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BOOK COMMENT: WHAT ARE WE TO DO WITH THE PUBLIC LAW OF TORTS?

Geoff McLay*

A comment on Tom Cornford's Towards a Public Law of Tort *(Ashgate, Aldershot, 2008).*

I INTRODUCTION: WHAT'S REALLY AT STAKE IN PUBLIC AUTHORITY LIABILITY?

Public law liability has been a hot topic in the Commonwealth for the last 10 to 15 years. Shockwaves from *Home Office v Dorset Yacht Co Ltd*[1] in 1972 (*Dorset Yacht)* and *Anns v Merton London Borough Council*[2] in 1980 (*Anns*) still echo around the Commonwealth. In England, developments were somewhat squashed in 1990 by the House of Lords' express overruling of *Anns,*[3] however, developments continued apace throughout the rest of the Commonwealth. In contrast to the blanket prohibitions on the recovery of damages for uniquely governmental functions, all things seemed possible; but all, of course, never are. Leading administrative lawyer Carol Harlow has argued that courts should, for mostly policy grounds, be wary of expanding liability too far,[4] while more traditional tort scholars have emphasised the difficulty of imposing liability within a tort paradigm.[5] There has never been a consensus of what needs to happen for delimiting appropriate liability. Generally, the last decade or so has not been a good period for plaintiffs in the appellate

* Reader in Law, Victoria University of Wellington; New Zealand Law Foundation International Research Fellow 2006. The ideas in this book comment were discussed and refined as a result of a symposium titled "The Future of Public Liability – Common Law and Beyond" held at Queens' College, Cambridge, on 22 May 2009. I thank the organisers of that event, Amanda Perreau-Saussine and Mr Richard Moules, and the New Zealand Law Foundation which funded my attendance and my research project into government liability.

1 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).

2 *Anns v Merton London Borough Council* [1978] AC 728 (HL).

3 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

4 Carol Harlow *State Liability: Tort Law and Beyond* (Oxford University Press, Oxford 2004).

5 Stephen Bailey "Public Authority Liability in Negligence: The Continued Search for Coherence" (2006) 26 Legal Studies 155.

courts, as a greater judicial scepticism of the role of tort law has taken hold.[6] But even given that scepticism, there have been startling cases like *Jain v Trent Strategic Health Authority*[7] in which the House of Lords suggested that the Human Rights Act 1998 (UK) might give a remedy when a licence is improperly revoked even if a negligence action would properly fail. There has also been the remarkable discussion paper issued by the English Law Commission which suggests the recognition of a general principle of serious fault.[8]

Claims for damages cast in sharp relief what we mean by a "right" in public law as compared with "private law." To what degree can we expect government obligations to amount to more than vague hopes of good treatment, but to something more akin to a private law right which must be compensated for when things go wrong? A more traditional view of public law, being not so much about outcomes as about the nature of the processes used by the state, contrasts perhaps with a more private law paradigm that is concerned with the outcomes of interactions between the parties.

Few have been brave enough to articulate a unified theory of government liability. The one major attempt before Tom Cornford's new book *Towards a Public Law of Tort*[9] was the attempt by David Cohen and his coauthor JC Smith in the 1980s to base liability on "entitlement".[10] This has been largely rejected, when it is not being ignored. There are a number of reasons why this might be so:

(a) First, common law tradition does not lend itself to programmatic development in any particular area.

(b) Secondly, there are very real difficulties with both the current doctrine and any abrogation of it. It is easy to critique the "equality principle", which provides that government ought to be liable only as a private individual might be, as a guiding principle of government liability law. It does not reflect the modern reality that government does things differently from private individuals. Other theories have proved just as problematic.

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6 See for instance the decision of the House of Lords in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326 (HL).

7 *Jain v Trent Strategic Health Authority* [2009] 1 All ER 957 (HL).

8 Law Commission *Administrative Redress: Public Bodies And The Citizen: A Consultation Paper* (Consultation Paper No 187, London, June 2008) www.lawcom.gov.uk/docs/cp187_web.pdf (last accessed 12 April 2010).

