utility* [2004] 1 All E.R. 135.

²² See R. Mullender, ‘Tort, Human Rights, and Common Law Culture’ (2003) 23 O.J.L.S. 301 at 312 ff.

out in the cases mean in terms Article 13 ECHR – which is not included in Schedule 1 to the Human Rights Act 1998²³ – and future cases in which ECHR guarantees are directly in issue?

The article begins with a section that outlines the significance of the *Barrett* judgment and related case law that suggested a more expansive approach to duties of care and liability. It next divides into two sections that outline the findings and reasoning in *Gorringe, D*, and *Brooks*, both as reflect upon *Barrett* and upon debates about the relationship between the common law and the ECHR. The central point made here is that *Gorringe, D* and *Brooks* do mark a return to the old law of negligence liability, and that *Barrett* is now apparently constrained by a number of emerging distinctions between different categories of cases. In terms of the ECHR, it will moreover be suggested that the majority decision in *D* (in particular) has set the common law at one remove from the ECHR and the Human Rights Act 1998 in a manner that may ultimately prove problematic for reasons associated with existing case law under the Act.²⁴ Although there are aspects of the cases that suggest that the ECHR and common law exist in a complementary relationship, the majority approach in *D* proceeds on the understanding that cases that fall under the Human Rights Act 1998 should be dealt with on that basis and that there is no need for the common law to provide an alternative cause of action. The conclusion thus offers some more general comments on the shift back to the old and queries whether the approach adopted in *D* will finally prove sustainable.

The (Original) Significance of *Barrett*

Prior to *Barrett*, the House of Lords' case law on the negligence liability of highway authorities, social welfare agencies, and the police had become synonymous with its judgments in *Stovin v Wise*,²⁵ *X v Bedfordshire C.C.*²⁶, and *Hill v Chief Constable of West Yorkshire*²⁷. The cases, which concerned appeals against a finding of liability (*Stovin*) and the striking-out of proceedings (*X* and *Hill*), provided seminal statements of the then judicial approach to the liability of public service providers in circumstances falling outside established duty of care situations (such as the provision of medical treatment).²⁸ Each case was of course specific to its own context, and the

²³ Sch.1 lists those provisions of the ECHR that are given further effect under the Act, namely, Arts.2-12 & 14 ECHR, Arts.1-3 of Prot 1, and Arts.1-2 of Protocol 6, as read with Arts.16-18 ECHR.

²⁴ Principally *R v Secretary of State for the Home Department, ex p. Greenfield* [2005] 1 W.L.R 673.

²⁵ [1996] A.C. 923.

²⁶ [1995] 2 A.C. 633.

²⁷ [1989] A.C. 53.

²⁸ Related case law on the liability of highway authorities, welfare agencies, the police, and other public service providers and authorities includes: *Haydon v Kent C.C.* [1978] Q.B. 343; *Rowling v Takaro Properties Ltd.* [1988] A.C. 473; *Calveley v Chief Constable of Merseyside* [1989] A.C. 1228; *Lonrho plc v Tebbit* [1992] 4 All E.R. 280; *R v Deputy Governor of Parkhurst Prison, ex p. Hague* [1992] 1 A.C. 58; *Alexandrou v Oxford* [1993] 4 All E.R. 328; *Osman v Ferguson* [1993] 4 All E.R. 344; *Ancell v McDermott* [1993] 4 All E.R. 355; *Metcalfe v Chief Constable of R.U.C.* [1995] N.I. 446; *Elguzouli-Daf v Commissioner of the Police* [1995] Q.B. 335; *Capital and Counties plc v Hampshire C.C.* [1997] Q.B.

House of Lords variously considered: questions of proximity;²⁹ the relevance of the (much criticised) “policy/operational” dichotomy;³⁰ whether an act or omission that was underscored by a statutory duty or power must have been *Wednesbury* unreasonable/irrational before it could found a negligence action;³¹ whether the policy of the governing legislation was to afford a remedy in damages;³² and whether it would have been “fair, just and reasonable” to impose duties of care on public authorities that were working within a statutory framework and in tandem with other agencies.³³ But whatever the context specific issues, the reasoning in each judgment relied, either expressly or implicitly, on the argument of public policy that favours limited liability in the interests of the wider public.³⁴ Hence in *Stovin v Wise*, where the defendant had joined the authority as partly liable for a car accident because it had failed to use its statutory powers to compel improvements to land adjoining the highway, it was held that no duty had been owed by the authority because the omission had not been irrational and because there was nothing in the policy of the statute to suggest that compensation should be paid. And in *X v Bedfordshire C.C.*, where the various claimants were children affected by a range of welfare and education decisions, it was held that the grafting-on to statutory duties of a common law duty of care would only serve to complicate the already “extraordinarily delicate” tasks performed by the relevant authorities.³⁵ The corresponding

1004; *O.L.L. Ltd v Secretary of State for Transport* [1997] 3 All E.R. 297; and *Goodes v East Sussex C.C.* [2000] 1 W.L.R. 1356. Although on the relevance of resource considerations in the context of medical negligence see C. Witting, ‘National Health Service Rationing: Implications for the Standard of Care in Negligence’ (2001) 21 O.J.L.S. 443.

²⁹ *Hill* [1989] A.C. 53 at 60-62.

³⁰ *X* [1995] 2 A.C. 633 at 736 ff (Lord Browne-Wilkinson). The value of the distinction – which was introduced in *Anns v Merton* [1978] A.C. 728 – was doubted by Lord Hoffmann in *Stovin* [1996] A.C. 923 at 951. And for a long-standing academic critique see SH Bailey and MJ Bowman, ‘The Policy/Operational Dichotomy – A Cuckoo in the Nest’ (1986) 45 C.L.J. 430.

