Comparative Law on Public Tortious Liability
Governance and Public Law Center, Sciences Po
Friday, 13th November 2009.

"Current trends in the English Law on Administrative Tortious Liability."

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Unlike the Cartesian rationality of French administrative law, the English law of public authority liability is very much a piecemeal affair, dependent upon the private law of obligations and structured around the numerous "torticles"[1] characterised by the English law of torts. There are thus a large number of potential causes of action against public bodies for administrative failures. In this paper, the focus will be on solely two of these torts, the tort of negligence (the most common tort) and the tort of misfeasance (the most intriguing). I will then look at contemporary themes in the sphere of public authority liability.

English law of State Liability : basic Landscape

(a). Negligence

The tort most commonly invoked in claims against public bodies remains the tort of negligence.[2] The traditional position of the case law was somewhat restrictive.[3] Over a long period of time, the courts repeatedly invoked a series of public policy concerns as militating against the imposition of duties of care on public authorities in the exercise of statutory functions,[4] including the fear that potential liability would prompt authorities to engage in unduly defensive practices, as well as diverting time and resources to repelling speculative claims.[5] This was followed by a perceptible change in attitude of the courts during the 1990s as regards the liability of public bodies, with indications of a more liberal approach in cases

[1] B.Rudden, 'Torticles' (1991-1992) 6/7 Tulane Civil Law Forum 105.
[2] Under the tort of negligence, claimants must show that there been a breach of a duty to take reasonable care to avoid reasonably foreseeable loss.
[3] See generally C.Booth QC and D.Squires, *The Negligence Liability of Public Authorities* (Oxford, 2005).
[4] See e.g. *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53 (liability of the police); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633
[5] Cf *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, 198.

such as *Barrett v Enfield LBC* (social welfare case),[6] as well as *Phelps v Hillingdon LBC* (education cases)[7] indicating that the courts were less ready to accept the standard policy concerns invoked to deny public authority liability. Whilst there has been a certain retrenchment in recent decisions,[8] the courts undoubtedly countenance public authority liability in broader circumstances now than a decade ago.

One area of current interest is that of claims brought against regulators. The courts have generally been reluctant to recognise that regulators owe a duty of care to members of the public in respect of economic loss suffered due to the actions of the regulated body. Claims for recovery of economic loss against regulators have thus foundered in the sphere of financial supervision,[9] planning control,[10] and health and safety regulation.[11] Unsurprisingly, actions for regulatory failure have also been rejected where the supervisee has sued the supervisor.[12] Whilst reference has been made to policy reasons for denying duties of care, tort actions against regulatory authorities have been rejected for grounds other than simply public interest concerns, such as lack of the requisite relationship of proximity,[13] or reference to the causally peripheral role of the defendant regulator (the primary causal contributor being the supervisee),[14] or the purely financial nature of the loss.[15]

[6] [2001] 2 AC 550.
[7] [2001] 2 AC 619.
[8] See *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373 (social welfare); *Chief Constable of Hertfordshire Police v Van Colle*, *Smith v Chief Constable of Sussex* [2008] UKHL 50 (police); *Trent Strategic Health Authority v Jain* [2009] UKHL 4 HL (dismissal of claim for pure economic loss due to revocation of claimants' nursing home's registration by court order after application by defendant based on misleading information). Note, however, the strong dissent of Lord Bingham in *Smith v Chief Constable of Sussex*, in which he argued that English law should adopt the 'liability principle' under which 'if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.' (at [44])
[9] See *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175; *Davis v Radcliffe* [1990] 2 All ER 536.
[10] *Strable v Dartford BC* [1984] JPL 329; *Lam v Brennan* [1997] PIQR P488; *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 EGLR 281.
[11] *Reeman v DoT* [1997] 2 Lloyd's Rep 648.
[12] *Minories Finance Ltd v Arthur Young* [1989] 2 All ER 105.
[13] *Yuen Kun Yeu* [1988] AC 175; *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 EGLR 281; *Tidman v Reading Borough Council* [1994] 3 PLR 72; *Gaisford v Ministry of Agriculture Fisheries and Food* The Times, 19 July 1996; *Reeman v DoT* [1997] 2 Lloyd's Rep 648.
[14] See Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301, 314.
[15] *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 EGLR 281.

(b). Misfeasance in public office

As an exception to the famous Diceyan principle of equality, there is one specifically public law tort, the tort of misfeasance in public office. Misfeasance in public office is the only tort applying *solely* to public bodies and provides a remedy for those who have suffered loss due to the abuse of power by a public officer acting in bad faith.