9 Tom Cornford *Towards a Public Law of Tort (*Ashgate, Aldershot, 2008).

10 David Cohen and JC Smith "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can Bar Rev 1.

(c) Thirdly, while it might be true to say that policy has a contested place in the heart of private law, particularly in recent Commonwealth writings on tort,[11] the resolution of the dilemmas created by expanding government liability need to take account of different policy concerns.

One suspects, though, that the difficulty of dealing with both public and private law has somewhat scared many off. There is a sense that the "separate" public and private law communities have each been shouting at each other "yours!" under the high ball of public liability.

A particular strength of Cornford's work in this book is his criticism of AV Dicey's venerable "equality principle"[12] as the organising principle of English public authority law.[13] The equality principle has proved to be something of a double-edged sword for those who have sought an expansion of liability. On the one hand it enabled expansion of liability under the appearance of only applying existing law. On the other, the very nature of the equality principle lends it to blocking liability on the grounds that private individuals would not be subject to liability.[14] But as Cornford rightly points out, the equality principle simply does not explain the modern welfare state. If one is to deny liability one needs more than the truism that government is doing different things differently than private individuals might do, but merely doing different things do not justify the imposition of liability. For Cornford, and for me, the strongest justification for the expansion of

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11 See for example Allan Beever "Corrective Justice and Personal Responsibility in Tort Law" (2009) 28 Oxford J Legal Studies 475. See also the general discussion in his book, Allan Beever *Rediscovering the Law of Negligence* (Hart Publishing, Oxford, 2007) in which he rejects the more policy-focused approach of leading writers such as the following: Jane Stapleton "Duty of Care Factors: A Selection from the Judicial Menus" in Peter Cane and Jane Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998) 59; and Jane Stapleton "The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable" (2003) 24 Aus Bar Rev 135.

12 Alfred Venn Dicey *Introduction to the Study of the Law of the Constitution,* (8 ed, Macmillan, London, 1923) 189. "In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person".

13 See criticisms in Geoff McLay "Remedies for Breaches of 'Public' Obligations: The Equality Principle Meets the Welfare State and the New Constitutionalism" in Jeff Berryman and Rick Bigwood (eds) *The Law of Remedies: New Directions in the Common Law* (Irwin Law, Toronto and Federation Press, NSW) (forthcoming).

14 See the use of the principle by Lord Hoffmann in *Gorringe v Calderdale Metropolitain Borough Council*, above n 6 (HL) Lord Hoffmann.

liability along principled lines is through some modified understanding of corrective justice.[15] The reality is that modern citizenry expect to be protected against an ingressive state in circumstances where private individuals would simply not intervene, and in some circumstances they expect protection and benefits to be conferred that one can compel one's fellows to confer. Current tort law often deals well enough, perhaps, with coercive behaviour so long as there is an underlying tort that might have been committed, but the failure to benefit from or to protect against harm are not so easily dealt with. The difficult question is "what is the next step": saying why some benefits or some failures to protect give rise to liability while some, and perhaps most, do not.

II WHAT TO DO NEXT?

The question of what to do next is answered for Cornford by the Council of Europe's two principles relating to state liability:[16]

> Principle I: Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.
>
> Principle II: 1) Even if the conditions stated in Principle I are not met, reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act. 2) The application of this principle may be limited to certain categories of acts only.

Much of the first part of Cornford's book is devoted to justifying these principles. The second part is devoted to working out how those principles might be applied. Cornford does not advocate the adoption of these principles as a matter of fidelity to the Council of Europe, but rather in the belief that they represent something fundamental about citizens' expectations of modern government. In his view, modern administrative law has come not only to establish that duties are owed to the general public, but that they might also be owed to private individuals. As public authorities can only exercise a power for the purpose for which they have been given it, citizens' legitimate expectations to receive the benefit can give rise to liability when it is not delivered. Cornford is, however, appropriately wary of any calculus that would automatically create a duty of care in a circumstance which would interfere with the public authority's functions and obligations to others.[17] One wonders whether courts faced with the necessity of considering monetary awards will

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15 See Geoff McLay "Remedies for Breaches of 'Public' Obligations: The Equality Principle Meets the Welfare State and the New Constitutionalism", above n 13.

