State Liability in South Africa: A Constitutional Remix

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I. INTRODUCTION

No area of South African law has been left unaffected by the post-apartheid constitutional revolution.[1] Tort liability, which has long been a crucial mechanism for ensuring that government, its officials and institutions, do not escape responsibility when they violate the rights of individuals, was always likely to be at the vanguard of these changes.[2] Over the past fifteen years, South African law has loosened its close historical ties in this field to the common law family of legal systems. Today, its willingness to provide remedies in tort for omissions on the part of public officials and institutions, especially when they have breached duties arising from fundamental rights, contrasts sharply with English law, even though this is one of the areas in which large-scale

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1. *See* L.W.H. Ackermann, *The Legal Nature of the South African Constitutional Revolution*, 2004 N.Z. L. REV. 633; DIGNITY, FREEDOM AND THE POST-APARTHEID LEGAL ORDER (A.J. Barnard-Naude, Drucilla Cornell & François du Bois eds., Juta 2008).

2. Tort law is in South Africa referred to as the law of delict. This Article uses 'tort' except when discussing South African law specifically. It also treats the terms 'governmental', 'state', and 'public' liability as interchangeable.

displacement of Roman-Dutch law by English legal principles helped constitute the overall mixed character of the South African legal system.[3]

This divergence between two historically intertwined jurisdictions provides the focus of this Article. The developments which produced this outcome are noteworthy for various reasons. First of all, they demonstrate that legal mixtures are never static. As this Article shows, the South African law of delict gradually reverted to a civilian approach in respect of liability for failures by public authorities to safeguard people against physical injuries, and this prepared the way for a subsequent constitutionally inspired expansion of state liability. The crucial role played by this 're-civilianization' in facilitating and supporting the impact of the new constitutional dispensation becomes clear when this course of events is compared to the altogether more modest effects of the United Kingdom Human Rights Act, 1998 on English tort law. South Africa's greater willingness to impose liability in tort for omissions, a trait shared with the civil law tradition, both epitomizes and partly explains its striking contemporary contrast with English law. In both jurisdictions attitudes deeply embedded in tort law interacted with the peculiarities of their newly enacted rights instruments in a process of mutual reinforcement and amplification. Taking our cue from popular music, we might say that South Africa's new constitutional dispensation brought about a 'remix', creating a new version of the original by altering the relationship among the existing components.

At the same time, the South African experience shows that the mixed character of a legal system serves to complicate and at times to obscure legal change. The 're-civilianization' described in this Article was a subtle process, often present in the attitudes rather than the words of judges and commentators. It is a prime specimen of Rodolfo Sacco's 'cryptotypes' that shape the law without being expressly acknowledged.[4] For this reason it is also easily overlooked. Ironically, it was in a case concerned with governmental liability in tort that South Africa's Constitutional Court recently—and startlingly—described itself as

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3. *See, e.g.*, SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (R. Zimmermann & D.P. Visser eds., Oxford Univ. Press 1996); V.V. PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Cambridge Univ. Press 2001); J.E. du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 477-512 (M. Reimann & R. Zimmermann eds., Oxford Univ. Press 2006).

4. On the notion of legal formants, especially the importance of 'cryptotypes', see R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1-34, 343-401 (1991).

operating in a common law jurisdiction.[5] Importantly, this observation was not without consequences, for the judgment immediately proceeded to refer extensively and exclusively to cases from England, Australia, New Zealand, and Canada—all jurisdictions which, precisely in this area, differ significantly from contemporary South African law, although there is of course some variation within the common law family.[6] Failure to recognize the fact and extent of this 'remix' therefore risks undermining the significantly enhanced protection of rights that has evolved in post-apartheid tort law.

The next Part of this Article highlights the contrast between contemporary South African and English law. This is followed in Parts III and IV by historically informed explorations of governmental liability in England and South Africa respectively, focusing on the background to, and reasons for, this contrast. These Parts explain how the divergence today between South African and English law in this area is the outcome of the manner in which civilian and common law ingredients were, over the course of more than a century, combined in the South African law of delict, culminating with the impact of a constitutional Bill of Rights which, unlike the Human Rights Act, expressly binds not only the state but private persons as well. Part V concludes that the complexity of the South African remix tends to hide its true character from view, and shows that this has resulted in this development being left unfinished and in danger of being killed off by ignorance.

II. THE CONTRAST ILLUSTRATED

A. The Cases

Two cases in particular exemplify the divergence between contemporary South African and English law concerning the tort liability of public authorities. Both address the question whether the police can be held liable for a negligent failure to prevent one member of the public from seriously injuring another. In both cases, the matter was adjudicated against the background of judicial decisions which established that the fundamental rights of individuals to bodily security imposed a duty on the state in some circumstances to safeguard them

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5. *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para. 42, where Moseneke DCJ, writing for the majority of the Court, refers to '[o]ur Courts . . . and courts in other common-law jurisdictions'.

6. *See also* C. Okpaluba, *The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective*, 2006 ACTA JURIDICA 117, 155-56.

against attacks by third parties, yet their outcomes could not be more different.

The South African case, *Carmichele v Minister of Safety & Security*, is the older of the two.[7] The plaintiff was viciously assaulted by an accused who was awaiting trial for rape but out on bail. The assault took place when the plaintiff surprized her attacker burgling the house of a friend she had gone to visit. She alleged that the negligent failure of the investigating police officer and state prosecutors to place all relevant information before the magistrate conducting the bail hearing had caused her assailant's release on bail. There was no prior link between the plaintiff and her assailant, other than that she regularly visited her friend's house, which was located in the same small coastal hamlet where the assailant lived with his mother (who worked as a cleaner for the friend) and that she knew who he was and had on a previous occasion seen him snooping about her friend's house.

The trial court and subsequently the Supreme Court of Appeal both held that the failures had not been 'wrongful' for the purpose of delictual liability because in the circumstances there had been no duty on the police officer or prosecutors to protect the claimant.[8] Translated into common law terminology, this is the equivalent of a ruling that the defendants owed no duty of care to the claimant: carelessness on their part would not give rise to liability.[9] The Supreme Court of Appeal's main reason for so holding was the absence of a 'special relationship' between the claimant and the defendants.[10] The claimant then appealed to the Constitutional Court, which promptly set that decision aside, on the ground that the trial court and the Supreme Court of Appeal had both mistakenly assumed that they should apply the test for determining the wrongfulness of an omission that had been developed before the new, post-apartheid constitutional dispensation introduced a Bill of Rights. In so doing, they had overlooked the obligation deriving from section 39(2) of the Constitution to develop the common law in the spirit of the Bill of Rights.[11] Although it chose not to rule on how the common law should

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7. This case involved five rounds of judgments, four of them finding their way into the law reports. See the footnotes immediately below for the citation details. The summary of facts presented in this paragraph is drawn from the judgment that finally disposed of the case, cited *infra* note 14.

8. *Carmichele v Minister of Safety & Sec. & Another* 2001 (1) SA 489 (SCA). The High Court judgment is not reported.

9. For an overview of the South African law of delict, see F. DU BOIS ET AL., WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW chs. 39-43 (by D.P. Visser) (Juta 2007).

10. 2001 (1) SA 489 (SCA) para. 20.

11. *Carmichele v Minister of Safety & Sec. & Another* (*Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC).

be developed in this instance, and accordingly sent the matter back to the trial court for a decision on liability, the Constitutional Court held that the state was under a 'constitutional duty to protect the public in general and women in particular against violent crime',[12] and agreed with the decision of the European Court of Human Rights in *Osman v UK* that 'in certain well-defined circumstances [there is] a positive obligation on the authorities to take preventive operational measures to protect an individual where life is at risk from the criminal acts of another individual'.[13]

When the matter was subsequently reconsidered, the trial court as well as the Supreme Court of Appeal ruled that the police officer's and the prosecutors' omissions had been both careless and wrongful and therefore gave rise to liability in delict.[14] It was wrongful for the purposes of the law of delict because of a 'general norm of accountability' that had in the meantime been developed by the Supreme Court of Appeal on constitutional grounds and according to which 'the State is liable for the failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm'.[15] The Supreme Court of Appeal now took the view that the claimant was 'pre-eminently a person who required the State's protection' because she was 'not simply a member of the public' but, being a regular visitor to a house where her assailant's mother worked, 'was a member of a class of people whom the State would have foreseen as being potential victims of another attack by' him.[16]

Now contrast this with the reasoning and outcome of *Smith v Chief Constable, Sussex Police*, a case brought against an English police force for failing to protect the claimant against being assaulted by an ex-partner after he had broken off their relationship and moved out of their joint home.[17] When the claimant had reported an assault on a previous occasion, the police had arrested and detained the ex-partner overnight. But this time round they took no steps to stop the ex-partner when he inundated the claimant with threats, including explicit death threats,

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12. *Id.* paras. 29 and 62.