³¹ *X* [1995] 2 A.C. 633 at 736-7 (Lord Browne-Wilkinson) and *Stovin* [1996] 2 A.C. 923 at 953 (Lord Hoffmann). On *Wednesbury* unreasonableness/irrationality see *Associated Provincial Picture Houses v Wednesbury Corporation* [1943] 1 K.B. 223 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 410-11 (Lord Diplock). But note that *Wednesbury*’s place in domestic law is increasingly being supplanted by the proportionality principle: see *R (Daly) v Home Secretary* [2001] 3 All E.R. 433, in particular at 447 (Lord Cooke).

³² *X* [1995] 2 A.C. 633 at 731 (Lord Browne-Wilkinson, addressing the related question of whether an action for breach of statutory duty could be sustained) and *Stovin* [1996] 2 A.C. 923 at 953 (Lord Hoffmann).

³³ *X* [1995] 2 A.C. 633 at 739 (Lord Browne-Wilkinson), applying *Caparo Industries plc v Dickman* [1990] 2 A.C. 605.

³⁴ On arguments of public policy see Booth and Squires n.1 above, chap.4. And for further and related arguments against the imposition of liability see, e.g. B. Feldthusen, ‘Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity’ [1997] Tort L. Rev. 17; C. Keenan, ‘A Plea Against Tort Liability for Child Protection Agencies in England and Wales’ (2003) 42 Washburn L.J. 235; and P. Leyland, ‘The Human Rights Act and Local Government: Keeping the Courts at Bay’ (2003) 54 N.I.L.Q. 136 at 150 ff.

³⁵ [1995] 2 A.C. 633 at 751, Lord Browne-Wilkinson, referring specifically to the abuse cases.

public policy point was then put at its highest in *Hill* when, having held that there was an insufficiently proximate relationship between the police and a random victim of a serial killer, the House (famously) added:

“(T)here is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy . . . The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they may 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 . . . (I)t would be reasonable to expect that if potential liability were to be imposed it would not be uncommon for actions to be raised against police forces . . . Many such decisions would not be regarded by the courts as appropriate to be called into question, yet elaborate investigation of the facts might be necessary to ascertain whether this is so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence . . . The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime”.³⁶

The significance of *Barrett* lay in the fact that the House of Lords there held that the question whether a duty of care was owed would, instead, often better be answered in the context of a full trial and that the courts should for that reason be cautious to strike-out proceedings at a preliminary stage. The claim for damages in the case had been brought by a man who had been taken into care at the age of 10 months and who claimed to have suffered psychiatric harm as a result of a variety of decisions taken by the defendant local authority (the case thereby differed from *X*, where the question in the child welfare cases had been whether duties could be owed in respect of decisions whether to take children into care³⁷). While the House of Lords accepted that “policy” decisions taken by local authorities could not found a duty of care as such decisions are non-justiciable (the term policy corresponding to that used in the “policy/operational” dichotomy),³⁸ it held that other decisions could potentially found an action and that the central question at trial would be whether the imposition of a duty of care would be fair, just and reasonable (the House thereby jettisoned the public law tests that had been applied in previous child welfare cases³⁹). In reaching this conclusion, the House was guided by a concern to heighten common law

³⁶ [1989] A.C. 53 at 63 (Lord Keith).

³⁷ But for criticism of the distinction see Cane n.1 above at p.283.

³⁸ See, e.g. [2001] 2 A.C. 550 at 571 ff (Lord Slynn). The judgment was in this sense at one with *X*: see [1995] 2 A.C. 633 at 738. On justiciability see further Booth and Squires n.1 above, chap.2.

³⁹ Namely whether a decision was *Wednesbury* unreasonable. Although note that Lord Browne-Wilkinson had, in *X*, already doubted the need to use public law concepts to determine the private law liability of public authorities: see [1995] 2 A.C. 633 at 736-7.

protections for vulnerable children,⁴⁰ although it was, as noted above, also influenced by the ECtHR's judgment in *Osman v U.K.*⁴¹ Lord Browne-Wilkinson, as the Law Lord who gave express consideration to the ECtHR's judgment, held that striking-out in the instant case could fall foul of the earlier *Osman* finding that striking-out on the basis of the *Hill* precedent had there represented a disproportionate interference with Article 6 ECHR rights of access to a court. Although his Lordship was at the same time critical of *Osman* – he considered that the ECtHR had misunderstood the dynamics of the duty of care element in domestic tort law and wrongly categorised the rule in *Hill* as constitutive of an immunity from liability – he held that the Article 6 ECHR point remained valid in the absence of its reappraisal by the ECtHR. His Lordship for that reason, among others, decided that the case should be allowed to proceed to trial; and the suggested reappraisal followed two years later – and largely in the light of Lord Browne-Wilkinson's comments – in the shift to Article 13 ECHR in *Z v U.K.*⁴²

The immediate consequence of *Barrett* was, of course, for striking-out to become increasingly exceptional – and duties of care more apparent – in the lower courts.⁴³ It was, moreover, a change that was soon consolidated by other House of Lords judgments. The most important of these was *Phelps*,⁴⁴ which established that educational psychologists and teachers could owe common law duties of care to children affected by their advice and decisions.⁴⁵ This finding thereby marked the move towards the more consumerist model of liability that was noted above, as the judgment emphasised that parents would often be making important decisions on behalf of their children on the basis of the professional service provided to them.⁴⁶ In doctrinal terms, the change in emphasis then took further form in the fact that the local authorities were here sued as vicariously, rather than directly, liable for the loss suffered. While the option of direct liability was said to remain,⁴⁷ the focus on vicarious liability meant that there was no apparent need to consider whether a matter was one of policy that was, *per Barrett*, non-justiciable. The question, instead, was whether there was any overriding reason in principle why a professional ought not to owe a duty of

⁴⁰ The justification was not offered explicitly in *Barrett*, but has since been forwarded by Lord Brown in *Gorringe* – see [2004] 1 W.L.R. 1057 at 1086, para.100, considered below.