16 Council of Europe Committee of Ministers *Recommendation No. R (84) 15 of the Committee of Ministers to Member States Relating to Public Liability* (18 September 1984).

17 Cornford, above n 9, 198-206.

simply emphasise the public nature of the job that the administrator is undertaking, possibly to the detriment of further development of a more individual-focused administrative law that Cornford admires and advocates.

More significantly, just because administrative law might properly be conceived of as protecting the benefits owed to particular individuals as opposed to the general public good, why ought there to be an action in damages when things go wrong and the benefit is not properly conferred? It is not necessarily clear why the failure to confer such a benefit should be remedied through the award of damages. Acknowledging that damages ought to be, if at all, a rare remedy in administrative law, is not the same as saying that there is no legal right that has been infringed or that the right has not been remedied. Rather, it might well be that in the province of public law, "rights" are simply remedied in different ways. It was, for instance, entirely appropriate to criticise the practical difficulties of the maxim "the king can do no wrong". It was created to prevent immunities being claimed by Crown servants who might otherwise have been liable for committing torts. However, it is a different thing to say that the provision of other administrative remedies is necessarily inadequate for those things which are not currently torts. At the root of the Council of Europe's principles, and Cornford's book, is a preference for one remedy over others, and a call for the juridification of compensation.

III WHY THE LAW OF TORT AT ALL?

A A Fundamental Clash of Values?

From his title onwards, Cornford's project is to use the law of tort to give effect to the Principles of the Council of Europe. It is not that he is against specific compensation regimes, or a generalised ability for ombudsmen to make awards, but that in the absence of such regimes, courts ought to get on with the task.

But why use tort at all? Claiming that the two Principles should give rise to tort claims is not contentious as long as one understands the law of torts as simply being a descriptive term for legal wrongs that do not fit within other categories. Placing them within the tort family might, for instance, have the advantage of not having to figure out what contributory negligence regime might apply, or of allowing the co-opting of causation, fault or damage considerations in the other torts. Cornford instead adopts a deeper notion of the role of tort law, that of corrective justice. But his (and my) view of corrective justice is not shared by all. For instance, in their recent accounts of torts based on corrective justice, both Robert Stevens and Alan Beaver have disclaimed that public authority liability claims that stand outside the equality principle are appropriate for the law of tort. Stevens' objection is that one simply does not have a right to be protected from crimes or to be provided with services by public bodies, in the same way that one enjoys a private law right.[18]

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18 Robert Stevens *Rights and Torts* (Oxford University Press, Oxford, 2007) chapter 10, 218-243.

Beever's objection is that much of what would be covered would be non-feasance.[19] Indeed, one of the few values that tort lawyers have reached agreement on is that the common law does not (in general) recognise positive obligations. Lord Goff's statement in *Smith v Littlewoods Organisation Ltd*[20] that positive obligations are not, in the absence of an assumption of responsibility or the creation of a danger, a feature of the common law has recently been reaffirmed by the House of Lords in *Mitchell v Glasgow City Council*.[21] In that case, a local authority failed to warn a neighbour that it was cautioning a tenant about the tenant's anti-social activities, the tenant having responded to that warning by murdering the neighbour. Nevertheless, there is one way of explaining cases like New Zealand's *Attorney-General v Prince*,[22] a case in which child protection went wrong and the children were not protected when they ought perhaps to have been (and where the New Zealand Court of Appeal recognised the possibility of a duty). This is that the underlying statutory obligation displaced the normal common law reluctance to do so, a reluctance that has often been difficult to displace in other contexts.[23]

B Why Negligence?

Cornford further wishes to employ negligence, which he views as sufficiently elastic to enable the incorporation of the Principles, a view perhaps against the tide of a more categorical approach to negligence that has dominated the higher courts for the last decade. Cornford rejects both breach of statutory duty and misfeasance in public office as being particularly useful in the implementation of either principle.

