

# *Fordham International Law Journal*

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*Volume 33, Issue 5*

2011

*Article 9*

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## The State's Liability in Damages for Administrative Action

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# The State's Liability in Damages for Administrative Action

Konrad Schiemann

## **Abstract**

This Essay looks at the state of the law in England as it was when Lord Gordon Slynn of Hadley was practicing at the bar. The Essay then considers state liability in the context of the European Union ("EU") and finally concludes by looking at the current English law governing state liability.

# THE STATE'S LIABILITY IN DAMAGES FOR ADMINISTRATIVE ACTION

*Konrad Schiemann\**

## INTRODUCTION

In the nature of things, from time to time, those put in authority by the state will misuse powers which they have been given, use powers which they have not been given, or fail to carry out duties which have been laid upon them. The question then arises: what can be done about this?

A topic which exists in all jurisdictions is the extent of the liability in damages of the state for wrongful administrative action. Should damages lie where they fall? Or should the courts attempt to balance the interests of aggrieved claimants against the fact that potential liability will create a burden on resources and might adversely affect the manner in which the administration carries out its duties? Is there a distinction between administrative action or inaction which was *unlawful* and action or inaction which was merely *substandard*? This is a topic to which Gordon Slynn made a number of different contributions as counsel, Advocate General, and judge.

This Essay looks at the state of the law in England as it was when Gordon Slynn was practicing at the bar, then considers what has happened in the European Union ("EU"),<sup>1</sup> and finally concludes by looking at the present position in England.

### I. ENGLISH LAW GOVERNING STATE LIABILITY WHEN SLYNN WAS PRACTICING AT THE BAR

When I first came across Gordon Slynn forty years ago, he was regularly acting for the defendant U.K. government before the English courts, the European Court of Human Rights, and the European Court of Justice ("ECJ" or "Court"). I tended to be

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\* Judge of the Court of Justice of the European Union.

1. For the sake of simplicity I adopt the expression "Union" throughout this Essay, even if referring to what used to be the European Community.

on the other side and, even if I usually lost, always found him a quick-witted, charming, and stimulating opponent.

At that time, English law had a reasonably well-developed system of remedies for putting an end to misfeasance and nonfeasance, but it was recognized to be deficient in providing adequate financial remedies for damages suffered by reason of misfeasance or nonfeasance.<sup>2</sup> The idea that a claimant might be able to obtain damages for a *legislative* or *judicial* act hardly crossed anyone's mind.

Throughout his life, Gordon Slynn was keenly aware of what other jurisdictions might have to contribute towards finding answers in this field in which the essential tensions are the same throughout the world. Here are some examples, the first of which may cause a New York readership, in particular, to raise its collective eyebrow.

*Dorset Yacht Co. v. Home Office* involved a party of seven boys who were committed to the lawful custody of the governor of a training institution for young criminals.<sup>3</sup> The governor of this borstal institution sent the boys to Brownsea Island on a training exercise and gave three officers instructions to keep the boys in their custody and under their control.<sup>4</sup> When the officers disobeyed these instructions and left the boys unsupervised, the trainees escaped. The boys proceeded to board a yacht that they found nearby.<sup>5</sup> The yacht collided with the claimants' nearby yacht. The collision, along with the boys' other conduct, caused significant damage.<sup>6</sup> The claimants sued the Home Office.<sup>7</sup> In May 1970, the case came before the House of Lords on the "preliminary issue [of] whether the Home Office or these officers owed any duty of care to the claimants capable of giving rise to a liability in damages."<sup>8</sup> Slynn, then junior counsel, was acting for the Home Office, when the House of Lords answered

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2. See, e.g., *Hoffmann-La Roche & Co. v. Sec'y of State for Trade & Indus.*, [1975] A.C. 295, 359 (H.L.) (appeal taken from Eng.) (Wilberforce, J., dissenting).

3. *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004, 1026 (H.L.) (appeal taken from Eng.).

4. *Id.*

5. *Id.* at 1025.