⁴¹ (2000) 29 E.H.R.R. 245.

⁴² (2002) 34 E.H.R.R. 97 at 135, para.91 ff, referring to Lord Browne-Wilkinson. The *Z* case was a petition arising from one of the child welfare decisions in *X v Bedfordshire C.C.*. See also *T.P. and K.M. v U.K.* (2002) 34 E.H.R.R. 42 and *D.P. and J.C. v U.K.* (2003) 36 E.H.R.R. 183.

⁴³ For cases in which duties were found to be owed see, e.g. *Kent v Griffiths* [2001] Q.B. 36, C.A.; *Larner v Solihull M.B.C.* [2001] R.T.R. 469, C.A.; and *Kane v New Forest D.C.* [2002] 1 W.L.R. 312, C.A., and *D v East Berkshire* [2004] 2 W.L.R. 58, C.A.. But for an early instance of post-*Barrett/Osman* striking-out see *S v Gloucestershire C.C.* [2001] 2 W.L.R. 909.

⁴⁴ *Phelps v Hillingdon L.B.C.* [2001] 2 A.C. 619. See also *W v Essex C.C.* [2002] 2 AC 592 and *Waters v Commissioner of the Police for the Metropolis* [2000] 1 W.L.R. 1607.

⁴⁵ The prospect of such liability had been held open by Lord Browne-Wilkinson in *X*: see [1995] 2 A.C. 633 at 764.

⁴⁶ For fuller analysis of the case see Fairgrieve n.6 above.

⁴⁷ [2001] 2 A.C. 619 at 658 (Lord Slynn).

care and why, if that duty was breached, the authority ought not to be vicariously liable. Having thus held that duties should in principle be owed – psychologists and teachers were equated with other professionals who already owe duties of care – the House concluded that vicarious liability would not impede the provision of educational services as the standards imposed would be at one with those expected in other professional contexts.

The significance of this move to a consumerist model of liability is returned to below, in particular in terms of how it might be reconciled with the community based reasoning of *D* and *Brooks*. However, one further point to be made here concerns the relationship between the duty and breach elements of negligence actions in the face of *Barrett* and *Phelps*. Although the judgments clearly gave rise to the possibility of increased liability – an award of damages to one of the claimants in *Phelps* was upheld by the House of Lords – judges and academic commentators suggested that the breach element of negligence actions might instead provide a mechanism for moderating liability.⁴⁸ The point here was simply that courts, when asking whether an authority has fallen beneath the standard of reasonable care, could account for traditional public policy concerns in the full hearing and on the question of breach, rather than at the preliminary stage associated with the duty of care and striking-out.⁴⁹ Subsequent case law has since suggested that this can and does occur,⁵⁰ although the merit of moderating liability at full trial should perhaps be juxtaposed with the House of Lords earlier concerns in *Hill*. The House, as quoted above, there held that striking-out on the question of the duty of care was to be preferred as the courts – and defendant authorities – could in that way avoid becoming engaged in an elaborate and costly investigation of facts. As will be seen below, this practical concern is one of several that have led the House of Lords back to the duty of care in *Gorringe*, *D*, and *Brooks*.

***Gorringe*, *D*, and *Brooks*: What was Decided, and Why?**

The appeals in *Gorringe*, *D*, and *Brooks* – as in *Stovin*, *X*, and *Hill* – were concerned with the correctness of a finding of liability (*Gorringe*) and of the striking-out of proceedings (*D* and *Brooks*). The finding of liability in *Gorringe* had been made at first instance, where the trial judge held that a car accident had been caused by Calderdale M.B.C.'s negligence in failing to provide sufficient road signs to alert drivers to dangers (the common law duty of care had been argued to co-exist with a statutory duty imposed by the Road Traffic Act 1988⁵¹). In holding that no duty had been owed, the House

⁴⁸ See [2001] 2 A.C. 550 at 591 (Lord Hutton) and *Craig and Fairgreive* n.13 above. See also Lord Bingham's dissenting opinion in *D*: [2005] 2 A.C. 373 at 399-400 (para.49), considered below.

⁴⁹ See further P. Cane n.1 above at p.283 ff.

⁵⁰ See, e.g. in the education context *Bradford-Smart v West Sussex C.C.* [2002] E.L.R. 139, C.A.; *Liennard v Slough B.C.* [2002] E.L.R. 527; *Smith v Havering London L.B.C.* [2004] E.L.R. 629; and *Carty v Croydon L.B.C.* [2005] 2 All E.R. 517. But for education cases in which liability was established see, e.g. *D.N. v Greenwich L.B.C.* [2005] E.L.R. 133, C.A.; and *Devon C.C. v Clarke* [2005] E.L.R. 375, C.A..