The inherent element of bad faith in this tort allows claimants to circumvent statutory immunities.[16] Moreover, there are other reasons why this tort can prove attractive. First, the notion of proximity, a frequent stumbling-block in regulatory cases,[17] would not seem to play any role in respect of the tort of misfeasance in public office.[18] Secondly, the courts' policy of caution as regards the recovery of pure economic loss in the context of negligence claims has not - as yet - been extended to the tort of misfeasance in public office.[19]

Of ancient lineage, this tort has recently undergone a renaissance in part due to high-profile litigation in the BCCI banking case. To make out the tort of misfeasance, it must be shown that the defendant is a public officer,[20] and that the claim relates to the defendant's exercise of power as a public officer.[21]

The crux of the tort, however, is the mental state of the defendant. The position in this regard is not simple,[22] but essentially boils down to two alternative elements. First, the most stringent arm of this tort is known as targeted malice and requires proof that a public officer has acted *with the intention of injuring the claimant*.[23] The second limb is less strict and in essence is made out when a public officer acts in the knowledge that he thereby exceeds his powers and that this act would probably injure the claimant.[24]

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[16] Due to the "bad faith" exception in the relevant statutory provisions.
[17] Particularly where the class of the potential claimants to which a duty of care in negligence would be owed, as in this case, is very broad.
[18] See *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1, 193 and 228 (Lords Steyn and Hutton).
[19] See discussion in Mads Andenas and Duncan Fairgrieve, 'Misfeasance in Public Office, Governmental Liability and European Influences' (2002) 51 *International and Comparative Law Quarterly* 757.
[20] *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1, 191.
[21] Ibid.
[22] As illustrated by the two House of Lords decisions on this topic: *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1 (House of Lords' first and second decision).
[23] *Bourgoin SA v MAFF* [1986] QB 716, 776. See also *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172.
[24] *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1. For the purposes of the second limb of the tort, the mental element encompasses both knowledge as to illegality, as well as awareness of consequences. The

(c). Other claims

A brief word will also be said about other causes of action. Breach of a statutory duty by a public body can give rise to a public law remedy, and potentially a private law action in damages. To make out the tort, the claimant must show that as a matter of statutory construction of the relevant legislation, the duty was imposed for the protection of a limited class of the public and that Parliament intended to confer private rights of action.[25] Recent case law has indicated a general reluctance to allow private law actions for breach of public law duties.[26] Courts have indicated that in respect of regulatory activities, a private right of action for breach of statutory duty will only arise where the statutory duty is very limited and specific as opposed to general administrative functions involving the exercise of administrative discretions.[27]

Some Issues of Comparative law interest

(a). Illegality & Fault

In English law, the relationship between public law unlawfulness and liability in damages negligence is a complex one. An *ultra vires* administrative act which causes loss is not a sufficient condition of administrative liability.[28] Satisfying the conditions for annulment in a judicial review action does not equate with wrongfulness as expressed in the breach of a duty of care in negligence.

A controversial question is whether it is a necessary precondition of liability to show that the administrative act is *ultra vires*. Must claimants prove public law invalidity as a prerequisite

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current position is as follows. For knowledge as to illegality, the claimant must show either that the officer had actual knowledge that the impugned act was unlawful or that the public officer acted with a state of mind of reckless indifference to the illegality.

[25] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731.

[26] See C.Booth QC and D.Squires, *The Negligence Liability of Public Authorities* (Oxford, 2005) paragraph 6.60.

[27] See e.g. *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 732; *Cullen v Chief Constable of Northern Ireland* [2003] 1 WLR 1763 (by a majority of the House of Lords).

[28] *X (Minors) v. Bedfordshire CC* [1995] 2 A.C. 633, 730. Although this is being challenged by European Community law and human rights law, see Amos, 'Extending the liability of the state in damages' [2001] L.S. 1.

of liability in negligence of public authorities? If so, then given the restrictive heads of judicial review, this would constitute an effective control mechanism on liability.