13. *Osman v UK* (1998) 29 EHRR 245.

14. *Carmichele v Minister of Safety & Sec. & Another* 2003 (2) SA 656 (C); *Minister of Safety & Sec. & Another v Carmichele* 2004 (3) SA 305 (SCA).

15. *Minister of Safety & Sec. & Another v Carmichele* 2004 (3) SA 305 para. 43 (SCA). The main source of this principle is *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA). *See infra* Part IV.

16. *Minister of Safety & Sec. & Another v Carmichele* 2004 (3) SA 305 para. 44 (SCA).

17. The facts are summarized from the judgment of the House of Lords, which, having been consolidated with another appeal, is reported as *Chief Constable, Hertfordshire Police v Van Colle; Smith v Chief Constable, Sussex Police* [2009] 1 A.C. 225.

despite being informed of the threats by the claimant when he specifically sought their protection. The claimant was then attacked by his ex-partner with a claw hammer, suffering very serious physical and psychological injuries.

The trial judge agreed with the police that these facts disclosed no reasonable grounds for the claim and struck it out, but the Court of Appeal reinstated the claim. The three members of the Court of Appeal hearing this case were at one that the transposition of the European Convention on Human Rights into the United Kingdom's domestic law by the Human Rights Act, 1998 meant that the tort of negligence should, as one of them put it, 'absorb the rights which Article 2 [of the Convention] protects',[18] and concluded that the claim was not doomed to failure. In the House of Lords, Lord Bingham, the senior law lord, adopted a similar line of reasoning and sought to refashion the common law of tort in harmony with the principle enunciated by the European Court of Human Rights in *Osman v UK*.[19] But the rest of the bench was unanimous in rejecting both his conclusion that the police had owed a duty of care in the circumstances of this case and his attempt to align tort law with the Convention. Every one of the remaining law lords took care to reaffirm English law's conviction that by 'placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded'.[20] And they insisted most emphatically on tort law's continuing autonomy from the Convention even after the enactment of the Human Rights Act.[21] In the words of Lord Brown, because the Convention and the Human Rights Act contain their own remedial provisions, 'it is quite simply unnecessary now to develop the

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18. *Smith v Chief Constable, Sussex Police* [2008] EWCA Civ 39 per Pill LJ para. 55. To similar effect is Rimer LJ paras. 43-45 and Sedley LJ paras. 22-31.

19. (1998) 29 EHRR 245. Lord Bingham would apply the principle

> 'that if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed'

See Van Colle; Smith [2009] 1 A.C. 225 para. 44; *see also id.* para. 58.

20. *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 para. 30 per Lord Steyn, reiterating the 'core principle' of *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (the same approach is applied in respect of public prosecutors: *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, 349). *See Van Colle; Smith* [2009] 1 A.C. 225 paras. 72-80 (Lord Hope); *id.* paras. 92-97, 100-102 (Lord Philips); *id.* paras. 106-109 (Lord Carswell); *id.* paras. 120-135 (Lord Brown).

21. *See Van Colle; Smith* [2009] 1 A.C. 225 paras. 81-82 (Lord Hope); *id.* paras. 98-99 (Lord Philips); *id.* paras. 136-139 (Lord Brown).

common law to provide a parallel cause of action'; besides, whereas 'civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights'.[22]

It is abundantly clear from these two cases, decided by courts at the peak of their respective judicial hierarchies, that contemporary South African and English law take very different approaches to the tort liability of public authorities for failures to protect persons from physical injury. When their outcomes are compared, it is plain that South African law imposes tort liability much more readily on public authorities than English law does. Give the facts of *Carmichele* to any English lawyer, and she will regard this as a textbook illustration of an instance where there are no prospects for success with a tort claim. Indeed, there can be little doubt that on these facts a claim for a remedy under the Human Rights Act itself is equally unlikely to succeed.[23] *Smith*, on the other hand, is an obvious case of liability for a South African lawyer in the aftermath of *Carmichele*.[24] Assessed in terms of their reasoning, the contrast between these cases is just as stark. *Carmichele* attaches primary importance to ensuring the accountability of public authorities, while *Smith* favours their freedom to carry out their functions unimpeded by litigation. South African judges seek to align tort liability with constitutional values and to use it as a means for safeguarding fundamental rights and enforcing the state's concomitant duties, whereas the English judiciary has settled on the view that tort law and the fundamental rights protected by the Human Rights Act and the Convention are sealed off from each other, pursuing different objectives and providing distinct remedies.

B. The Context

It is not entirely surprising that the sharp contemporary contrast between South African law and the common law tradition should have eluded the Constitutional Court in the case quoted in the Introduction. After all, even in the cases epitomising their divergence from the common law path, South African judges have expressed themselves in terminology quintessentially associated with the common law approach

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22. *Id.* paras. 136-138 (Lord Brown).

23. See the outcome of the other appeal considered alongside *Van Colle; Smith* [2009] 1 A.C. 225, where an *Osman*-type claim brought under the Human Rights Act failed.

24. These cases provide a fair representation of the approaches followed in their respective jurisdictions. For further South African cases illustrating the tendencies described here, see *infra* Part IV , and for further English examples, see *infra* Part III.

to governmental liability. Thus, in the *Carmichele* judgment, which initiated this development, the issue is presented as turning on 'how these constitutional obligations on the state translate into *private law* duties towards individuals',[25] and this has subsequently been followed consistently.[26] In doing so, South African judges have employed a vocabulary which articulates, and takes sides in, the fundamental disagreement between the common law and civil law families about how to approach the liability of governmental officials and institutions. Whereas civilian jurisdictions work with a distinctive conception of state or public liability, the common law assimilates the liability of public institutions and persons into the ordinary principles of tort law governing private activities[27] and speaks of the 'private law liability' of governmental officials and institutions.[28]

Of course, the terminology employed by South African judges reflects the fact that South African law has long fallen on the common law side of this particular fence. In a classic instantiation of the evolution of South Africa's mixed legal system, English principles governing the tort liability of public bodies and the Crown came to displace the rather ramshackle Roman-Dutch law on this topic. From the nineteenth century onwards, governmental liability in South Africa followed the general pattern of the tortious liability of public bodies and the Crown that applied in England. Judicial activity and limited legislative intervention modernized the law by injecting the civilian legal framework of the Roman-Dutch law of delict with content largely derived from

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25. *Carmichele v Minister of Safety & Sec. & Another* (*Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC) para. 57 (emphasis added).

26. *See Minister of Safety & Sec. v Van Duivenboden* 2002 (6) SA 431 (SCA) para. 21; *Premier, W. Cape v Faircape Prop. Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) para. 40; *Van Eeden v Minister of Safety & Sec.* 2003 (1) SA 389 (SCA) para. 19; *Minister of Safety & Sec. & Another v Carmichele* 2004 (3) SA 305 (SCA) para. 37; *Minister of Safety & Sec. v Hamilton* 2004 (2) SA 216 (SCA) para. 35; *Rail Commuters Action Group v Transnet Ltd. t/a Metrorail* 2005 (2) SA 359 (CC) para. 80; *Steenkamp NO v Provincial Tender Bd., E. Cape* 2007 (3) SA 121 (CC) para. 30.

27. For general comparative surveys, see GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY (J. Bell & A.W. Bradley eds., UKNCCL 1991); TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE (D. Fairgrieve, M. Andenas & J. Bell eds., BIICL 2002); D. FAIRGRIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY (Oxford Univ. Press 2003). Of course, as these works show, there are important variations within the civil law family.