⁵¹ *Viz*, s 39(2)(3). It was accepted that this statutory duty did not give rise to a private law cause of action and that the common law duty was parasitical on its

of Lords ruled that it would be inconsistent with the policy of the statute to impose a common law duty of care when the statute in question did not itself give rise to a private law cause of action;⁵² and it also applied its earlier *Stovin* ruling on liability for omissions while at the same time accepting criticisms of that judgment's reliance on the public law concept of irrationality.⁵³ The House then likewise drew upon pre-*Barrett* authority in *Brooks* when holding that it had been correct to strike-out the negligence action in that case on the basis of the *Hill* precedent (Mr Brooks, who had been with Stephen Lawrence on the night that he was murdered in a notorious racist attack,⁵⁴ claimed that he was both a witness and a victim of crime and that the police had breached their duty to treat him as such by, for instance, failing to offer him protection, support, assistance and treatment⁵⁵). Although the House accepted that developments since *Osman* meant that the blanket approach in *Hill* was no longer appropriate – “Nowadays, a more sceptical approach to the carrying out of all public functions is necessary”⁵⁶ – it considered that the duties contended for still fell within even a reformulated statement of the *Hill* principle and that the claimant could only avail himself of his alternative causes of action.⁵⁷ And in *D*, where the issue

existence (the finding of common law liability had been made at first instance in the light of *Larner v Solihull M.B.C.* [2001] R.T.R. 469, C.A.).

⁵² [2004] 1 W.L.R. 1057 at 1066 (Lord Hoffmann), affirming the CA at [2002] R.T.R. 446. Note that it was also argued that there had been breach of the statutory duty contained in s.41(1) of the Highways Act 1980 (*i.e.* to “maintain the highway”). The argument failed on the authority of *Haydon v Kent C.C.* [1978] Q.B. 343, C.A. and *dictum* of Steyn L.J. in *Lavis v Kent C.C.* (1992) 90 L.G.R. 416 at 418, C.A..

⁵³ Lord Steyn doubted whether use of the concept had any merit in the context of private law proceedings, and referred to the shift away from public law precepts in *Barrett* and *Phelps*: see [2004] 1 W.L.R. 1057 at 1060. See also the approach of Lord Hoffmann, who accepted that use of the concept of irrationality may have been “ill-advised”, at [2004] 1 W.L.R. 1057 at 1067-1068, considered below.

⁵⁴ See *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny*, 1999, Cm 4262-I.

⁵⁵ The duty argued for was three-fold and framed thus: “to (1) take reasonable steps to assess whether [the respondent] was a victim of crime and then to accord him reasonably appropriate protection, support, assistance and treatment if he was so assessed; (2) take reasonable steps to afford [the respondent] the protection, assistance and support commonly afforded to a key eye-witness to a serious crime of violence; (3) afford reasonable weight to the account that [the respondent] gave and to act upon it accordingly”.

⁵⁶ [2005] 2 All E.R. 489 at 504, para.28 (Lord Steyn). See also Lord Steyn's comments at [2005] 2 All E.R. 489 at 504 para.27 where, having referred to the fate of the barrister's immunity enunciated in *Rondel v Worsley* [1969] 1 A.C. 191 and ended in *Arthur J.S. Hall & Co (A Firm) v Simons* [2002] 1 A.C. 615, he said: “More fundamentally since the decision of the European Court of Human Rights in . . . (*Z v U.K.*) . . . 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”. For further reconsideration of the breadth of the principle in *Hill* see [2005] 2 All E.R. 489 at 493, para.3 (Lord Bingham) and at 494, para.6 (Lord Nicholls). And on *Rondel* and *Arthur J.S. Hall* see D. Capper. ‘The Demise of the Advocate's Immunity’, this issue.

⁵⁷ *E.g.* under s.20 of the Race Relations Act 1976. Although note that Mr Brooks was subsequently given an out of court settlement of £100,000 and an apology

was whether healthcare professionals owed duties of care to parents who they had wrongly suspected of abusing their children, the House drew upon arguments about the limited circumstances in which duties are owed to third parties⁵⁸ and about the paramouncy of the interests of the child⁵⁹ when holding that striking-out orders had there too been appropriate (several of their Lordships also read case law beginning with *Barrett* as establishing that duties of care are now owed to children in such cases⁶⁰). While the House recognised that the interests of parents were deserving of protection, it nevertheless held that liability should sound only where there is an absence of good faith on the part of individual professionals who act on their suspicions of abuse.⁶¹ Any other threshold, it was said, would place professionals in the impossible position of seeking to balance the interests of the child – which should be paramount – with the need to protect parents from unnecessary interference with their family life.⁶²

The corresponding emphasis on the interests of the wider public, or community, was at its most pronounced in *D* and *Brooks*. In *Brooks*, for instance, Lord Steyn considered that the core reasoning in *Hill* remained valid as the imposition of duties of the kind argued for in *Brooks* would impede “the police’s ability to perform their public functions in the interests of the community, fearlessly and with despatch . . . It would, as was recognised in *Hill*, be bound to lead to an unduly defensive approach in combating crime”.⁶³ While this perhaps begs the question of how far notions of community can be developed with reference to politically contested services such as policing,⁶⁴ Lord Steyn nevertheless considered that a community based justification for limiting liability was consistent both with the essence of the common law and with the rights based jurisprudence of the ECHR.⁶⁵ Lord Brown then similarly relied upon notions of responsibility to

from the Metropolitan Police in the light of their treatment of him: see <http://www.guardian.co.uk/crime/article/0,,1728650,00.html>.

⁵⁸ See, e.g. Lord Rodger’s opinion: [2005] 2 A.C. 373 at 409 ff.

⁵⁹ [2005] 2 A.C. 373 at 418, para.127 ff (Lord Brown).