The tort of breach of statutory duty is problematic. That tort requires plaintiffs to embrace its inherent contradiction: finding a statutory purpose to provide compensation, when the very thing the statute has not done is to find a remedy for compensation. Greater thought, though, might have been given to misfeasance in a public office. Misfeasance in a public office is the one established exception to Dicey's equality principle. It applies expressly only in situations where there is the wrongful exercise of a public power. Indeed Lord Steyn, for instance, wrote in *Three Rivers District Council and others v Bank of England*:[24]

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19 Allan Beever *Rediscovering the Law of Negligence* (Hart Publishing, Oxford, 2007) chapter 9, 231-340.

20 *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 272-274 (HL) Lord Goff.

21 *Mitchell v Glasgow City Council* [2009] 1 AC 874, para 15 (HL) Lord Hope.

22 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).

23 See for instance, *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] 3 NZLR 725 (SC) and Geoff McLay "The New Zealand Supreme Court, the *Couch* Case and the Future of Governmental Liability" (2009) 17 Torts Law Journal 77-99.

24 *Three Rivers District Council and others v Bank of England* [2003] 3 All ER 1, 7 (HL) Lord Steyn.

> The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes.

That observation now needs to be read in line with the decision in *Watkins v Secretary of State for the Home Department* (*Watkins*).[25] In *Watkins,* the plaintiffs failed to establish what actual loss resulted from the prison officers' misbehaviour in reading their correspondence with their lawyers. I, for one, would have argued that there was more potential in the tort than the House of Lords in *Watkins,* or Cornford in his book, recognised. If the real problem of administrative law is to require fairness in the decision-making process, then perhaps we need a tort that expressly acknowledges that it is the right to be treated fairly that is being protected, as opposed to any consequential financial interest. If one adopts a negligence analysis, one also needs to adopt a device to deal with the possibility that discretion might have been exercised otherwise, even it had been exercised fairly. One possibility is to adopt a loss of a chance analysis. The New Zealand Court of Appeal took such an approach in *Craig v East Coast Bays City Council* (*Craig*),[26] in which a local authority failed to give notice of a proposed building alteration that would have obstructed the plaintiff's view. The analysis of the Court of Appeal in *Craig* has always seemed strained (and in any event recent case law has cast doubt over *Craig's* status as good law).[27] Cornford rightly does not favour the loss of a chance approach. He argues that unless a court is prepared to say that the outcome would have been different, "it is difficult to see what meaning can be attached to the idea that the claimant has lost some quantifiable possibility of influencing it."[28] This approach asks the judge to substitute his or her version of what the administrator might have done. That is consistent with Cornford's overall view of administrative law as requiring particular outcomes. It is less consistent with a view of administrative law as setting the rules of the game, but with winners and losers still being determined by the administrator. Misfeasance focuses liability on the abuse committed rather than its consequences, lessening concern about compensating for those consequences that may never in fact have eventuated.

C What about the Human Rights Act 1998 (UK) and the New Zealand Bill of Rights Act 1990?

Another alternative would be to employ such instruments as the Human Rights Act 1998 (UK) or the New Zealand Bill of Rights Act 1990 to provide the foundations for a new cause of action that looks to vindicate the administrative failure. Cornford is somewhat disparaging of the United Kingdom case law under the Human Right Act 1998. He writes, for instance, of Lord Bingham's

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25 *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 (HL).

26 *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA).

27 *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA).

28 Cornford, above n 9, 107-108.

reluctance to award monetary compensation in *R (Greenfield) v Secretary of State for the Home Department*:[29]

> Lord Bingham's interpretation of s.8 [of the Human Rights Act 1998 that allows the award of damages for breaches of obligations under the statute] is highly disputable. His lordship argues that damages should seldom be awarded because to do so is not usually necessary to ensure the compliance of states with Convention standards. But this seems to overlook the role of the Convention in protecting the rights of the particular people whose rights have been infringed. It is, moreover, hard to see how the courts can take as their sole or principal guide the principles applied by the ECtHR when it is generally agreed that its case law on just satisfaction does not contain any clear principles. As the Law Commission pointed out, there are many reasons, all related to its position as an international court, why formulating clear principles may be difficult for the ECtHR. These reasons do not apply in the domestic context, however. Our own courts can surely do better than to mimic Strasbourg's ad hoc and casuistic decisions in relation to just satisfaction. Our courts should create a body of case law laying down clear principles as to what sorts of infringements are to sound in damages. Recognition of principle I requires this in relation to violations of convention rights as it does in relation to ordinary public law wrongs.