6. *Id.*

7. *Id.*

8. *Id.* at 1025–26.

that question in the affirmative.<sup>9</sup> In an endeavor to persuade their Lordships to arrive at a different conclusion, Slynn referred them to *Williams v. State of New York*<sup>10</sup> in vain. Lord Reid, the senior law lord at the time, and a much respected jurist, said:

Finally I must deal with public policy. It is argued that it would be contrary to public policy to hold the Home Office or its officers liable to a member of the public for this carelessness—or, indeed, any failure of duty on their part. The basic question is: who shall bear the loss caused by that carelessness—the innocent [claimants] or the Home Office, who are vicariously liable for the conduct of their careless officers? I do not think that the argument for the Home Office can be put better than it was put by the Court of Appeals of New York in *Williams v. State of New York*:

[P]ublic policy also requires that the State be not held liable. To hold otherwise would impose a heavy responsibility upon the State, or dissuade the wardens and principal keepers of our prison system from continued experimentation with ‘minimum security’ work details—which provide a means for encouraging better-risk prisoners to exercise their senses of responsibility and honor and so prepare themselves for their eventual return to society. Since 1917, the legislature has expressly provided for out-of-prison work, Correction Law, § 182, and its intention should be respected without fostering the reluctance of prison officials to assign eligible men to minimum security work, lest they thereby give rise to costly claims against the State, or indeed inducing the State itself to terminate this . . . salutary procedure.

It may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims that they could be influenced in this way. But my experience leads me to believe that Her Majesty’s servants are made of sterner stuff. So I have no hesitation in rejecting this argument. I can see no good ground in public policy for giving this immunity to a government department.<sup>11</sup>

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9. *Id.* at 1071.

10. *Williams v. New York*, 127 N.E.2d 545 (N.Y. 1955).

11. *Dorset Yacht*, [1970] A.C. at 1032–33.

## II. *STATE LIABILITY IN THE CONTEXT OF THE EUROPEAN UNION*

This Essay will return to English law later, but let us first accompany Slynn to Luxembourg where he also had to confront this type of problem not merely in the context of the liability of the state, but also in the context of what is now the EU.

Article 340 of the Treaty on the Functioning of the European Union (“TFEU”) (article 288 of the Treaty Establishing the European Community (“EC Treaty”)), which came into force on December 1, 2009, provides, in wording which has remained unchanged since 1957, “In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”<sup>12</sup>

A problem that has, from time to time, exercised the Union’s courts is whether it is possible to sue the Union with respect to a lawful, as opposed to unlawful, act. During his time as Advocate General at the ECJ, Slynn had to opine on such a claim made by a company that sold foodstuffs for piglets and alleged that it had suffered damages as a result of the enactment and implementation of certain European Commission (“Commission”) regulations. He said in his opinion:

Lastly, on the law, Biovilac claims that even if the relevant acts of the Commission were lawful, it is nevertheless entitled to compensation. In so doing, it relies on the German legal concept of “Sonderopfer” (special sacrifice) and the equivalent French legal concept of “rupture de l’égalité devant les charges publiques” (unequal discharge of public burdens). By virtue of these concepts, an application for compensation may be brought with respect to a lawful act of the administration provided that the plaintiff can show that he has suffered particularly severe loss as a result of the act. . . . It seems to me that, as regards Community acts affecting a person’s business activities and causing economic

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12. Consolidated Version of the Treaty on the Functioning of the European Union art. 340, 2008 O.J. C 115/47, at 193 [hereinafter TFEU]; Consolidated Version of the Treaty Establishing the European Community art. 288, 2006 O.J. C 321 E/37, at 147 [hereinafter EC Treaty].

loss, such an action, if existing at all, must be within a narrow compass.<sup>13</sup>

He considered, and the Court accepted, that on the facts of that case, no such liability arose.<sup>14</sup> However, the Court left open whether in principle any such action could lie in some circumstances.<sup>15</sup> That position of ruling out liability in the case under review, but leaving the door open has been consistently followed by the Court ever since.

A recent example is *Fabbrica Italiana Accumulatori Motocarri Montecchio Spa* (“FIAMM”).<sup>16</sup> The complicated underlying facts of this case arose out of the “banana war” between the EU and the United States. The EU had, by regulation, taken various measures (the “banana measures”) against the importation of bananas, which measures were ruled unlawful by the appellate mechanisms of the WTO.<sup>17</sup> As a result, the United States had, pursuant to provisions contained in the WTO regime, imposed various retaliatory restrictions on, among other things, the importation of batteries and spectacle cases from the EU into the United States (the “retaliatory measures”).<sup>18</sup> These retaliatory measures had allegedly caused FIAMM and the Fedon company damage.<sup>19</sup> For various reasons not presently relevant, the ECJ was not prepared to proceed on the basis that the banana measures were *unlawful*. FIAMM and others claimed that, even supposing that the banana measures had been *lawful*, the Union should be liable for doing something which had caused them substantial harm—notwithstanding the fact that neither of them had anything whatsoever to do with bananas—and they were the innocent victims of retaliatory measures taken by the United States.<sup>20</sup>

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13. Opinion of Advocate General Slynn, *SA Biovilac NV v. Eur. Econ. Cmty.*, Case 59/83, [1984] E.C.R. 4057, 4091.