⁶⁰ See [2005] 2 A.C. 373 at 391-2 (Lord Bingham, dissenting) and [2005] 2 A.C. 373 at 417, para.124 (Lord Brown). See also the judgment of the C.A. at [2004] 2 W.L.R. 58, reading *X* as an authority limited to its facts.

⁶¹ [2005] 2 A.C. 373 at 407, para.77 ff (Lord Nicholls).

⁶² See [2005] 2 A.C. 373 at 403, para.70 ff (Lord Nicholls). And see further, e.g., *D v Bury M.B.C.* [2006] 1 F.C.R. 148, applying the House of Lords ruling in *D*.

⁶³ [2005] 2 All E.R. 489 at 504, para.30.

⁶⁴ For wider and contemporary perspectives see I. Loader and N. Walker, ‘Policing as a public good: Reconstituting the connections between policing and the state’ (2001) 5 *Theoretical Criminology* 9.

⁶⁵ See [2005] 2 All E.R. 489 at 505, para.31, where his Lordship quotes from his earlier judgment in *Brown v Stott* [2003] 1 A.C. 681 at 707-708: “The inspirers . . . and the framers of the European Convention . . . realised that from time to time the fundamental right of one individual may conflict with the human right of another . . . They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: *we live in communities of individuals who also have rights*. The direct lineage of this ancient idea is clear: the European Convention (1950) is the descendant of the Universal Declaration of Human Rights (1948)

wider society – or certainly groups within it – when justifying the finding that no duty was owed to the parents in *D*. Having acknowledged that the burden placed upon parents was onerous, his Lordship nevertheless viewed that burden as merited for purposes of the greater good: “(I)t is a price they pay in the interests of children generally. The well-being of innumerable children up and down the land depends crucially upon doctors and social workers . . . being subjected by the law to but a single duty: that of safeguarding the child’s own welfare”.⁶⁶

Lord Brown’s judgment in *D* also referred to the practical problems associated with negligence actions going to full trial, where he noted that the imposition of duties would inevitably be followed by “costly and vexing litigation”.⁶⁷ This quite obviously echoes the understanding in *Hill* that striking-out is to be preferred because it enables public authorities to prioritise the full and effective provision of public services by ensuring that their limited financial resources are not diverted to the preparation and defence of proceedings. Related points of emphasis were also evident in other opinions in *D*⁶⁸ and (to a lesser extent) *Brooks*,⁶⁹ and they were equally apparent in *Gorringe* where the negligence action had proceeded to full trial. The judge at first instance in *Gorringe* had, as such, been influenced by Court of Appeal authority that had preferred a breach inquiry at full trial to one centred on the preliminary question of whether a duty of care is owed.⁷⁰ However, in criticising that authority – in which the Court of Appeal ultimately held on the facts that there had been no breach – Lord Hoffmann noted the practical consequences that proceeding to full trial had had in *Gorringe*. These included the council’s obligation to make disclosure of documents relating to its accident studies, to reveal the decision-making process by which it decided what measures to adopt in the light of those studies, to reveal the means by which those chosen measures were implemented, and to call a number of council officers as witnesses.⁷¹ Given the time and expense involved, Lord Hoffmann considered that the “enthusiasm for a hostile judicial inquiry into the council’s administration” had been nothing other than counterproductive. He added: “If (the Road Traffic Act 1988) continues to provoke investigations of this nature, much of the road safety budget will be consumed in the cost of litigation”.⁷²

which in article 29 expressly recognised the *duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others*”. Emphasis added.

⁶⁶ [2005] 2 A.C. 373 at 422, para.138.

⁶⁷ [2005] 2 A.C. 373 at 422, para.137.

⁶⁸ See [2005] 2 A.C. 373 at 408-9, paras.92-95 (Lord Nicholls). But see also Lord Bingham’s dissenting opinion: [2005] 2 A.C. 373 at 382-400.

⁶⁹ The “lesser extent” followed from the H.L. acceptance that the *Hill* principle, as originally formulated, was too broad and that striking-out should not be resorted to too readily: see [2005] 2 All E.R. 489 at 493, paras.2-4 (Lord Bingham); and [2005] 2 All E.R. 489 at 498, para.16 (Lord Steyn).

⁷⁰ *Larner v Solihull M.B.C.* [2001] R.T.R. 469.

⁷¹ [2004] 1 W.L.R. 1057 at 1068, para.33.

⁷² *ibid*; and see [2004] 1 W.L.R. 1057 at 1079, para.74 (Lord Scott): “Quite apart from the objections of principle which, in my opinion, ought to be held to bar the creation of common law liability . . . the history of this case provides a very salutary example of the undesirability of opening the door to the possibility of the

Consumers, communities, and the ECHR

One further issue addressed in *Gorringe* was, of course, how the shift back to duty in that case could be reconciled with the more consumerist tendencies in *Barrett* and *Phelps*. For Lord Hoffmann, the key to the difference between the cases lay in the fact of the performance of positive acts in *Barrett* and *Phelps* and the failure to act, or omission, in *Gorringe*. While his Lordship considered that the performance of positive acts could generate common law duties against the backdrop of statutory powers or duties – viz where authorities make decisions about children in care (*Barrett*) or about the educational welfare of children (*Phelps*) – he emphasised that the position was different when the authority had “not actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care”.⁷³ Under those circumstances, the mere existence of a statutory duty could not generate a common law duty of care, and his Lordship modified *Stovin* when concluding that it was difficult to “imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has a power (or a public law duty) to provide.”⁷⁴ Consumers, on this rationale, were to be solely those in respect of whom authorities had assumed a direct and individual responsibility and under circumstances in which the common law – not statute – imposed duties of care.⁷⁵