Putting to one side criticism of the unquestionably shambolic European Court's jurisprudence, such instruments might enable us to vindicate what has actually been breached – a right to be consulted or heard, or be treated fairly – as opposed to valuing the underlying result that was hoped from the administrative process. Such an approach appears to have been adopted by the New Zealand Supreme Court in cases where compensation is sought for a breach of the New Zealand Bill of Rights Act.[30] The New Zealand Supreme Court has attempted to place monetary remedies along the continuum of the discretionary remedies that might be used to vindicate the breached rights.[31] But Cornford is at pains to reject this approach.[32] He prefers tort law as a default remedy precisely because plaintiffs would get damages as of right:[33]

> Nor should it be thought that decisions whether to grant the monetary remedy in judicial review should be made in an ad hoc or casuistic manner. If there were such a remedy, it should be governed by the standards that, I have argued, flow from principle I i.e. it should be granted wherever breach of a public

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29 Cornford above n 9, 235 (footnotes omitted). *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14.

30 While there is no "remedies" provision in the New Zealand Bill of Rights Act, the Court of Appeal in *Simpson v Attorney-General* (*Baigent's case*) [1994] 3 NZLR 667 recognised that there might be public law compensation for breaches of the protected rights.

31 *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC), examined in Geoff McLay "Damages for Breaches of the New Zealand Bill of Rights – Why aren't they a Sufficient Remedy?" [2008] NZ Law Rev 333-375.

32 Cornford is not alone is his trust in tort to do the job: see Jason Varuhas "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 74 MLR 570.

33 Cornford, above n 9, 222.

> law duty owed to an individual causes harm to an individual of a sort that the courts have decided (on the basis of a carefully developed case law) can be made the object of compensation. This should be calculated on the basis of the traditional principle that the claimant must be put in the position she would have been in if the wrong had not occurred.

Indeed one might agree that there is a risk that, by emphasising the "public" nature of the award of compensation, and the consequential discretion therein, courts discount the ability to make an award to such an extent that it is seldom made at all. For example, in *Combined Beneficiaries Union Inc v Auckland City Council COGS Committee*,[34] the New Zealand Court of Appeal accepted that a breach of natural justice under section 27(1) of the New Zealand Bill of Rights Act could result from administrative, as opposed to what might have been considered judicial actions. But the Court went on to emphasise the rarity of such awards, if they are to be made at all:[35]

> There is strong support in [prior cases] for the proposition that Bill of Rights damages for a breach of s 27(1) are likely to be rare. They would be confined to circumstances where there is no other effective remedy, where human dignity or personal integrity or (possibly) the integrity of property are also engaged and where the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse. It is not necessary for the purposes of this case to decide whether, as a matter of principle, we should go further and uphold the respondents' position that Bill of Rights damages are never available for s 27(1) breaches. We expressly leave that point open.

As illustrated in *Jain v Trent Strategic Health Authority*,[36] the Human Rights Act in the United Kingdom may have greater potential for plaintiffs because of its property guarantee,[37] but even then compensation under the Human Rights Act is subject to an overriding discretion contained in section 8.[38] Perhaps the real force of Cornford's critique is that mere judicial or legislative assertion

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34 C*ombined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56 (CA)

35 C*ombined Beneficiaries Union Inc v Auckland City COGS Committee,* ibid, para 70 (CA) Glazebrook and Hammond JJ.

36 *Jain v Trent Strategic Health Authority*, above n 7.

37 Article 1 of Protocol 1 to the European Convention of Human Rights provides: Article 1 – Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

38 Section 8(3) of the Human Rights Act 1998 (UK) provides: No award of damages is to be made unless, taking account of all the circumstances of the case, including— (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

of discretion is not good enough. What we need from the courts is a clear articulation of what the role of the public remedies generally are, and how compensation fits with those roles.

IV (NO) DAMAGES FOR BREACHES OF ADMINISTRATIVE LAW – A NEW ZEALAND EXAMPLE?