28. *See, e.g.*, *Chief Constable, Hertfordshire Police v Van Colle; Smith v Chief Constable, Sussex Police*, [2009] 1 A.C. 225. Recent examples from the literature include The Law Commission, *Monetary Remedies in Public Law: A Discussion Paper* (11 Oct. 2004); S.H. Bailey & M.J. Bowman, *Public Authority Negligence Revisited*, 59 CAMBRIDGE L.J. 85 (2000); T. Hickman, *The Reasonableness Principle: Reassessing Its Place in the Public Sphere*, 63 CAMBRIDGE L.J. 166 (2004); S. Bailey, *Public Authority Liability in Negligence: The Continued Search for Coherence*, 26 LEGAL STUD. 155 (2006).

English law.[29] Despite a 'long campaign of emotive criticism'[30] waged against it around the middle of the twentieth century by leading 'purists', this was one of the more successful admixtures. Pleas for the restoration of Roman-Dutch law in this field fell victim to the implausibility of a return to the comparatively rudimentary legal principles of public liability that had emerged in the Netherlands before the abolition of Roman-Dutch law upon Napoleon's conquest put an end to their development.[31] And so, in South Africa, too, governmental liability became a matter for the private law of delict.

But transplanted legal principles seldom remain pristine; often the process of transplantation involves an element of transformation. That happened here as well. The liability of governmental officials and institutions was shaped by the general approach and values of the Roman-Dutch law of delict into which it was assimilated. These were not identical to the approach and values of the common law of tort. Such differences and their practical impact on the scope of private-law governmental liability refute the claim that South African law is, at least in this respect, a common law jurisdiction. More importantly, they fostered a legal mentality that facilitated the absorption of constitutional duties into the South African law of delict and thereby widened the gap with the common law world. And they explain how South African judges can use the same conceptual apparatus as their common law counterparts yet come to very different conclusions.

All this becomes clear once one explores the evolution of this branch of the law in England and South Africa in greater detail.

III. ENGLAND

A. The Assimilation of Private and Public Liability

It has long been the proud boast of the common law world that, as Dicey famously put it more than a hundred years ago, 'every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen'.[32] This has aptly been referred to as the common law's 'equality principle'.[33] As is well known, Dicey

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29. For general accounts of the nature and evolution of South Africa's mixed legal system, see the works cited *supra* note 3.

30. L. BAXTER, ADMINISTRATIVE LAW 623 (Juta 1984).

31. *See id.* His verdict on this purist campaign is that 'seldom can such a vigorous campaign have been fought with such unreliable weapons'.

32. A.V. DICEY, THE LAW OF THE CONSTITUTION 193 (10 ed. 1959).

33. P. Cane, *Damages in Public Law*, 9 OTAGO L. REV. 489, 490 (1997-2000).

exaggerated the contrast between the common law and civil law approaches as well as the merits of the common law approach, downplaying in particular the extent to which English law at the time gave special treatment to the Crown.[34] Yet his claim also captured an important and lasting truth. As in Dicey's day, and despite the emergence and growth since then of a distinctive body of administrative law, English law and the broader common law family still do not possess a distinct concept of 'state liability', 'public liability', 'governmental liability' or the like. Standard English texts on tort law and administrative law prefer to use broad phrases such as 'the liability of public and statutory bodies'[35] or refer to specific forms of liability such as 'breach of statutory duty' and 'misfeasance in public office'.[36] Leading monographs and practitioners' texts likewise favour labels such as 'Statutory Torts',[37] 'The Liability of the Crown',[38] or more narrowly, 'The Negligence Liability of Public Authorities'.[39] The same is true of articles in academic journals.[40] When 'state liability' or 'governmental liability' does make an appearance, it is in works that are comparative in scope[41] or of a polemical flavour.[42]

This is the outcome of a pattern of legal development which, in contrast with the civilian tradition, failed to demarcate 'the state' (or any cognate term) as an organising concept of legal doctrine.[43] On the one hand, the common law failed to treat the various holders of governmental power as a single category. On the other hand, it made use of liability principles that applied indiscriminately to private and governmental actors. Thus, the principle that 'the king (or queen) can do no wrong', which persisted in England until the enactment of the 1947 Crown

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34. *See* P.W. HOGG, LIABILITY OF THE CROWN 80-82 (Carswell, 2d ed. 1989).

35. *See* S. DEAKIN, A. JOHNSTON & B. MARKESINIS, MARKESINIS AND DEAKIN'S TORT LAW (Oxford Univ. Press, 6th ed. 2008).

36. *See* W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT (Sweet & Maxwell, 17th ed. 2006).

37. *See* K. STANTON ET AL., STATUTORY TORTS (Sweet & Maxwell 2003).

38. *See* HOGG, *supra* note 34.

39. *See* C. BOOTH QC & D. SQUIRES, THE NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES (Oxford Univ. Press 2006).

40. *See, e.g.*, works cited *supra* note 28.

41. *See* works cited *supra* note 27; *see also* C. HARLOW, STATE LIABILITY (Oxford Univ. Press 2004).

42. HARLOW, *supra* note 41.

43. *See* M. Loughlin, *The State, the Crown and the Law*, *in* THE NATURE OF THE CROWN 33 (M. Sunkin & S. Payne eds., Oxford Univ. Press 1999); *see also* J.W.F. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW ch. 5 (Oxford Univ. Press 1996); J.W.F. ALLISON, THE ENGLISH HISTORICAL CONSTITUTION ch. 3 (Cambridge Univ. Press 2007). For the European contrast, see DIETER GRIMM, RECHT UND STAAT DER BÜRGERLICHEN GESELLSCHAFT ch. 2 (Suhrkamp 1987).

Proceedings Act (although it was abolished much earlier in the colonies, including South Africa),[44] drew a line between the Crown, including its servants, and other holders of governmental power such as the many boards and similar bodies, as well as the institutions of local government, to which a great many functions were entrusted and which fell outside this principle. A wrong committed by a Crown servant—that is, an official of the central government—could found a tort claim only against the official personally, not against the Crown (although the latter could be approached through the arcane 'petition of right' and did, as a rule, pay compensation in such cases).[45] Moreover, when Crown immunity was eventually abolished, this was done in a manner that perpetuated this distinction—the Crown did not become sue-able in its own right, like other public authorities, but could only be approached by way of vicarious liability, i.e., by identifying torts committed by its individual officials.[46] Such a differentiation among the holders of governmental power militated against the evolution of a unified notion of their liability.[47] So, too, did the fact that officials and public bodies were subjected to the same principles as private persons—trespass (which includes liability for wrongful arrest and prosecution), nuisance, negligence, and breach of statutory duty governed the liability of officials as much as citizens. The sole exception was misfeasance in public office, but this has always had a narrowly circumscribed range of application.[48]

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44. *See* HOGG, *supra* note 34, at 80-85.

45. *Id.*

46. Crown Proceedings Act 1947, s 2. Local authorities and comparable public bodies can be liable both directly for their own torts and vicariously for the torts of their employees—see *X v Bedfordshire County Council; M v Newham LBC & Others* [1995] 2 AC 633, especially the speech of Lord Browne-Wilkinson.

47. Compare the remark by J.D.B. Mitchell, *The Causes and Effects of the Absence of a System of Public Law in the United Kingdom*, [1965] PUB. L. 95, 113 ('The "administration" does not exist. Instead the law contemplates two things: "the crown"—which is very broadly the central government, and other public authorities—largely local authorities with public corporations existing in an uncanny half-world'.)

48. On the tort of misfeasance in public office, see *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1. The common law duty of the inhabitants of a parish to put and keep its highways in repair (eventually transferred by 'various statutes culminating in the Highways Act, 1959, . . . to statutory highways authorities') did not constitute a true exception, as it 'could not be relied upon by an individual to found a claim for damages' (*Gorringe v Calderdale Metro. Borough Council* [2004] 1 WLR 1057 para. 12). As Lord Hofmann explains: 'An individual who had suffered damage because of some positive act which the authority had done to make the highway more dangerous could sue for negligence or public nuisance in the same way as he could sue anyone elses. . . . But the duty to take active steps to keep the highway in repair was special to the highway authority and was not a private law duty owed to any individual' (*id.* para. 13). However, s 1(1) of the Highways (Miscellaneous Provisions) Act, 1961, in converting the duty to repair into a statutory duty, gave a remedy in damages for breach thereof.