In the landmark case of *X(minors) v Bedfordshire County Council*, Lord Browne-Wilkinson initially rejected any role for *ultra vires*, denying that it was 'either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence.'[29] However, he went on to state that there could be no liability unless 'the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority.'[30] Lord Browne-Wilkinson's interpretation of this tenet was controversial. It is clear in his judgment that he envisaged a standard akin to *Wednesbury* unreasonableness,[31] which would in its orthodox interpretation involve showing that the public body's action was so unreasonable that no reasonable body could have taken it. Later in his judgment, Lord Browne-Wilkinson indicated that the requisite level of carelessness would only be committed by a 'grossly delinquent authority.'[32]

This resulted in a paradox. Whilst doubting the relevance of any public law notions of invalidity in the tort of negligence, Lord Browne-Wilkinson nonetheless ushered in a specific head of unlawfulness to play an important role in negligence actions against public authorities. The introduction of the Wednesbury principle into negligence actions was controversial. It was unfair because it was a very high standard of unreasonableness to require, and it was inflexible in the sense that it focussed on the substance of the decision taken, neglecting actions concerning procedural violations[33] or the failure to take into account relevant considerations.[34]

In the later case of *Barrett v Enfield LBC*, the House of Lords took a different view of the role of unlawfulness. Lord Slynn confessed that he shared Lord Browne-Wilkinson's reluctance to inject administrative law notions into the law of negligence.[35] His Lordship argued that the test of invalidity was not conclusive: it is the normal conditions of a duty of care as set out in

[29] [1995] 2 A.C. 633, at 736.
[30] Ibid, at 736.
[31] Ibid, at 736 and 761. This standard of unreasonableness derives from Lord Greene's judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223.
[32] [1995] 2 A.C. 633, at 761.
[33] P. Cane, "Suing Public Authorities in Tort" (1996) 112 L.Q.R. 13, at 16-17.
[34] See T. Hickman, 'Making Public Bodies liable for Failure to confer benefits' [2000] C.L.J. 432, at 434.
[35] [2001] 2 A.C. 550, at 571-572.

Caparo Industries Plc v Dickman[36] that must be satisfied. Lord Hutton was even more explicit in asserting the autonomy of negligence from administrative law notions of invalidity. He held that the courts should apply the common law concept of negligence rather than stipulating Wednesbury unreasonableness as a precondition of liability.[37] Their Lordships seem to have intended to expunge public law concepts of invalidity from this area of the law. This approach was confirmed in the case of *Phelps v Hillingdon LBC*. Lord Slynn again emphasised the primacy of the common law principles of negligence.[38] Lord Nicholls applied principles of professional negligence to this area of the law.[39]

The movement away from invalidity as a precondition for an action in negligence against public authorities is a welcomed rationalisation of this area of the law.[40] This does not mean that the public law context will be neglected. Account will still be taken of the public law backdrop in shaping the duty of care,[41] and setting the standard of breach.[42] No duty may be recognised if it would interfere with the performance of the local education authority's statutory duties.[43] There is however one area in which the role of public law unlawfulness is not entirely resolved. In the case of a failure to exercise statutory powers, the courts are wary of imposing negligence unless it is shown that it was irrational for the authority not have exercised the statutory powers.[44]

(b). European Influences

The recent evolution in state liability has undoubtedly been influenced by European law, both Community and human rights law. There have been a number of decisions of the European Court of Human Rights (ECtHR) on the topic of state liability, with the United Kingdom in a

[36] [1990] 2 A.C. 605.
[37] [2001] 2 A.C. 550, 586.
[38] An action should only be excluded where the impugned acts are not justiciable: [2000] 3 W.L.R. 776, at 790.
[39] [2000] 3 W.L.R. 776, at 802ff.
[40] See also Lady Justice Arden in the case of *Jain v Trent Strategic Health Authority* [2007] EWCA Civ 1186 : "we have also seen from *Barrett* that the courts are now reluctant to introduce administrative law concepts into the law of negligence" (at para 62) upheld by the House of Lords in *Trent Strategic Health Authority v Jain* [2009] UKHL 4 HL.
[41] *Phelps v. Hillingdon LBC* [2000] 3 W.L.R. 776, at 810.
[42] *ibid*, at 792, 809; *Barrett v. Enfield LBC* [2001] 2 A.C. 550, 591.
[43] *Phelps v. Hillingdon LBC* [2000] 3 W.L.R. 776 at 790, 810.
[44] See *Stovin v. Wise* [1996] A.C. 923, at 953. Lord Hoffmann also added the pre-condition that there must be exceptional grounds for holding that the policy of the statute was to confer the right to compensation on those who suffered loss if the power was not exercised.

number of cases as respondent. The controversial case of *Osman v UK*[45] is of course emblematic,[46] and has been followed by a steady stream of other decisions such as the more nuanced decision in *Z v UK*,[47] (which arose from the House of Lords' decision in *X(minors) v Bedfordshire CC*), as well as more recent case of *RK and AK v United Kingdom*.[48]