A recent New Zealand example might serve to make the debate more real. *Minister of Fisheries v Pranfield Holdings Ltd*[39] was the last installment in a long running litigation saga, which resulted from the failure to process licence applications to fish for scampi made by Pranfield Holdings Ltd before a moratorium was introduced in October 1990. A previous Court of Appeal decision accepted there had been administrative irregularities in the scampi fishery, whereby applications had been treated differently in different districts.[40] The consequential failure to award Pranfield a quota resulted in large losses, which the plaintiffs sought to recover through a range of claims, including breach of statutory duty, misfeasance in a public office and negligence. In the High Court, McKenzie J held somewhat confusingly that, although no tort had been committed, the effect of the previous Court of Appeal decision in granting a declaration that the actions of the Ministry of Fisheries were illegal, ought to result in a payment of $2.9 million.[41] The Court of Appeal rejected each of the alleged heads in turn. The breach of statutory duty claim and the common law negligence claim both failed because the relevant sections of the Fisheries Act 1996 did not impose a statutory duty to issue a license, but rather gave discretion to grant licences. In essence, the High Court and the Court of Appeal followed through, although did not cite, the Privy Council's obiter statement in *Takaro Properties Ltd v Rowling*[42] that there ought to be no duty of care in relation to administrative decision-making. The argument that the discretion had been exercised in a way that was beyond jurisdiction could not transform the situation into one in which a duty of care was owed and breached.

Both the High Court and Court of Appeal quoted extensively from the decision of *X v Bedfordshire County Council*,[43] in which Lord Browne-Wilkinson held that a decision made within the bounds of discretion could not be subject to a duty of care. What would have been interesting is an attempt to reconcile that statement with the later decisions of the House of Lords in cases like *Barrett v Enfield London Borough Council*[44] and *JD v East Berkshire Community NHS Trust &*

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39 *Minister of Fisheries v Pranfield Holdings Ltd* [2008] 3 NZLR 649 (CA) [*Pranfield*].

40 *Goodship v Minister of Fisheries* (2 October 2003) CA 236/02.

41 *Pranfield*, above n 39, para 59 (CA) O'Regan J for the Court.

42 *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).

43 *X (Minors) Appellants v Bedfordshire County Council Respondents* [1995] 2 AC 633 (HL).

44 *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL).

Ors.[45] In those cases, the House of Lords recognised that a duty might be owed in the way that the local authority dealt with children in need, even if the authority had acted within the bounds of its discretion.

In contrast to Cornford's view, the Court of Appeal saw little place for damages in judicial review proceedings. The Court of Appeal rejected MacKenzie J's holding that the declaration of legality made by the prior Court of Appeal decision ought to result in monetary compensation for not getting quota. A declaration was not necessarily an insufficient remedy, since it might have some very real consequences in the administrative decision-making process. The Court considered, but rejected, an argument which it had itself put forward as to whether the plaintiffs had had some kind of entitlement that had been affected by the decisions. The Court, in the end, rejected the notion that an entitlement theory might justify liability:[46]

> Nor do we agree … that the declaration was a "hollow" remedy unless it was seen as creating a right capable of enforcement and providing a base for a claim in damages. … this Court was aware that the declaration might have limited practical effect. However, it accepted the submission that Pranfield did have avenues to claim the grant of a fishing permit or quota and that a declaration may assist it in that regard.

A common law remedy might well have struggled with the reality that, even if the discretion had been appropriately exercised, the decision might still have gone against the applicant even if similar applications had resulted in success in other regions. There was also an element of bootstrapping: an entitlement to a licence would have, in the passage of time, transformed into an entitlement to quota, and thence to the plaintiff's claim for the kind of consequential loss that is easily recognisable at common law.

V WHAT MIGHT THE ENGLISH HAVE LEARNED FROM NEW ZEALAND?

Cornford largely dismisses more instrumental concerns about whether using tort, and in particular negligence, is the best way to reflect government obligations – especially concerns about deterrence.[47] While I have some sympathy with his view that the empirical case for or against tort law as a deterrence is clouded, and that claims of a liability crisis in the United Kingdom can be overblown, that is not quite the point. There is a more profound and persistent critique of tort that it is not particularly good at what Cornford sees as the key goal – that of compensating.[48] If the

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45 *JD v East Berkshire Community Health NHS Trust &* Ors [2005] 2 AC 373 (HL).