The aim of the common law is, as Dicey rightly noted, to ensure that no one escapes the law's strictures by virtue of enjoying an official status—but this is as far as it goes. No more is expected of the Crown than of a private employer, and no more is expected of a Crown official than of a private employee. There is no notion that the exercise of political authority by the Crown and/or its officials might give rise to special responsibilities not shared by those who merely pursue their own and their employers' self-interest. The common law sees no more than 'a bundle of officials, individually responsible for their acts, and only united by a mysterious Crown which is responsible for nothing'.[49] This area of law perfectly reflects Laski's observation that '[i]n England, that vast abstraction we call the state has, at least in theory, no shadow even of existence'.[50] And the archaic vocabulary of 'Crown liability'—'more apt', as Lord Diplock wrote, 'to the constitutional realities of the Tudor or even the Norman monarchy than to the constitutional realities of the 20th century'[51]—reveals why: the common law remains predicated on ideas of political authority that are rooted in the personal legitimacy of monarchs rather than the service that such authority must provide if it is to be legitimate.

In time, especially with the rise in tort claims against public bodies that followed the growth of governmental activity after the Second World War, the public mission of such defendants did come to receive explicit attention in judgments on their liability.[52] But this has typically served to curtail rather than enhance the scope for liability,[53] and anyway should

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49. E. Barker, *The Discredited State: Thoughts on Politics Before the War*, [1915] POL. Q. 101, 101.

50. H.J. Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447, 447 (1919).

51. *Town Investments v Dep't of the Env't* [1978] AC 359, 380. Lord Diplock's attempt to replace the concept of the Crown with that of 'the government' was ultimately rejected by the House of Lords in *M v Home Office* [1994] 1 AC 377, where the House employed the traditional distinction between the Crown and its officers in order to allow an injunction against a Crown officer despite the bar in the Crown Proceedings Act 1947 against the granting of injunctions against the Crown. This case illustrates the deep hold of this mode of thinking in common law reasoning.

52. In *Home Office v Dorset Yacht Co* [1970] AC 1004, 1067-68, Lord Diplock considered that a claimant should show an exercise of statutory discretion to be *ultra vires* in public law as a precondition for liability in negligence. In *Anns v Merton London Borough Council* [1978] AC 728, Lord Wilberforce agreed that 'there must be acts or omissions taken outside the limits of the delegated discretion' before the common law could be applied (at 757), and introduced the distinction between 'policy' and 'operational' decisions in order to give effect to this idea.

53. Due to a fear of bringing about the misapplication of scarce public resources and/or the adoption of defensive practices. In addition to the cases cited in the preceding footnotes, see *Chief Constable, Hertfordshire Police v Van Colle; Smith v Chief Constable, Sussex Police*

not blind one to the fact that this occurs within a framework of principles that seamlessly covers private individuals as well. After all, the law lords not only speak of the 'private law liability' of public officials and bodies,[54] but also refuse to impose common law liability on them for omitting to perform tasks entrusted to them in the public interest—like private individuals, they are liable for making things worse ('misfeasance'), but not, as a rule, for failures to make things better ('non-feasance').[55] Unless expressly or impliedly provided otherwise by statute, so that they become subject to the tort of breach of statutory duty, such failures can only be challenged by administrative law remedies. In recent years, the House of Lords affirmed the gap between the tort liability of public bodies and public/administrative law by taking the view that it is not necessary in a negligence action to show that decisions taken in the exercise of a statutory discretion were *ultra vires*, or that they were 'unreasonable' for the purposes of administrative law.[56] Crucially, although the House of Lords held that the negligent exercise of statutory duties designed to protect people from harm, such as child protection legislation, may result in liability where officials make things worse,[57] it also insisted that no common law liability would be imposed where officials merely failed to exercise their powers or duties.[58]

B. The Impact of Human Rights Law

English law's refusal to impose a common law duty on governmental institutions to take positive steps to safeguard persons, even in cases of physical harm, found its clearest expression in cases

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[2009] 1 A.C. 225 para. 133 and *Mitchell v Glasgow City Council (Scotland)* [2009] 2 WLR 481 para. 28.

54. *See Chief Constable, Hertfordshire Police v Van Colle; Smith v Chief Constable, Sussex Police* [2009] 1 A.C. 225.

55. *See especially Stovin v. Wise* [1996] A.C. 923; *Capital & Counties plc v. Hampshire County Council* [1997] Q.B. 1004; *Gorringe v. Calderdale Metro. Borough Council* [2004] 1 WLR 1057.

56. *Barrett v Enfield LBC* [2001] 2 A.C. 550; *Phelps v Hillingdon LBC* [2001] 2 A.C. 619. *See especially* Hickman, *supra* note 28, at 173-76; Bailey, *supra* note 28, at 163-71. Moreover, the distinction between 'policy' and 'operational' decisions has been found to be of limited use, mainly because they cannot be clearly distinguished—see *Stovin v Wise* [1996] A.C. 923, 955-56 (Lord Hofmann (for the majority) and at 938 (Lord Nicholls for the minority)). Canada still recognizes an immunity in respect of 'policy' decisions: *Cooper v Hobart* [2001] 3 SCR 537.

57. *D v E. Berkshire Cmty. NHS Trust* [2004] QB 558 (CA), [2005] 2 AC 373 (HL); *Barrett v Enfield LBC* [2001] 2 A.C. 550.

58. *Stovin v Wise* [1996] A.C. 923; *Gorringe v Calderdale Metro. Borough Council* [2004] 1 WLR 1057. The Court of Appeal has at times proven more willing to impose liability for omissions. *See Kent v Griffiths* [2001] Q.B. 36.

involving claims against the police. In the most striking of these, *Osman v Ferguson*,[59] the Court of Appeal ruled that no duty of care had been owed by the police to members of the Osman family, targeted by a stalker who ended up killing one family member and injuring another. This vividly illustrates the common law approach, but the ultimate significance of this case lies in the way that it came to link tort law to European human rights law. The claimants subsequently turned to the European Court of Human Rights, which held (a) that the United Kingdom was in breach of the claimants' right under Article 6 of the European Convention of Human Rights to have a claim relating to civil rights and obligations brought before a court and (b) that the right to life in Article 2 of the Convention obliges a state to take appropriate steps to safeguard the lives of persons within its jurisdiction but that this had not been breached in the circumstances of this case.[60] Holding (a) rested on a misunderstanding deriving from a classic instance of civilian bafflement at the workings of the common law and has subsequently been retracted by Court,[61] but (b) was not affected thereby and indicated that the police could, in an appropriate case, be in breach of the Convention if they failed to protect a potential victim of crime. This sat uneasily with the English courts' refusal to allow tort actions in such circumstances.[62]

After that decision, the view came to be widely held among lawyers that the incorporation of the Convention into the domestic law of the United Kingdom via the Human Rights Act would stimulate the convergence of the tort liability of public authorities with human rights law.[63] This is hardly surprising. Tort law not only contains liability principles that are straightforwardly directed at the protection and

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59. [1993] 4 All ER 344.

60. *Osman v United Kingdom* (1998) 29 EHRR 455.

61. In *Z v United Kingdom* (1999) 28 EHRR CD 65, the ECtHR subsequently modified its position about the impact of Article 6 on decisions regarding the scope of the tort of negligence. Of course, this does not preclude the potential relevance of other Articles to tort law—*see generally* J. Wright, *The Retreat from Osman: Z* v United Kingdom *in the European Court of Human Rights and Beyond*, *in* TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE, *supra* note 27, at 55ff.

62. *See especially Hill v Chief Constable of West Yorkshire* [1989] AC 53.