The influence of the human rights considerations has fed into the English case law. In the case of *Jain v Trent Strategic Health Authority,*[49] Lady Justice Arden referred to the impact of the Human Rights Act on the consideration of the just fair and reasonable test in negligence, as follows :

> *"The fifth point which I draw from the authorities … is that the 1998 Act has also had a perceptible impact in this field. As a result of that Act giving further protection in domestic law to Convention rights, the courts are now more conscious that the denial of a duty of care may result in a violation of Convention rights. The effect has been to encourage courts to identify more specific policy factors and to consider the interests of the individual affected by the decision-making by the public authority. This led the House of Lords in D to consider whether to shift the emphasis from duty to breach but the majority largely rejected this. In the result, the duty of care remains a major control mechanism for the purpose of controlling the potential opening of the floodgates in this field."*

In the case of *Smith v Chief Constable of Sussex Police*,[50] Lord Bingham in a dissenting opinion describes the position as follows:

> "*Considerable argument was devoted to exploration of the relationship between rights arising under the Convention (in particular the article 2 right relied on in Van Colle)*

[45] *Osman v. UK* [1999] 1 F.L.R. 193.
[46] The reaction of commentators to the case of *Osman v. UK* was somewhat critical of the ECtHR's reasoning in *Osman* : See e.g. M. Lunney, "A Tort Lawyer's View of *Osman v United Kingdom*" (1999) 10 K.C.L.J. 238; T. Weir, 'Down Hill - All The Way?' [1999] CLJ 4; C. Gearty, "Unravelling *Osman*" (2000) 64 M.L.R. 159. But compare L. Hoyano, "Policing Flawed Police Investigations: Unravelling the Blanket" (1999) 62 M.L.R. 912.
[47] [2001] 2 F.L.R. 612. See J. Wright, *Tort Law and Human Rights* (Hart Publishing, 2001); J. Miles, "Human rights and child protection" [2001] CFLQ 431.
[48] See *RK and AK v United Kingdom*, Application no. 38000(1)/05, Judgement 30 Sep 2008 (arising from one of the appeals in the case of *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373, referred to above). ECtHR found a breach of Article 13 ECHR, but rejected a claim based on Article 8.
[49] [2007] EWCA Civ 1186, upheld by the House of Lords in *Trent Strategic Health Authority v Jain* [2009] UKHL 4 HL.
[50] [2008] UKHL 50

and rights and duties arising at common law. Should these two regimes remain entirely separate, or should the common law be developed to absorb convention rights? I do not think that there is a simple universally applicable answer. It seems to me clear, on the one hand that the existence of a Convention right cannot call for instant manufacture of a corresponding common law right where none exists: Wainwright v Home Office [2003] UKHL 53, [2004] 2AC 406. On the other hand, one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not in fact find a reflection in a body of law ordinarily as sensitive to human needs as the common law, and it is demonstrable that the common law in some areas as evolved in a direction signalled by the Convention: see the judgment of the Court of Appeal in D v East Berkshire Community NHS Trust [2003] EWCA Civ 1151, [2004] QB 558, para 55-88. There are likely to be persisting differences between the two regimes, in relation (for example) to limitation periods and probably compensation. But I agree with Pill LJ in the present case (para53) that "there is a strong case for developing the common law action for negligence in the light of convention rights" and also with Rimer LJ (para 45) that "where a common law duty covers the same ground as a Convention right, it should so far as practicable, develop in harmony with it"."

Another avenue for the introduction of European influences, and perhaps even the changing of mindsets, is a claim for damages for breach the Convention rights enshrined in the Human Rights Act 1998.[51] In formulating the rules governing damages under the HRA, the English courts must take account of the more liberal attitude found in the jurisprudence of the ECtHR on the notion of just satisfaction,[52] such as monetary awards for a wide variety of non-pecuniary loss, as well as taking a broad approach to the recovery of pure economic loss, and lost chances.[53] In a broader sense, it has been argued that the HRA is challenging orthodox common law philosophy of state liability, with the introduction of a rights-based approach,

[51] See generally Duncan Fairgrieve, 'The Human Rights Act 1998, Damages and Tort Law' [2001] Public Law 695.
[52] Section 8(4) HRA.
[53] See eg *Allenet de Ribemont v France* (1995) 20 EHRR 557 (compensation *inter alia* for loss of business opportunities); *Pine Valley Developments Ltd v Ireland* (1993) 16 EHRR 379 (loss of value in land).

rather than the traditional focus on defining tortuous wrongs by reference to duties, and not rights.[54]