46 *Pranfield*, above n 39, para 85 (CA) O'Regan J for the Court.

47 Cornford, above n 9, 225-229.

48 The classic critique is perhaps that by Terence G Ison *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (Staples Press, London, 1967).

intellectual struggle of the twentieth century tort academics was to express tort as something to be overcome, why do we want to expand its empire even further?

Cornford's United Kingdom readers might have benefited from the experience of jurisdictions that have gone some way down the road Cornford advocates. One example might serve to illustrate this. Cornford accepted Lord Wilberforce's approach in *Anns*, and by implication the result that a local authority could be liable for failing to inspect a property properly, in the following way:[49]

> Where a public authority has powers for the purpose of preventing a particular sort of harm to citizens and that harm occurs in circumstances in which the proper use by the authority of its powers would have prevented it, then it is unfair for the citizens in question to have to bear the loss involved. This proposition is not identical with principle I but it is implied by it. Principle I states that reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person; and one way in which a public authority can fail to conduct itself in the way reasonably expected of it in law in relation to the injured person is by failing to fulfill a legal obligation to protect that person from a particular harm.

New Zealand has considerable "experience" in imposing liability on local authorities for negligent inspections, which the United Kingdom lacks. In the case of New Zealand two lessons are really important. First, New Zealand courts, once at the forefront of expanding liability, have joined those in England in basically rejecting liability for economic loss resulting from negligent inspection, except in the case of domestic homes.[50] Part of that rejection may be a desire to return to the Commonwealth mainstream, but also perhaps a realisation that allowing such recovery suspends the appropriate obligation on buyers to look after their own interests.[51]

Secondly, the New Zealand leaky building cases, in which a large number of homes and other buildings were constructed in a way that failed to keep out water, which extended from the defective foundation cases of the 1980s and the famous 1994 decision of *Invercargill City Council v Hamlin*,[52] have shown that such liability creates its own problems. The regime through which the courts have imposed liability has not served either as an effective incentive to get inspections right, nor as a compensation mechanism when the building was inadequate. Indeed, litigation has failed as

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49 Cornford, above n 9, 156.

50 *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA) and *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786 (CA) [*Charterhall*] holding that a local authority did not owe a duty of care in the inspection of a "commercial motel" and a "luxury lodge" respectively. The decision in *Charterhall* is currently under appeal: *Blair & Co Limited v Queenstown Lakes District Council* (24 November 2009) SC 82/2009.

51 *Attorney-General v Carter* [2003] 2 NZLR 160, para 35 (CA) Tipping J for the Court, applying *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648 and describing the building cases as "sui generis".

52 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA). Most recently see *Sunset Terraces* (22 March 2010) [2010] NZCA 64 and *Byron Avenue* [2010] NZCA 65.

a primary compensatory mechanism for what is now estimated to be an $11.3 billion problem, and certainly the prospect of litigation seems to have done little to incentivise local authorities to get the job right.[53]

VI CONCLUSION

Cornford is to be commended for attempting to lay out a comprehensive theory. If this comment disagrees with him, it is not because the author does not respect the immense amount of work and thought that he has put into this enterprise. Rather, it perhaps reflects the difficulty of correctly articulating what ought to be the guiding principle once one has gone beyond a blanket rejection of liability. The reality is that any successful theory of public liability needs to explain the distinction between the sorts of things one can only hope to receive from the state; and those which one can get compensation for if things go wrong. This is not the work of one book, but the work of many. What argument and scholarship need to focus on in the future is the key question – what is the role of damages within a public law system?

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53 Martin Kay "Leaky Building Cost Likely to Top 11 Billion" *The Dominion Post* <www.stuff.co.nz> (last accessed 17 April 2010). The systemic failure that led to the leaky homes crisis is examined in Don Hunn, Ian Bond and David Kernohan *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority* (prepared for the Building Industry Authority, 2002) (The Hunn Report).