14. *Biovlac*, [1984] E.C.R. 4057, ¶ 26.

15. *Id.* ¶ 28.

16. *Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) v. Council*, Joined Cases C-120 & C-121/06 P, [2008] E.C.R. I-6513.

17. See Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

18. *FIAMM*, [2008] E.C.R. I-6513, ¶ 20.

19. *Id.* ¶ 30.

20. *Id.* ¶ 31.

In *FIAMM*, the Court of First Instance (“CFI”) held that the Community could, in principle, be liable without unlawfulness having been shown.<sup>21</sup> It said in its judgment:

When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met.<sup>22</sup>

However, the CFI held that on the facts of the case the Council of the European Union (“Council”) and Commission were not liable.<sup>23</sup>

*FIAMM* and *Fedon* appealed.<sup>24</sup> The Council and the Commission cross-appealed the ruling, arguing that there could be liability in principle for a lawful act. As to this, Advocate General Maduro, like the CFI, was in favor of giving a remedy in damages in some circumstances for a lawful act. He said:

The establishment of a principle of no-fault Community liability could take its inspiration from the notion of the equality of citizens in bearing public burdens on which French administrative law has based liability for legislation. The reasoning may be summarised as follows: as all public activity is assumed to benefit society as a whole, it is normal that citizens must bear the resulting burdens without compensation, but if, in the general interest, the public authorities cause particularly serious damage to certain individuals and to them alone, the result is a burden that does not normally fall on them and which must give rise to compensation; the compensation, borne by society via taxation, restores the equality that has been upset. .

This idea is not very far removed from the ‘Sonderopfertheorie’ of German law, according to which individuals who, by reason of lawful public action, suffer a ‘special sacrifice’, that is to say damage equivalent to expropriation, must be granted reparation. Presented in this

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21. *Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) v. Council*, Case T-69/00, [2005] E.C.R. II-5393.

22. *Id.* ¶ 160.

23. *Id.* ¶ 214.

24. *FIAMM*, [2008] E.C.R. I-6513, ¶ 1.

manner, no-fault Community liability could also be based on property rights, which are protected in the Community legal system as a general principle of law in accordance with the constitutional traditions common to the Member States. It would express the idea that even lawful action by the Community's legislative body cannot have an effect equivalent to expropriation without compensation being granted.<sup>25</sup>

In a footnote to this passage, referring to the citation above from *Biovilac*, he says, "For an early example of such an insight, see the Opinion of Advocate General Sir Gordon Slynn in *Biovilac v. EEC*"<sup>26</sup>—an indication of the fact that Slynn's influence is still felt many years after his departure from the Court. Another indication, of course, is that his former Legal Secretary, Eleanor Sharpston, is now an Advocate General at the ECJ.

On the cross-appeal in *FIAMM*, notwithstanding the opinion of its Advocate General, the ECJ pursued its normal cautious course and, while leaving open the possibility that in some circumstances there might be an award of damages in respect of an action which was lawful, refused in the instant case to approve any award. The Court said:

[T]he Council has contended that the *FIAMM* and *Fedon* judgments should be set aside . . . on the ground that the Court of First Instance erred in law in establishing a principle of Community liability in the absence of unlawful conduct attributable to its institutions or, in any event, in holding that such a principle is applicable in the case of conduct such as that at issue in the case in point.

. . . .

It should be pointed out first of all that, in accordance with the settled case-law . . . the second paragraph of Article 288 EC means that the non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of.

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25. Opinion of Advocate General Maduro, *FIAMM*, [2008] E.C.R. I-6513, ¶¶ 62–63.

26. *Id.* ¶ 63 n.65 (citing Opinion of Advocate General Slynn, *SA Biovilac NV v. Eur. Econ. Cmty.*, Case 59/83, [1984] E.C.R. 4057, 4091).