63. *See* J. Wright, *Local Authorities, the Duty of Care and the European Convention on Human Rights*, 18 OXFORD J. LEGAL STUD. 1 (1998); J. WRIGHT, TORT LAW AND HUMAN RIGHTS 21-33 (Hart 2001); Wright, *supra* note 61; A. Lester & D. Pannick, *The Impact of the Human Rights Act on Private Law: The Knight's Move*, 116 L.Q.R. 380, 383 (2000); CLERK AND LINDSELL ON TORTS 1-73, 1-77 (Sweet & Maxwell, 18th ed. 2000); T.R. Hickman, *Tort Law, Public Authorities, and the Human Rights Act 1998*, *in* TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE, *supra* note 27, at 17ff; FAIRGRIEVE, *supra* note 27, at 80; BOOTH & SQUIRES, *supra* note 37, at 379-85; DEAKIN, JOHNSTON & MARKESINIS, *supra* note 35, at 425, 438-45, 469; R. CLAYTON & H. TOMLINSON, THE LAW OF HUMAN RIGHTS 5.74-5.99 (Oxford Univ. Press 2003).

vindication of rights, as in the case of trespass and nuisance,[64] but also controls the abuse of public power through the tort of misfeasance in public office. Several cases appeared to reflect an emerging influence of human rights norms on the common law, senior judges frequently taking care to note parallels and possible interactions between tort principles and human rights.[65] Moreover, the Convention's rather extensive imposition of duties on the state drove a legal wedge between the state and private persons, potentially casting doubt on the propriety of maintaining the common law's assimilation of public and private tort liability, especially in respect of omissions.[66] And indeed, the case law of the European Court of Human Rights led the Court of Appeal exceptionally to decline to follow a House of Lords decision concerning the negligence liability of child protection agencies.[67]

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64. This is stressed by Hickman, *supra* note 63, especially at 25-33, and *Watkins v Secretary of State for the Home Department* [2004] 4 All ER 1158 (CA) para. 44ff (per Brooke LJ). *See also Ashley v. Chief Constable of Sussex* [2008] 2 W.L.R. 97; J. Steele, *Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?*, 67 CAMBRIDGE L.J. 606 (2008). See also more generally P. CANE, THE ANATOMY OF TORT LAW chs. 2-3 (1997) on rights-protecting torts.

65. *See, e.g.*, *R v Governor of Brockhill Prison, ex parte Evans (No. 2)* [2000] 3 WLR 843 (unreasonable conduct is not a requirement for liability under the tort of false imprisonment) at 849 (per Lord Steyn), 857-59 (per Lord Hope) and 867 (per Lord Hobhouse); *Pemberton v Southwark London Borough Council* [2000] 1 WLR 1672 (CA) (a tolerated trespasser may sue in nuisance) judgment of Clarke; *Marcic v Thames Water Utils. Ltd.* [2001] 3 All ER 698 (QB); [2002] 2 All ER 55 (CA) paras. 68, 113-118; [2004] 2 AC 42 (the House of Lords holding however that on the facts a statutory scheme precluded application of the common law and provided remedies that were adequate means for the protection of Convention rights); *McKenna v British Aluminium* [2002] ENVTL. L. REV. 30 (residents of a home who lack a proprietary interest therein may have standing to sue in nuisance in order to give effect to art. 8 ECHR); *Dennis v Ministry of Defence* [2003] EWHC 793 (QB) especially paras. 46-47 (noise from a military airfield constitutes both a nuisance and interference with Convention rights and this affects the way in which the public interest should affect the claim); *Austin v Comm'r of Police of the Metropolis* [2005] EWHC 480 (QB), *Connor v Chief Constable of Merseyside Police* [2006] EWCA Civ. 1549 (both concerning false imprisonment); *Smith v Chief Constable, Sussex Police* [2008] EWCA Civ 39 paras. 43ff, 53ff.

66. On the duties imposed by the Convention, see A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (Hart 2004).

67. *D v E. Berkshire Cmty. NHS Trust* [2004] QB 558 (CA), declining to follow the refusal in *X v Bedfordshire County Council; M v Newham LBC & Others* [1995] 2 AC 633, to impose a duty of care on local authorities regarding decisions relating to child protection orders. The ECtHR had in the meantime ruled in *Z v United Kingdom* (1999) 28 EHRR CD 65 that the events giving rise to *X* had involved a breach of the children's Convention rights. The Court of Appeal held that a duty of care was owed to the children concerned, although not to their parents. There was no appeal against the decision in *D* regarding the CA's imposition of a duty of care in favour of children and the House of Lords subsequently agreed that no duty of care was owed to a parent (*D v E. Berkshire Cmty. NHS Trust* [2005] 2 AC 373 (HL)).

However, the assimilation of public and private liability in tort is so deeply embedded in common law legal culture that the Human Rights Act was soon quarantined as 'not a tort statute' but a parallel legal institution with its own, quite different, objectives.[68] In a series of cases, including *Smith v Chief Constable of Sussex Police*, discussed above, the House of Lords emphatically set its face against the alignment of tort law with the human rights regime. In *Smith* Lord Hope considered 'the case for preserving' the purity of the common law 'to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the [field of liability established under the Convention] . . . can now be dealt with in domestic law under the 1998 [Human Rights] Act'.[69] Lord Brown likewise countered the contention that 'the common law should now be developed to reflect the Strasbourg jurisprudence' by pointing out that 'it is quite simply unnecessary now to develop the common law to provide a parallel cause of action'.[70]

This line of argument echoed the position already adopted some years earlier in *Wainwright v Home Office*, where their Lordships declined 'the invitation to declare that since at the latest 1950 [when the Convention entered into force] there has been a previously unknown tort of invasion of privacy'[71] and refused to develop existing common law liability into such a tort. In a speech with which the other law lords expressed their full agreement, Lord Hofmann asserted that 'the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies [since,] if it is indeed the case that a person's rights under article 8 [of the Convention] have been infringed by a public authority, he will have a statutory remedy.'[72] He was unmoved by the argument that 'unless the law is extended to create a tort which covers the facts of the present case, it is inevitable that the European Court of Human Rights will find that the United Kingdom was in breach of its Convention obligation to provide a remedy for infringements of

68. The phrase quoted is from *R v Secretary of State for the Home Department ex parte Greenfield* [2005] 1 WLR 673 para. 19. This case concerned the remedies directly provided by the Human Rights Act.

69. *Chief Constable, Hertfordshire Police v Van Colle; Smith v Chief Constable, Sussex Police* [2009] 1 A.C. 225 para. 82.

70. *Id.* para. 136.

71. [2004] 2 AC 406 para. 35.

72. *Id.* para. 34.

Convention rights',[73] as the incident in question had occurred before the Human Rights Act came into force. In his view,

> a finding that there was a breach of article 8 [of the Convention] will only demonstrate that there was a gap in the English remedies for invasion of privacy which has since been filled by sections 6 and 7 of the 1998 Act. It does not require that the courts should provide an alternative remedy which distorts the principles of the common law.[74]

The *Wainwright* line quickly became entrenched across the law of torts. It was used by Lords Bingham, Rodger and Walker in *Watkins v Home Office*, where the House of Lords unanimously refused to develop the tort of misfeasance in public office so as to cover wrongful acts that did not result in financial loss or physical or mental injury.[75] Since then, it has been reiterated in *Smith* as well as in *Trent Strategic Health Authority v Jain*,[76] both involving negligence claims against a public bodies. Indeed, in their subsequent decision in *Mitchell v Glasgow City Council (Scotland)*, all the law lords treat it as given that the case at common law is not only distinct from the case under the Human Rights Act but also entirely unaffected by the Act.[77] The discussions of these two grounds of liability are fully insulated from one another and the possibility of cross-pollination is no longer even adverted to, thus leaving no doubt that they regard the matter as having been laid to rest by *Smith*.