There are other indirect entry points for foreign legal concepts through the influence of State liability for breach of European Community law, which has both focussed attention upon the illegality-fault relationship in English law, and provided an example of alternative ingredients for determining state liability, most notably with the 'sufficient seriousness' test.[55]

It is interesting to note that not only have the courts adopted the Community law test for state liability with equanimity, avoiding the restrictive language that has often marked the domestic law, but the application of Community law has also led certain judges to go through remarkable metamorphoses.[56]

(c). Using Comparative Law[57]

Courts make use of comparative law and make open reference to it to an unprecedented extent. Some form of comparative law has long been part of the judicial process but there has been a major shift in the role that courts are playing in a legal system shedding their traditional adherence to 20th century positivist and national paradigms. This opens up for the use of and increases the utility of comparative law.

It is not surprising that courts are to an increasing degree involved in dialogues with one another across the traditional jurisdictional divides. A horizontal exchange between national courts is becoming active, both on an informal level with meetings and systems for the provision of information. At another horizontal level, international courts and tribunals,

[54] See T. Hickman, 'Tort Law, Public Authorities and the Human Rights Act 1998' in D. Fairgrieve, M. Andenas and J. Bell, *Tort Liability of Public Authorities in Comparative Perspective* (BIICL, 2002).

[55] P. Craig 'The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?' in J. Beatson and T. Tridimas, *New Directions in European Public Law* (Oxford, 1998).

[56] This is illustrated by Lord Hoffmann's views on state liability. Compare *Stovin v Wise* [1996] AC 923 where Lord Hoffmann declared that "the trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from a person (preferably insured or a public authority) whose act or omission can be said to have caused it. The default position is that he is not", with *R v Secretary of State for Transport ex p Factortame Ltd (No 5)* [2000] 1 AC 524, in which in a crucial part of his judgment, his Lordship boldly declared that 'I do not think that the United Kingdom....can say that the losses caused by the legislation should lie where they fell. Justice requires that the wrong should be made good."

[57] See generally on comparative law in this sphere : B.S. Markesinis, J-B Auby, D. Coester-Waltjen and S.Deakin, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (Oxford, 1999) ; D.Fairgrieve, *State Liability in Tort : A Comparative Law Study* (2003, Oxford University Press).

including the International Court of Justice, the European Human Rights Court and the European Court of Justice, are involved in dialogues with one another.[58] At a vertical level, the dialogues between the international and national courts are developing and are also formally recognized in a way they were not a few years ago. One may talk about an international market place for judgments,[59] where the form of judgments may be influenced by the accessibility and increased use of comparative law.

I have already argued in other fora that the resort to comparative law may assist in the development of State liability, notably as a tool for challenging assumptions inherent in the English system, and that this might even facilitate an exchange of ideas between legal systems.[60] The English courts have long been open to considering how legal problems are solved in other jurisdictions, and in some tort law cases the courts have even showed an interest in looking further afield than common law jurisdictions.[61] As is well-known, In the case of *Fairchild v Glenhaven Funeral Services Ltd*, Lord Bingham conducted a comparative law survey on a point of causation and declared that:

> *Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more*

[58] There is an increasing literature taking account of this dialogue, and Anne–Marie Slaughter has been a pioneer in studying its role and placing it in a broader context, in particular as seen from a US perspective, see A-M Slaughter, 'A Typology of Transjudicial Communication' 20 *University of Richmond Law Review* 99 (1994) and A-M Slaughter, *New International Order* (2005).

[59] See Lord Rodger, 'The Form and Language of Judicial Opinion' (2002) 118 LQR 226, 247 and Lord Goff of Chieveley, 'The Future of the Common Law (1997) 46 ICLQ 745, 756–7 on the accessible form of common law judgments. M Adams, J Bomhoff and N Huls (eds), *The Legitimacy of Highest Courts' Rulings* (The Hague: Asser Press, 2008) provide important contributions to this analysis.

[60] D.Fairgrieve, *State Liability in Tort : A Comparative Law Study* (2003, Oxford University Press).