A more general justification for the difference was also offered by Lord Brown. Having agreed with Lord Hoffmann’s distinction between positive acts and omissions, his Lordship added that, while road accidents are often caused by the error of the claimant driver, wronged children are “themselves wholly blameless” and for that reason deserving of the protection of the courts.⁷⁶ This thus represents the heightened common law protection of vulnerable children that was referred to above, and it arguably also reflects upon a levelling up of the common law and ECHR.⁷⁷ The Court of Appeal in *D*, for instance, noted how child abuse cases will often raise issues under Articles 3 and 8 ECHR and that the imposition of common law duties of care to children thereby ensures that domestic law protections parallel those of the international order.⁷⁸ Such parallelism in turn then also points to related

creation of such liability. A tragic but simple road traffic accident, the cause of which was that Mrs Gorringe, driving too fast for the road, made a driving error, has led to a lengthy trial involving an extensive (and expensive) trawl through council documents going back many years in order to enable her to try and establish a breach by the council . . .”.

⁷³ [2004] 1 W.L.R. 1057 at 1068, para.38.

⁷⁴ [2004] 1 W.L.R. 1057 at 1067, para.32.

⁷⁵ See also Lord Scott’s opinion: [2004] 1 W.L.R. 1057 at 1079, para.73. And on liability for omissions more generally see S. Deakin, A. Johnston, and B. Markesinis, *Markesinis and Deakin’s Tort Law* (5th ed., 2003) p.149 ff.

⁷⁶ [2004] 1 W.L.R. 1057 at 1087, para.100.

⁷⁷ Arguments about levelling-up have also been seen in the context of domestic law’s relationship with EU law: see, most famously, the progression from *R v Secretary of State for Transport, ex p. Factortame (No 2)* [1991] 1 All ER 70 to *M v Home Office* [1993] 3 WLR 433. And see also, e.g. *Woolwich Building Society v Inland Revenue Commissioners (No.2)* [1992] 3 WLR 366, 395-396 (Lord Goff).

⁷⁸ See [2004] 2 W.L.R. 58 at 80, para.55 ff. See also, e.g. *E v U.K.* (2003) 36 E.H.R.R. 519.

debates about the relationship between the common law and ECHR, as it suggests that the common law is able to develop in manner that complements, and is compatible with, international standards. This is certainly the argument put forward by Richard Mullender, who notes an overlap between common law notions of community and the ECHR's "margin of appreciation" and "fair balance" doctrines (the former "identifying moral sentiment within particular communities at particular times as a concern salient to the proper application of Convention rights"; and the latter requiring "judges and other public officials to strike a 'fair balance between the . . . general interest of the community and . . . the protection of the individual's fundamental rights'").⁷⁹ Viewing community as important point of "intersection", Mullender thus concludes that it might facilitate common law compliance with the ECHR; and the example of Lord Steyn's subsequent appeal to community in *Brooks* would suggest that it is an intersection that is already being acted upon.⁸⁰

The potential for a drifting apart of the common law and ECHR – as envisaged by Jane Wright⁸¹ – can however also be seen in other aspects of the cases. For example, it was argued before the House of Lords in *D* that the duty of care element in negligence actions should in any event cede to a standard of care inquiry as this would be in keeping with the human rights approach whereby a court "look(s) backwards over everything which happened . . . (and) . . . makes a value judgment based on more flexible notions than the common law standard of reasonableness and does so freed from the legal rigidity of a duty of care".⁸² This argument, if acted upon, would likely have ensured fuller common law compliance with *Z v U.K.* and the Article 13 ECHR guarantee of effective remedies, although it was ultimately rejected by Lord Nicholls.⁸³ While his Lordship accepted that the standard of care approach was "not without attraction" and was "appropriate in the field of human rights",⁸⁴ he was reluctant simply to transpose it onto the domestic law of negligence, particularly when the ECHR was not directly in issue in the case. For his Lordship, such transposition would only

⁷⁹ n.22 above, at 313. The quote within the quote is taken from *Sporrong Lonnroth v Sweden* (1982) 5 E.H.R.R. 35 at 52, para.69; and for a further – and more recent – example of the ECtHR balancing individual rights against community interests see *Moreno-Gomez v Spain* (2005) 41 E.H.R.R. 40.

⁸⁰ The ECtHR's acceptance of the public policy argument used in *Brooks* was in evidence even in the *Osman* judgment. See (2000) 29 E.H.R.R. 245 at 316, para.149 ff: "The reasons which led the House of Lords in the *Hill* case to lay down an exclusionary rule to protect the police from negligence actions in the context at issue are based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardised by the constant risk of exposure to tortious liability. *Although the aim of such a rule may be accepted as legitimate in terms of the Convention. . .*" (emphasis added).

⁸¹ n.19 and text.

⁸² [2005] 2 A.C. 373 at 408-9, para.93, Lord Nicholls. The argument drew upon Fairgrieve, Andenas and Bell (eds.) n.6 above p.485. And on common law reasonableness see Lord Hutton, 'Reasonableness and the Common Law' (2004) 55 N.I.L.Q. 242.

⁸³ Note that Wright was highly critical of the reasoning in the ECtHR judgment in *Z*: see n.19 above at pp. xxiii-xxxvii.