It is nevertheless a puzzling approach to take. The mere fact that the Human Rights Act may have rendered it unnecessary to develop the common law in order to protect Convention rights does not rule out the existence of other reasons for convergence; indeed, such reasons have been put forward.[78] More fundamentally, the fact that a development is not *needed* does not show that it is not *desirable*. Unfortunately their Lordships have not done much to remove this obscurity. The *Wainwright* line is often simply asserted in oracular fashion, and those law lords who have taken the trouble to put forward a justification have not spoken with one voice. Lord Hofmann's own reasoning in *Wainwright* suggests that convergence would distort the common law,[79] but in *Watkins* and *Jain* two

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73. *Id.* para. 48. This is indeed what subsequently happened—see *Wainwright v United Kingdom* (2007) 44 EHRR 40.

74. *Wainwright* (2007) 44 EHRR 40 para. 52.

75. *Watkins v Home Office* [2006] 2 AC 395 paras. 26, 64, 73.

76. [2009] 2 WLR 248; *id.* paras. 11 and 39 (Lord Scott), and 43 (Baroness Hale).

77. [2009] 2 WLR 481.

78. See the literature cited *supra* note 63.

79. 'That is not the way the common law works' is his response in [2004] 2 AC 406 para. 31 to the possible presence of 'privacy as a principle of law itself'. In his view it would distort

law lords rely on their interpretation of Parliament's intention in enacting the Human Rights Act, inferring Parliamentary opposition to the provision of tort remedies from the presence of a remedial provision in the Act itself,[80] while Lord Brown proffers yet a third rationale in *Smith*: whereas 'civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights'.[81]

Despite their differences, these arguments do exhibit a common feature: a shared determination to maintain the integrity of tort law. Although most obvious in Lord Hofmann's reasoning in *Wainwright*, this sentiment is also present in the other two justifications. Thus the insistence that the provision of remedies in the Human Rights Act itself argues against a legislative intention to allow the enforcement of its rights via common law remedies, simply applies to this Act the orthodox test for determining whether breach of a statutory duty constitutes a tort.[82] And the notion that 'Convention claims have very different objectives from civil actions' draws attention to the fact that, while tort law primarily provides remedies against those who cause harm, human rights law also encompasses a much broader concern with failures to prevent and/or to remedy harm.[83]

This shielding of pure common law tort principles against the influence of the Human Rights Act takes place against the background of, firstly, a very basic feature of tort law and, secondly, the text of the Human Rights Act itself. The first of these—tort law's eschewal of a rigorous distinction between private and public liability—was discussed extensively above. The second is the direct negation hereof in the Human Rights Act, which in section 6(3)(b) prohibits *only* public authorities from acting incompatibly with Convention rights. Taken together, these two features of English law mean that a convergence between the common law of tort and the Human Rights Act may threaten the integrity of either or both of them.[84] Thus, since tort law on the whole

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the principles of the common law to mould them into a remedy providing protection against unlawful strip searches in order to comply with the Convention—see para. 52.

80. *Watkins*, *supra* note 75, para. 26 (per Lord Bingham); *Jain*, *supra* note 76, para. 11 (per Lord Scott).

81. *Chief Constable, Hertfordshire Police v Van Colle; Smith v Chief Constable, Sussex Police* [2009] 1 A.C. 225 para. 138.

82. See ROGERS, *supra* note 36, at 337-58 for this test.

83. For a different interpretation, see Steele, *supra* note 64, who finds in these judgments the (clearly mistaken) view that tort law does not serve to vindicate rights.

84. Significantly, the House of Lords also protects the remedies directly provided by the Human Rights Act itself against a tort take-over—see *R v Secretary of State for the Home Department ex parte Greenfield* [2005] 1 WLR 673.

refuses to differentiate between private and public persons, convergence may extend the impact of the Human Rights Act beyond its own express boundaries, a concern raised by Lord Hofmann in *Wainwright*.[85] Here it is vital to note that the House of Lords has taken the view that 'the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg',[86] and has accordingly adopted an arguably rather narrow understanding of 'public authority' which focuses on whether the person or body to 'carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs'.[87] This manifests a clear underlying determination to minimize the disruptive impact on the common law of translating Convention rights into domestic law,[88] something which is also evident in decisions of the new United Kingdom Supreme Court.[89] The discussion in cases like *Watkins* of the specific function and purpose of the Convention, and the concomitant emphasis on the different functions of tort and Human Rights Act remedies, are outgrowths of this sentiment.

This attitude also goes against the grain of the alternative possibility for harmonizing tort liability with the Human Rights Act. If the boundaries of the Human Rights Act were strictly adhered to, and the impact of Convention rights confined to the liability of public authorities only, developing tort law in line with the Act would eat away at its assimilation of private and public liability. This, too, would put the

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85. [2004] 2 AC 406 para. 34.

86. *R (SB) v Governors of Denbigh High Sch.* [2007] 1 AC 100 para. 29 (Lord Bingham). To the same effect are *R(Quark Fishing Ltd) v Sec'y of State for Foreign & Commonwealth Affairs* [2006] 1 AC 529 para. 34 (Lord Nicholls); and *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 para. 20 (Lord Bingham).

87. *Aston Cantlow & Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 paras. 160, 163 (Lord Rodger); *id.* paras. 52 (Lord Hope), 87 (Lord Hobhouse) and 129 (Lord Scott); *see also YL v Birmingham City Council* [2007] 3 WLR 112, the opinions of Lord Mance (paras. 87-88) and Lord Neuberger (paras. 157-59), Lord Scott agreeing with both; and note the contrast with the broader conception of 'public authority' adopted in the minority opinions of Lord Bingham and Baroness Hale.

88. Note also Lord Walker's observation in *Doherty v Birmingham City Council* [2008] 3 WLR 636 para. 99 that 'this House has so far firmly and unanimously rejected' the 'spectre of courts at every level having to remould or develop the common law . . . in order to make it fully compatible with the HRA'.

89. *See, e.g.*, *R v Horncastle; R v Marquis; R v Carter* [2010] 2 WLR 94 (refusing to follow a rule developed by the European Court of Human Rights due to the severe practical difficulties it would create if applied to English criminal procedure), especially para. 11 (per Lord Philips PSC). The Supreme Court replaced the Appellate Committee of the House of Lords as the highest UK court in October 2009.

common law out of joint. It is therefore no accident that the neat separation of the common law and Human Rights Act in *Mitchell v Glasgow City Council (Scotland)* should accompany Lord Hope's description of the common law issues raised by its use as 'about the scope of the duty that is owed to third parties by landlords, *whether in the public or the private sector*, whose tenants are abusive or violent to their neighbours'.[90]

Crucially, in light of the contrast being explored in this article, both dangers are particularly acute when it comes to the enforcement of public duties, for this, as *Smith* shows, is where the divergence between tort law and human rights law is most pronounced. Moreover, the state has positive obligations under many articles of the Convention to take steps to prevent violations of an individual's human rights.[91] True, both fears may be assuaged by the argument that, since the courts are among the public authorities bound by the Act, they can and must give effect to Convention rights also when adjudicating tort suits between private persons.[92] But this cannot still them entirely. That a court has to give effect to rights does not indicate how it should do so, and a court giving such indirect horizontal effect to Convention rights would be bound to take into account that, unlike public authorities, private persons are not expressly prohibited from acting incompatibly with a Convention right.

IV. SOUTH AFRICA

A. Reception of English Law and the Evolution of the Mixture

'Apart from statute a public body, even though . . . entrusted with functions of the highest importance, has no greater power to take away or prejudice the rights of a third person than a private individual has.'[93] With these words, Bristowe J, an early twentieth century South African judge, echoed Dicey's boast about the English common law. Some years earlier, De Villiers CJ of the Cape Supreme Court had already declared in *Binda v Colonial Government* that, in considering whether the colonial government at the Cape could be held vicariously liable for the acts of its

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90. Cases cited *supra* note 53. He also asks, 'if social landlords are under such a duty, must . . . private landlords not be under the same duty too?' (para. 27).

91. *See* MOWBRAY, *supra* note 66. The judiciary is alive to this: *see YL v Birmingham City Council*, [2007] 3 WLR 112 paras. 57, 60 (Baroness Hale) and 93-96 (Lord Mance).

92. For discussion of the horizontal effect of the Act, see especially M. Hunt, *The Horizontal Effect of the Human Rights Act*, [1998] PUB. L. 423; G. Phillipson, *The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?* 62 M.L.R. 824 (1999); Sir William Wade, *Horizons of Horizontality* 116 L.Q. REV. 217 (2000).