[61] See eg *Henderson v Merrett Syndicates* [1995] 2 AC 145, 184. In the case of *White v Jones* [1995] 2 AC 207, Lord Goff, whilst recognising the challenges posed by comparative law, opined that 'in the present case, thanks to material published in our language by distinguished comparatists, German as well as English, we have direct access to publications which should sufficiently dispel our ignorance of German law and so by comparison illuminate our understanding of our own.' (263). See also *A v National Blood Authority* [2001] 3 All ER 289, a case on product liability, in which Burton J held that '[a]part from the evidence and its analysis, and from the separate consideration of the lead cases, I have had the great benefit of detailed submissions in writing, and some ten days of exegesis and argument orally in opening and closing by leading counsel, just on the law, including authorities and academic writings from France, Germany, Spain, Portugal, Sweden, Denmark, Belgium, Italy, Holland, Australia and the United States, as well as the United Kingdom and the European Court.' (para 17)

> *acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world … there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.*[62]

In French administrative law, foreign law sources are becoming an increasing and, in doctrinal terms, somewhat overlooked, reference point for judicial decision-making.[63] Let me give two examples.

In the case of *Kechichian*,[64] which concerned administrative liability for failure to supervise banks and was heard by the Plenary Chamber of the *Conseil d'Etat*, *Commissaire du Gouvernement* (as he then was) Alain Seban started his detailed conclusions,[65] with a survey of comparative law, covering Germany, America and England,[66] concluding with the remark that 'despite the different legal and administrative traditions, the same features may be found [in the three systems].' Whilst noting the English courts' tendency to broaden the tort of misfeasance in public office, CG Seban concluded that the comparative law survey highlighted the 'liberalism of French administrative law.'

Another recent example of this phenomenon is the plenary decision of the *Conseil d'Etat* on 30 October 2009,[67] on the issue of vertical direct effect of European Directives. *Rapporteur Public* Mattias Guyomar, in his brilliant conclusions in favour of a modification of the traditional *Cohn-Bendit* case law,[68] undertook a masterly and detailed review of German, Italian, English, Belgian and Spanish case law, so as to note that :

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[62] [2002] UKHL 22, para 32. Lord Rodgers also observed that '[t]he Commonwealth cases were supplemented, at your Lordships' suggestion, by a certain amount of material describing the position in European legal systems… The material provides a check, from outside the common law world, that the problem identified in these appeals is genuine and is one that requires to be remedied' (para 165).

[63] Although, see the excellent book F.Melleray, *L'Argument de Droit Comparé en Droit Administratif Français* (Bruylant, 2007), in the collection edited by Jean-Bernard Auby.

[64] CE 30 November 2001, *Kechichian* AJDA 2002.136. See also M. Andenas and D. Fairgrieve, 'Misfeasance in Public Office, Governmental Liability and European Influences' (2002) 51 ICLQ 757.

[65] CE 30 November 2001, *Kechichian*, conclusions Seban, *Les Petites Affiches*, N° 28, 7 February 2002, 7. The court subsequently adopted the solution which *CG* Seban proposed in his *conclusions*.

[66] Including an analysis of the most recent House of Lords decision in *Three Rivers DC v Bank of England* [2001] UKHL 16.

[67] CE 30 Octobre 2008, Mme P , N° 298348.

[68] CE Assemblée *Ministre de l'intérieur c/ Cohn-Bendit* 22 décembre 1978 Lebon p. 524

Il est frappant de relever que toutes les cours européennes dont nous avons étudié la jurisprudence se sont progressivement alignées sur la position de la Cour de Luxembourg et ont admis l'effet direct vertical ascendant des directives.

These examples may be unusual in the French case law, but it is difficult to think of the judge of another European Member State undertaking such a detailed exercise as this in marshalling comparative law examples for use in the judicial process.

(d). Reforming State Liability

The English law in this sphere has been in a state of constant flux. A point of equilibrium has by no means been reached. Voices have called for a root and branch reform. In its project on monetary remedies against public bodies,[69] the Law Commission took an ambitious stance, and ultimately made some very wide-ranging proposals in a consultation paper,[70] but the status of those are unclear, and it is unlikely that there will be the political will to push this forward. This is an unfortunate position as the judiciary have indicated on a number of occasions that this exercise was the most appropriate forum for looking at polycentric question in the round.[71]

Focus thus inevitably shifts back to the court room. As the judiciary continues the incremental development of this area through the case law, it is to be hoped that foreign law and supranational sources may prove to be a fertile source for inspiration.

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Paris, 4 November 2009

[69] See *Monetary Remedies in Public Law : A Discussion Paper* (Law Commission, October 2004) ; *Remedies against Public Bodies: A Scoping Report* (Law Commission, October 2006).
[70] See Consultation Paper N° 187, entitled *Administrative Redress : Public Bodies and the Citizen* (Law Commission, October 2008).
[71] *Watkins v Home Office* [2006] UKHL 17 (paragraph 26)