⁸⁴ [2005] 2 A.C. 373 at 408-9, para.93.

generate further uncertainty in the law as the courts would then need to find another control mechanism that was sensitive to the wide range of considerations accounted for under the duty of care. In the absence of that mechanism, change of the kind urged was therefore not only inappropriate but also unnecessary, as future claims involving the ECHR could be brought directly under the Human Rights Act 1998.⁸⁵

At one level, this willingness to leave future cases that engage the ECHR to the Human Rights Act 1998 can be read as unremarkable. Although Article 13 ECHR is not included in Schedule 1 to the Human Rights Act 1998⁸⁶, sections 7-9 of the Act are intended to ensure access to effective remedies⁸⁷, and proceedings under the Act should in that way provide for a full hearing in a manner that complies with Article 13 ECHR.⁸⁸ However, cast in terms of Jane Wright's argument that the common law cannot easily accommodate the logic of the ECHR, Lord Nicholls' apparent closing-off of the common law from cases under the Human Rights Act is of a different – and contestable – quality. For instance, Lord Bingham, dissenting, considered that the challenge for the common law in *D* was to “fashion appropriate remedies to contemporary problems” and that that process had already begun with the shift to breach in *Barrett* and *Phelps*.⁸⁹ While his Lordship at the same time emphasised that proof of breach would require evidence of a very clear departure from the ordinary standards of skill and care, he considered that such a test would be welcome “since the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought

⁸⁵ *ibid*, para.94. See also, e.g. *Fairlie v Perth and Kinross Healthcare NHS Trust* 2004 S.L.T. 1200 at 1209, para.36 (Lord Kingarth). Although for an e.g. of an (unsuccessful) action that was brought both at common law and under the Human Rights Act see *Mitchell v Glasgow C.C.* 2005 S.L.T. 1100: no common law duty of care owed to a council tenant who was killed by another council tenant where the authority knew of, and had acted upon, the latter tenant's aggressive behaviour towards the deceased as such a duty would interfere with the authority's ability to carry out its statutory functions and lead to a significant diversion of resources; and a corresponding action under Art.2 ECHR could not be sustained as there was no evidence that the authority knew or ought to have known that there was a real and immediate threat to the life of the deceased. On the Art.2 ECHR (positive) obligations of public authorities see further, e.g. *Van Colle v Chief Constable of the Hertfordshire Police* [2006] E.W.H.C. 360, Q.B.: police liable in damages to a witness whom they had failed to protect in the light of threats from the person against whom evidence was to be given.

⁸⁶ n. 23 above.

⁸⁷ For a Parliamentary statement to this effect see 583 H.L. 475.

⁸⁸ On ss.7-9 see further A. Lester and D. Pannick, *Human Rights Law and Practice* (2nd ed, 2004) p.48 ff.

⁸⁹ [2005] 2 A.C. 373 at 400, para.50 (for his consideration of *Barrett* and *Phelps* see [2005] 2 A.C. 373 at 389, para.25 ff.). It should also be noted that Lord Bingham sat on the Appellate Committee in *Brooks*, where he agreed that the proceedings should be struck-out. His Lordship did, however, cross-refer to this opinion in *D* and emphasise that he is generally 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”. Striking-out in *Brooks* was nevertheless merited because (a) the facts of the instant case had already been examined exhaustively and (b) because the claim fell within the reformulated statement of *Hill*. See [2005] 2 All E.R. 489 at 493, paras.3-4.

reasonably to lead to recovery from claims which ought not".⁹⁰ Having thus situated the shift to breach within the comparative experience of civil law jurisdictions⁹¹ – his Lordship also distinguished comparative common law case law relied on by the majority⁹² – he concluded that the central question for the domestic system was whether “the law of tort should evolve analogically and incrementally . . . or whether it should remain 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”.⁹³ His Lordship preferred evolution⁹⁴ and, it seems, an outcome that would have protected the Article 13 ECHR rights of the parents notwithstanding that their rights under the ECHR were not directly in issue in the case.⁹⁵

Of course, such differences in judicial approach ultimately rest upon competing normative assumptions about the relationship between the common law and international law, and there are well-worn criticisms of the respective judicial positions (*viz* that a reluctance to embrace external norms is either to be welcomed as safeguarding national orders against the perils of legal transplantation or criticised for failing to embrace legal realities at a time of globalisation and overlapping legal processes).⁹⁶ Of more immediate relevance here, however, are the practical consequences of those normative assumptions when they result in human rights claims being brought under the Human Rights Act 1998 as opposed to a body of domestic tort law that

⁹⁰ [2005] 2 A.C. 373 at 400, para.49.

⁹¹ His Lordship cited, among others, B. Markesinis, J.B. Auby, D. Coester-Waltjen and S. Deakin, *Tortious Liability of Statutory Bodies*.

⁹² Principally *B and others v Attorney-General of New Zealand* [2003] 4 All E.R. 833.

⁹³ [2005] 2 A.C. 373 at 400, para.50.

⁹⁴ See also, *e.g.* his Lordship’s joint dissenting opinion (with Lord Steyn) in *Cullen v Chief Constable of the R.U.C.* [2003] 1 W.L.R. 1763 at 1771, holding that actions for breach of statutory duty that engage fundamental rights at common law should be part developed in the light of – in this instance – EU law’s State liability doctrine. On the more general impact of EU law in the area public authority liability see Anthony n.18 above, chap.6; and Birkinshaw, n.18 above, chap.10.