The Court has also repeatedly pointed out that that liability cannot be regarded as having been incurred without satisfaction of all the conditions to which the duty to make good any damage, as defined in the second paragraph of Article 288 EC, is thus subject . . . .

. . . .

The Court's case-law enshrining, in accordance with the second paragraph of Article 288 EC, both the existence of the regime governing the non-contractual liability of the Community for the unlawful conduct of its institutions and the conditions for the regime's application is thus firmly established. By contrast, that is not so in the case of a regime governing non-contractual Community liability in the absence of such unlawful conduct.

. . . .

[A]s regards the liability regime recognised in Community law, the Court, while noting that it is to the general principles common to the laws of the Member States that the second paragraph of Article 288 EC refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties, has held that the principle of the non-contractual liability of the Community expressly laid down in that article is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused.

. . . .

The Court has . . . held in particular that, in view of the second paragraph of Article 288 EC, the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred . . . .

It has further pointed out, in this connection, that the rule of law the breach of which must be found has to be intended to confer rights on individuals . . . .

The Court has, moreover, stated that the strict approach taken towards the liability of the Community in the exercise of its legislative activities is attributable to two considerations. First, even where the legality of measures is subject to judicial

review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

Finally, it is clear that, while comparative examination of the Member States' legal systems enabled the Court to make at a very early stage the finding recalled in paragraph 170 of the present judgment concerning convergence of those legal systems in the establishment of a principle of liability in the case of unlawful action or an unlawful omission of the authority, including of a legislative nature, that is in no way the position as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature.

In the light of all the foregoing considerations, it must be concluded that, as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.

. . . .

It follows from all of the foregoing that, in affirming in the judgments under appeal the existence of a regime providing for non-contractual liability of the Community on account of the lawful pursuit by it of its activities falling within the legislative sphere, the Court of First Instance erred in law.

However, two further points should be made.

First, the finding in paragraph 179 of the present judgment is made without prejudice to the broad discretion which the Community legislature enjoys where appropriate for the purpose of assessing whether the adoption of a given legislative measure justifies, when account is taken of certain harmful effects that are to result from its adoption, the provision of certain forms of compensation . . . .

Second, it is to be remembered that it is settled case-law that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.

With regard, more specifically, to the right to property and the freedom to pursue a trade or profession, the Court has long recognised that they are general principles of Community law, while pointing out however that they do not constitute absolute prerogatives, but must be viewed in relation to their social function. It has thus held that, while the exercise of the right to property and to pursue a trade or profession freely may be restricted, particularly in the context of a common organisation of the market, that is on condition that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed . . . .

It follows that a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community.<sup>27</sup>

The Court, however, found that there was in the instant case no infringement of any right to property.

Turning, now, to the state's liability for unlawful acts, it is worth noting that during Sir Gordon Slynn's time as a member of the European Court of Justice he was a party to the famous decision in *Francovich and Others*,<sup>28</sup> which affirmed the liability of the state for damages caused to an individual by the state's failure to transpose a community directive. The Court said:

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

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27. *FIAMM*, [2008] E.C.R. I-6513, ¶¶ 161, 164–65, 167, 170, 172–76, 179–84.

28. *Francovich v. Italy*, Joined Cases C-6 & C-9/90, [1991] E.C.R. 5357.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

....

Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.<sup>29</sup>

In *Brasserie du Pêcheur v. Factortame*, those principles were held to be applicable to German and U.K. legislation enacted in breach of EU law obligations.<sup>30</sup> In *Köbler v. Austria*, it was held that the principle of liability on the part of a Member State for damages caused to individuals as a result of breaches of Community law for which the state is responsible could be applied to any authority of the Member State whose act or omission was responsible for the breach, including a supreme court of a Member State adjudicating at last instance.<sup>31</sup>

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29. *Id.* ¶¶ 33–35, 39–41.

30. *Brasserie du Pêcheur SA v. Germany*, Joined Cases C-46 & C-48/93, [1996] E.C.R. I-1029, ¶¶ 18–20.

31. *Köbler v. Austria*, Case C-224/01, [2003] E.C.R. 239, ¶¶ 30–50.