93. *Herrington v Johannesburg Municipality* 1909 TH 179, 190.

servants, 'I have not . . . found it necessary to enter into a thorough investigation of the Roman and Dutch laws on the subject, because the legal relations subsisting between government and its officials must, to a great extent, depend upon the law of England'.[94] Still, the striking parallel between Bristowe J's words and those of Dicey is noteworthy, for it underscores the extent to which the South African law of state liability received what Dicey regarded as its central and most valuable divergence from the civilian legal systems of the European continent.

Through subsequent statutory reform based on common law precedents, the liability of the central government in South Africa also took the indirect form of vicarious liability for the 'wrong committed by . . . [a] servant of the State acting in his capacity and within the scope of his authority as such servant'.[95] Local government bodies were, however, treated as bearers of duties in their own right and directly liable, as in England, under the same principles as regulated the liabilities of private persons.[96] Thus, in cases concerning the liability of municipalities for injuries suffered due to dangerous road conditions, the courts consistently asked whether the municipality itself had a duty to take precautions against the danger; the question whether an employee of the municipality had committed a delict simply did not arise.[97] But when it came to the liability of the central government, establishing the delictual liability of one of its employees was a *sine qua non*.[98]

The upshot was that, as in England, no coherent concept of state liability emerged in South Africa: the central state was not treated as directly subject to duties imposed by the law of delict, different frameworks of liability applied to various classes of governmental authorities, and the liability of state institutions was subsumed under the

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94. *Binda v Colonial Gov't* (1887) 5 SC 284.

95. State Liability Act 20 of 1957, § 1. This is essentially a re-enactment of the Crown Liabilities Act 1 of 1910, which consolidated legislation to this effect in the various British colonies in South Africa. The first of these was the Crown Liabilities Act 37 of 1888 enacted in the Cape Colony. This development therefore occurred earlier in South Africa than in England; the South African legislation followed a pattern employed in earlier Australian legislation (*see* HOGG, *supra* note 34, at 81 n.8).

96. *See Port Elizabeth Municipality v Nightingale* (1855) 2 Searle 214. The Court relied on what it called 'the first principles of Roman-Dutch law'.

97. *See, e.g.*, *Hume v Divisional Council of Cradock* (1880) 1 EDC 104; *Jordaan v Worcester Municipality* (1893) 10 SC 159.

98. In *Mhlongo & Another NO v Minister of Police* 1978 (2) SA 551 (A) at 566D-567B, the Appellate Division of the Supreme Court rejected the suggestion that the liability of the state for harm inflicted by a policeman could be direct instead of being founded on vicarious liability. The State Liability Act envisaged only the latter.

principles governing the liability of private persons *inter se*.[99] Indeed, the assimilation of private and public liability was even more thoroughgoing in South Africa's mixed legal system, because here this approach was introduced into a civilian conception of delictual liability. Being founded on general principles rather than nominate wrongs, the South African law of delict lacked anything comparable to the tort of misfeasance in public office or a place to slot it in as a distinctive ground of liability. Thus, state liability, despite enjoying the prominence of appearing in the title of a statute,[100] never developed into a doctrinal category shaping legal thought and principles; in fact, the common law approach so thoroughly pervaded South African legal thinking that the leading purist work of public law, Verlooren van Themaat's *Staatsreg*, unabashedly referred to this subject as 'the civil or private law liability of the state'.[101] The topic became even more elusive in South African legal literature than it is in England,[102] featuring as a distinctive category of thought only for those few who decried the *status quo*.[103]

But behind the facade of this conceptual similarity there was also a significant discrepancy between South African and English law, which gradually made itself felt. This comes out most clearly from a closer examination of cases concerning the liability of municipalities for harms suffered by users of roads and the like. In the nineteenth and most of the twentieth centuries, their outcome was identical to that of English cases concerning the tort liability of highway authorities: there was liability for introducing a new source of danger (misfeasance) but not for merely

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99. The assimilation of private and public defendants is explicit in *Port Elizabeth Municipality v Nightingale* (1855) 2 Searle 214. It is also evident in the application of the principles developed in this case and the other municipality cases to private defendants in, e.g., *Solomon v Du Toit's Pan DM Co Ltd* (1882) 1 HCG 1; *Haarhoff's Trustee v Frieslich* (1894) 11 SC 158; *Eagleson v Argus Printing & Publishing Co.* (1894) 1 OR 259. Moreover, the vicarious liability of public bodies, including that of the state under the State Liability Act and its predecessors, is identical to that of a private employer for the wrongs of its employees: *British South Africa Co. v Crickmore* 1921 AD 107; *Union Government v Thorne* 1930 AD 47.

100. *See* State Liability Act 20 of 1957, *supra* note 95.

101. M. WIECHERS, VERLOREN VAN THEMAAT STAATSREG ch. 25 (Butterworths 2d ed. 1967).

102. See, for example, the leading contemporary text on the South African law of delict, J. NEETHLING, J.M. POTGIETER & P.J. VISSER, LAW OF DELICT (Butterworths 4th ed. 2001), where the leading cases dealing with the liability of public authorities are discussed in a general section on liability for omissions (at 57-73).

103. See the criticisms of the vicarious liability model in J.A. van S d'Oliveira, State Liability for the Wrongful Exercise of Discretionary Powers 486, 492 (unpublished doctoral thesis, Univ. of South Africa 1976); M. WIECHERS, ADMINISTRATIEFREG ch. 7 (Butterworths 1973); BAXTER, *supra* note 30, at 631-32.

failing to keep a roadway in a proper state of repair (nonfeasance).[104] English legal influence played a significant role in bringing this about, for, '[a]lthough the courts professed to base their views on Roman-Dutch law, English terminology . . . imported essentially English modes of thought'.[105] However, whereas English lawyers justify the absence of liability in these circumstances by combining the general principle that nonfeasance does not normally result in liability with a steadfast refusal to treat public authorities differently from private persons,[106] South African lawyers came to see municipalities' immunity from liability for nonfeasance as a *failure* to treat them on all fours with private persons, justified, if at all, by municipalities' need to use their scarce resources in the broader public interest.[107] It was therefore also kept within narrow bounds, so that liability *would* be imposed when the case was 'not [really] concerned with the duties of public authorities in regard to the construction and repair of roads' but rather with the principle that '*every* landowner is under a duty to exercise reasonable care to prevent injury to persons whom he may reasonably expect to be on his property'.[108]

This divergence reveals a more fundamental one: a different approach to liability for omissions. For the fact that the principle just quoted provided a viable route to holding *any* landowner liable is proof of a typically (modern) civilian readiness to subject both commission and omission to the same delictual principles, resulting in a less restrictive attitude to liability for omissions than exists in common law jurisdictions.[109] It is this deeper difference that explains why South

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104. *See especially Halliwell v Johannesburg Municipal Council* 1912 AD 659. For a complete list and discussion of the municipality cases, see P.Q.R. BOBERG, THE LAW OF DELICT, VOL. I AQUILIAN LIABILITY (Juta 1984).

105. A. Van Aswegen, *Aquilian Liability I (Nineteenth Century)*, *in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA, *supra* note 3, at 585.

106. See especially Lord Hofmann's speeches in *Stovin v Wise* [1996] A.C. 923; *Gorringe v Calderdale Metro. Borough Council* [2004] 1 WLR 1057.

107. *See, e.g.*, B. Beinart, *Culpa in omittendo* 2 THRHR 141, 158ff (1949); R.G. MCKERRON, THE LAW OF DELICT 22-23 (Juta, 7th ed. 1971); *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A) 522.

108. MCKERRON, *supra* note 107, at 22. In English law, however, occupiers of land have long been protected against liability to persons on their land while exercising public rights of way.