⁹⁵ Although note that there are limits to Lord Bingham’s willingness to develop common law causes of action as an alternative to proceedings under the Human Rights Act. See, most recently, *Watkins v Home Office* [2006] 2 All E.R. 353, where his Lordship rejected the argument that the tort of misfeasance in public office should be actionable *per se* and without proof of damage when the claimant’s common law constitutional rights are in issue. See, in particular, 364-5, para.26: “Breach of a fundamental human or constitutional right would also, in all probability, found a claim under section 7 of the Human Rights Act 1998, as it would in this case where the violation occurred after the Act came into force. I have myself questioned, albeit in a lone dissent (in *D*), whether development of the law of tort should be stunted, leaving very important problems to be swept up by the European Convention . . . but the observation was made in a case where, in my opinion, the application of familiar principles supported the recognition of a remedy in tort, not a case like the present where the application of settled principle points strongly against one” (the settled principle is that proof of damage is required for a successful claim for misfeasance in public office). But for an earlier argument to the effect that an expanded tort of misfeasance in public office would complement the ECHR see M. Andenas and D. Fairgieve, ‘Misfeasance in Public Office, Governmental Liability, and European Influences’ [2002] 51 I.C.L.Q 757.

⁹⁶ For a survey of the literature see Anthony n.18 above, chap.1.

evolves in the light of human rights principles. Claims under the Act must, in short, now be assessed in the light of a corresponding body of case law that suggests that awards of damages under the Act may be more limited than awards at common law.⁹⁷ Given the point, Lord Rodger in *D*, while concurring with Lord Nicholls, stated that he would “reserve his opinion as to whether, in (a future) case, it would be appropriate to modify the common law of negligence, rather than to found any action on the provisions, including section 8, of the Human Rights Act”.⁹⁸ The practical working through of the normative may yet prove problematic.⁹⁹

Conclusion

This article began by asking the question whether the old law on the negligence liability of public authorities was the right law. There are two points that can be made in response, and by way of conclusion. The first is that, as the old law of striking-out etc has now been returned to, it may, in that straightforward sense, be regarded as having been right. Whether “right” also equates to “good”, however, is a separate question that highlights the tension between consumerist and community based approaches to liability.¹⁰⁰ The shift away from striking-out in *Barrett* and *Phelps* was prompted partly by a concern that individual interests were insufficiently protected by the common law, and Lord Bingham’s dissenting opinion in *D* favoured the continuation of that trend. But the more general emphasis on community and corresponding arguments of public policy in *Gorringe*, *D*, and *Brooks* would suggest that “good” is, for the moment, to be associated with the “common good” or “greater good”.¹⁰¹ While the distinctions drawn in *Gorringe* may thus mean that the consumerist model is not wholly without relevance, its reach is constrained by those very same distinctions and the related assumption that duty, not breach, provides the preferred means for moderating liability.

The second point concerns the longer-term relevance of the ECHR. The highpoint of the ECHR’s impact in *Barrett* has, as *per* the majority opinion in *D*, now been replaced by an understanding that claims raising novel human rights points may be better dealt with under the Human Rights Act 1998 and at one remove from existing law common law causes of action. The fact that this may result in a claim for damages under the Human Rights

⁹⁷ See *R v Secretary of State for the Home Department, ex p. Greenfield* [2005] 1 W.L.R 673. The judgment of the House in this case was delivered by Lord Bingham, a point that is perhaps paradoxical given his judgment in *D* (but see also n.95 above).

⁹⁸ [2005] 2 A.C. 373 at 416, para.118.

⁹⁹ See further R. Clayton, ‘Damage Limitation: the courts and the Human Rights Act’ [2005] P.L. 429. See, in particular, 439, where he says that, “marginalising the role of Human Rights Act damages is unlikely to secure compliance with the Act or to promote a culture of rights”.

¹⁰⁰ For the beginnings of new proposals on public authority liability see the Law Commission’s discussion paper, *Monetary Remedies in Public Law* (2004) and the corresponding *Report of a Seminar* (2005), both available through <http://www.lawcom.gov.uk/publications.htm>. And see also C. Harlow, *State Liability - Tort Law and Beyond*.

¹⁰¹ On these and related concepts see, e.g. D. Bell, *Communitarianism and its Critiques*.

Act 1998 being assessed on a less favourable basis than a claim at common law has, however, been noted by Lord Rodger, who has implied that the common law may need to evolve to allow human rights to be vindicated at common law too.¹⁰² Should such evolution be required, it may be that Lord Bingham's dissenting opinion in *D* will assume an added significance and that breach will again become the moderating element in a negligence action.¹⁰³ And while debate about the merit of such change may focus once more upon the consumerism-community problematic, it may be that the human rights component to any case will require that understandings of the relationship between the interests of individuals and communities be reassessed. Human rights cases, as Lord Bingham stated in *D*, often involve, "in human terms, very important problems".¹⁰⁴ Viewed from this perspective, a common law award of damages may therefore be seen as concerned less with the rights of a consumer and more with the wider community interest in the vindication of an individual's "higher order" human rights.¹⁰⁵

¹⁰² [2005] 2 A.C. 373 at 416, para.118. But see also his Lordship's opinion in *Watkins v Home Office* [2006] 2 All E.R. 353 at 375, para.64, where considerations of parallelism were taken to militate against the argument that the common law should develop monetary remedies in the form of exemplary damages that would exceed those available in an action under the Human Rights Act (the question in *Watkins* was whether the tort of misfeasance in public office should be actionable *per se* and without proof of damage when the claimant's common law constitutional rights are in issue – see further n. 95 above).

¹⁰³ But see also n.95 above.

¹⁰⁴ [2005] 2. A.C. 373 at 400, para.50.

¹⁰⁵ The term is used by Mullender: see n.22 above at p.314.