III. *CURRENT ENGLISH LAW GOVERNING STATE LIABILITY*

When Slynn returned to England in 1992, he joined the Judicial Committee of the House of Lords.<sup>32</sup> In 1996, he found himself in a minority when deciding the case *Stovin v. Norfolk County Council*.<sup>33</sup> Stovin had been injured in a highway accident at a dangerous junction.<sup>34</sup> The council knew the junction was dangerous and the deficiency could have been rectified for less than UK£1000.<sup>35</sup> Had this been done, the accident would not have happened. After Stovin sued the council, Lords Slynn, Nicholls, and the courts below were in favor of allowing Stovin to recover.<sup>36</sup> However, the majority in their Lordships' House denied Stovin any remedy. Lord Hoffman, with whom the remainder of their Lordships agreed, said, echoing the thoughts expressed by the New York Court of Appeals cited at the beginning of this Essay:

[T]he creation of a duty of care upon a highway authority, even on the grounds of irrationality in failing to exercise a power, would inevitably expose the authority's budgetary decisions to judicial inquiry. This would distort the priorities of local authorities, which would be bound to try and play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services . . . [I]t is important, before extending the duty of care owed by public authorities, to consider the cost to the community of defensive measures which they are likely to take in order to avoid liability.<sup>37</sup>

Subsequently, Lord Slynn delivered leading opinions in *Barrett v. London Borough of Enfield*<sup>38</sup> and *Phelps v. London Borough*

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32. *Lord Slynn of Hadley*, TELEGRAPH (London), Apr. 8, 2009, available at <http://www.telegraph.co.uk/news/obituaries/law-obituaries/5127036/lord-slynn-of-hadley.html>.

33. *Stovin v. Norfolk County Council*, [1996] A.C. 923 (H.L.) (appeal taken from Eng.).

34. *Id.* at 923.

35. *Id.*

36. *Id.*

37. *Id.* at 958.

38. *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550 (H.L.) (appeal taken from Eng.).

of *Hillingdon*,<sup>39</sup> in which the same sort of issues and the interrelationship between public law liability and liability in the tort of negligence arose in the context of the possibility of striking out actions as disclosing no cause of action, and in which the possibility of successful actions was left open.<sup>40</sup>

A more clear-cut result can be seen in *R v. Factortame*, where the House of Lords, affirming the lower courts, held that the United Kingdom was liable in damages for its enactment of the Merchant Shipping Act of 1988 in breach of community law.<sup>41</sup> Lord Slynn delivered the leading judgment. Lord Hoffman, this time agreeing with Lord Slynn, said:

The question is now whether they are entitled to compensation. The Court of Justice has ruled that this depends upon whether the breach of Community law was sufficiently serious. It accepts that in principle the area in which the United Kingdom was legislating was one in which it had a wide discretion. In such a case, the breach of Community law will be sufficiently serious only if the legislature “manifestly and gravely disregarded the limits of its discretion.”

I agree with my noble and learned friend Lord Slynn of Hadley that the actions of the United Kingdom can properly be so described. There is no doubt that in discriminating against non-U.K. Community nationals on the grounds of their nationality, to which the requirements of domicile and residence were added to tighten the exclusion of non-U.K. interests, the legislature was prima facie flouting one of the most basic principles of Community law. The responsible Ministers considered, on the basis of the advice they had received, that there was an arguable case for holding that the United Kingdom was entitled to do so. In that sense, the Divisional Court has held that the Government acted bona fide. But they could have been in no doubt that there was a substantial risk that they were wrong. Nevertheless, they saw the political imperatives of the time as justifying immediate action. In these circumstances, I do not think that the

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39. *Phelps v. Hillingdon London Borough Council*, [2001] 2 A.C. 619 (H.L.) (appeal taken from Eng.).

40. See the valuable discussion in DUNCAN FAIRGRIEVE, *STATE LIABILITY IN TORT* 46–51 (2003).

41. *R. v. Sec’y of State for Transport, ex parte Factortame Ltd.* (No. 5), [2000] 1 A.C. 524 (H.L.) (appeal taken from Eng.).

United Kingdom, having deliberately decided to run the risk, can say that the losses caused by the legislation should lie where they fell. Justice requires that the wrong should be made good.<sup>42</sup>

In 2008, the Law Commission for England and Wales issued consultation paper number 187, entitled *Administrative Redress: Public Bodies and the Citizen*,<sup>43</sup> which is of interest to a wider audience. The Law Commission, following a couple of decades and more of criticism,<sup>44</sup> took the view that English law in this area was unsatisfactory.<sup>45</sup> Some of the reasons for this arise from the English rules governing judicial review, and others from the English traditions of: (1) not allowing a remedy for breach of statutory duty unless the statute provides for this and the breach is of a kind contemplated by the statute,<sup>46</sup> (2) having a variety of torts rather than an overarching principle governing all torts,<sup>47</sup> and (3) requiring the existence of a duty of care before any recovery could be had for negligence.<sup>48</sup> It is not, however, appropriate to examine these in the context of this contribution.

What is presently of most interest in the Essay, as indicating a viewpoint formed, in part, by looking outside the United Kingdom, is the following:

Our provisional view is that judicial review has developed in a way that is over restrictive in relation to the award of damages to an aggrieved citizen.

....

What is clear from the discussion above is that the area is uncertain to such an extent that it requires frequent appeal to the House of Lords. While underlying considerations such as liability creating an undue burden for public bodies can be determinative in some instances, they are not in others. What cannot be ignored is that the Human Rights Act 1998 and the jurisprudence of the European Court of Human

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42. *Id.* at 547–48 (citations omitted).

43. THE LAW COMMISSION, *ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN*, 2008, Consultation Paper No. 187 [hereinafter REDRESS], available at [http://www.lawcom.gov.uk/docs/cp187\\_web.pdf](http://www.lawcom.gov.uk/docs/cp187_web.pdf).

44. See, e.g., MICHAEL FORDHAM, *JUDICIAL REVIEW HANDBOOK* 312–13 (5th ed. 2004).

45. REDRESS, *supra* note 43, at 111.

46. *Id.* at 32.

47. *Id.* at 31.

48. *Id.* at 37.

Rights are starting to affect liability of public bodies in negligence to an ever increasing extent and exert a distinct pressure to expand liability.

In considering how to move forward and react to the competing demands of claimants and public bodies it is important to bear in mind the two salient issues that come out of the above analysis:

(1) Recent history has seen an increase in governmental liability and there seems little to suggest that this increase will halt or that the extent of liability will decrease.

(2) The jurisprudence on the law of negligence, particularly relating to the liability of public bodies, is complicated and uncertain to such an extent that outcomes are difficult to predict.

It does not seem desirable to leave the system in present state. This would serve neither the interests of public bodies nor those of claimants.

....

It is clear that negligence has developed in an unpredictable manner, leaving the law so uncertain that the House of Lords has frequently been called upon to readdress key areas of liability. Our provisional view is that both breach of statutory duty and misfeasance in public office fail to meet the requirements of a just system that properly balances the interests of claimants against those of public bodies in a clear and predictable manner. In both public and private law, it provisionally appears to us, there is a lack of any underlying principle or foundational structure that could lead to a simpler and more predictable system. This serves neither the interests of claimants nor those of public bodies.

....

We provisionally propose to allow the recovery of damages in judicial review if the claimant satisfies the elements of conferral of benefit, "serious fault" and causation, which are set out in detail below. In our provisional view, this is a natural development in the law, considering that damages for breach of EU law and under the Human Rights Act 1998 are currently available. Furthermore, we do not believe that such a development would impose a substantial burden on public bodies.

....

Our suggested approach in private law is to place certain activities which are regarded as “truly public” in a specialised scheme where, in order to establish liability, the claimant would have to prove the same elements as in the public law scheme. The effect would be to restrict liability in some areas and widen the potential for liability in others. This reflects our attempts to strike a balance between the following competing demands:

- (1) Allowing citizens to obtain redress where they are adversely affected by the acts or omissions of a public body in a wider range of governmental activity than is currently the case in private law; and
- (2) Appreciating that public bodies are subject to a wide range of competing demands and are thus in a special position. This means that imposing general negligence liability may not be in the interests of justice as it could adversely affect the activities of the public body and therefore harm the general public.<sup>49</sup>

Legislators and judges in the United Kingdom have, over the last forty years, been increasingly conscious of legal developments on the continent of Europe and have seen the merit of some of them. They, like other mortals, tend to react to the stimuli to which they are exposed. One of these was Lord Slynn. The advantage he had was that, by reason of his French wife, his wide exposure to a number of different jurisdictions, and his own indefatigable taste for travel and for meeting scholars from all over the world, his own mind had considerable breadth. Others have benefited from it.

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49. *Id.* at 60, 67, 75–76.