109. See R. ZIMMERMANN, THE LAW OF OBLIGATIONS 1043-47 (Juta 1990), for the civilian approach; for comparisons of the civil law and common law, noting the more restrictive attitude of English common law, see W. VAN GERVEN, J. LEVER & P. LAROUCHE, CASES, MATERIALS AND TEXTS ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW 280-300 (Hart 2000); P. Catala & T. Weir, *Delict and Tort: A Study in Parallel*, 37 TUL. L. REV. 573, 617-20 (1963); 1 F.H. LAWSON & B. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 71-80 (1982). A contemporary South African text, NEETHLING, POTGIETER & VISSER, *supra* note 102, at 72, goes as far as to claim that where a 'champion swimmer' sees a small child drowning, 'it will probably be decided that a legal duty rested on the swimmer to take

African courts already during this period found no real difficulty in developing the scope of landowners' liability to persons on their property to a point that English law could only approximate through later statutory intervention.[110]

True, this attitude to liability for omissions took some time to gain the upper hand in respect of public authorities. Although the courts had been willing in the nineteenth century to impose liability on municipalities (and private persons) for omissions when there was a duty to act, typically deriving from legislation,[111] the early twentieth century saw the firm establishment of a requirement of prior conduct in the form of the introduction of a new source of danger that would not otherwise have existed.[112] This was justified by reference to Roman-Dutch rather than English law—Voet's view that liability should only be imposed for an omission connected with a prior positive act or when there had been an express assumption of a duty was preferred over the opinion of Grotius who made no principled distinction between acts and omissions, seeing both as turning on the criterion of the *diligens paterfamilias*.[113] But the requirement attracted increasing criticism, not least because it failed to cohere with the more plaintiff-friendly treatment of landowners' duties generally, and it came to be seen as an anomalous policy-based exception to the general approach of Roman-Dutch law.[114]

The demise of the municipal immunity was gradual, but its fate was inescapable once the Appellate Division of the Supreme Court ruled in

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steps to rescue the child' provided that this would not place his own life in danger. Article 4:103 of the EUROPEAN GROUP ON TORT LAW'S PRINCIPLES OF EUROPEAN TORT LAW (Springer 2005) proposes an equally wide approach. C. VON BAR, THE COMMON EUROPEAN LAW OF TORTS 194 ff (Oxford Univ. Press 2000), attempts to integrate cases from across Europe, but note his revealing dismissal of Lord Hofmann's rationalization of the English approach as in part 'strongly reminiscent of the views so typical of the 19th C' (at 195 n.106).

110. In South Africa, a duty to take reasonable care of their safety was held to be owed to any person whose presence on the premises was reasonably foreseeable (*Tranvaal & Rhodesian Estates Ltd v Golding* 1917 AD 18), including a trespasser (*Fleming v Rietfontein Deep Gold Mining Co. Ltd.* 1905 TS 111; *Farmer v Robinson Gold Mining Co. Ltd.* 1917 AD 501). In England it required the enactment of the Occupiers Liability Acts of 1957 and 1984 to reach something close to this position. See further MCKERRON, *supra* note 107, at 240-46; D. Hutchison, *Aquilian Liability II (Twentieth Century)*, *in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA, *supra* note 3, at 601-03; and *King v Arlington Court (Muizenberg) (Pty) Ltd.* 1952 (2) SA 23 (C) at 27, where this contrast between the two systems is noted.

111. *See Jordaan v Worcester Municipality* (1893) 10 SC 159.

112. *See Halliwell v Johannesburg Municipal Council* 1912 AD 659.

113. Hutchison, *supra* note 110, at 605.

114. *See, e.g.*, F.P. VAN DEN HEEVER, AQUILIAN DAMAGES IN SOUTH AFRICAN LAW 37ff (1945); Beinart, *supra* note 107; MCKERRON, *supra* note 107; T.W. Price, *Aquilian Liability for "Acts of Omission,"* 1962 ACTA JURIDICA 76.

1973 that liability for an omission might arise from a wide variety of circumstances not necessarily connected to prior conduct, for example, awareness of a fire on land under one's control.[115] This was followed two years later by the introduction of a new test governing liability for omissions:

> 'It appears that the stage of development has been reached wherein an omission is regarded as unlawful conduct also when the circumstances of the case are of such a nature that the omission not only excites moral indignation but also that the legal convictions of the community demand that the omission should be considered wrongful and that the loss suffered should be made good by the person who neglected to take positive action.'[116]

This was a seminal moment in the development of South African law. For present purposes, its significance is primarily three-fold. In the first place, it eventually led to the jettisoning of the municipal immunity around the same time as the new constitutional dispensation was introduced, resulting in a pattern of liability that is striking in its contrast with English cases. Whereas the House of Lords has refused to hold highway authorities liable for careless failures to exercise powers to remove an obstacle to visibility and to erect warning signs on a dangerous stretch of road,[117] South African courts have imposed liability on a local authority for failing to repair a malfunctioning traffic light when this caused a traffic accident,[118] and held that 'a local authority which is in control of a dangerous road . . . is under a duty to warn intending road users specifically of the nature of the hazard and the risk involved, by special and appropriate road signs or other means' and thus liable if it fails to do so.[119] In 2000, the Supreme Court of Appeal put the final stamp of approval on this development by holding that the premise in the municipality cases that 'our law of negligence recognizes liability for omissions only exceptionally, and more particularly when there has been a previous act of commission on the part of the alleged wrongdoer' had been erroneous.[120]

Secondly, as a previous Chief Justice pointed out in 1987:

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115. *Minister of Forestry v Quathlamba (Pty) Ltd.* 1973 (3) SA 69 (A).

116. *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B (as translated by Hutchison, *supra* note 110, at 626).

117. *Stovin v Wise* [1996] A.C. 923; *Gorringe v Calderdale Metro. Borough Council* [2004] 1 WLR 1057.

118. *Rabie v Kimberley Munisipaliteit* 1991 (4) SA 243 (NC).

119. *Graham v Cape Metro. Council* 1999 (3) SA 356 (C) at 370.

120. *Cape Town Municipality v Bakkerud* 1997(4) SA 356 (C), [2000] 3 All SA 171 (SCA).

> 'Even in 1975 there were probably still two choices open to the court . . . . The one was to confine liability for an omission to certain stereotypes, possibly adding to them from time to time; the other was to adopt a wider, more open-ended general principle, which, while comprehending existing grounds of liability, would lay the foundation for a more flexible and all-embracing approach to the question whether a person's omission to act should be held unlawful or not. The court made the latter choice . . . .'[121]

This, too, constitutes a noteworthy contrast with English law. Despite the evolution by the House of Lords of a broadly formulated, essentially policy-focused test for the imposition of a duty of care,[122] there still is a decided preference in England for employing a restrictive classification of stereotypical situations in which omissions may lead to liability.[123] However, South Africa's Supreme Court of Appeal today simply asks, 'assuming that the defendants' omissions to avoid the plaintiff's loss were negligent, did the legal convictions of the community require them to be held liable?'[124] It can't get more open-ended than this.

Finally, this new test very quickly burst through the bounds of omissions liability and came to be treated as the general criterion for establishing 'wrongfulness', i.e., the boundaries of liability, in *all* cases, including positive acts—it became South Africa's *Donoghue v Stevenson*.[125] And this meant that the late twentieth century re-established the unified treatment of acts and omissions that the municipality cases had denied. Although this, of course, did not mean that liability would as frequently and as easily be imposed for omissions as for acts,[126] it did mean that the form and substance of the treatment of omissions in South African law was now (again) closer to that of civilian systems than the common law family with its explicit bias against

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121. M.M. Corbett, *Aspects of the Role of Policy in the Evolution of Our Common Law*, 104 S. AFR. L.J. 52, 56 (1987).

122. *See Caparo Industries plc v Dickman* [1990] 2 AC 605 (in addition to foreseeability and proximity, it must be fair, just and reasonable to impose a duty of care on the one party for the benefit of the other).

123. *See, e.g.*, ROGERS, *supra* note 36, at 174-82; *Mitchell v Glasgow City Council (Scotland)* [2009] 2 WLR 481 especially paras. 15, 22-23 (Lord Hope), 39-40 (Lord Scott)—a Scottish case in which Scots law is treated as identical to English law.

124. *Local Transitional Council of Delmas & Another v Boschoff* [2005] 4 All SA 175 (SCA) para. 24 (per Brand JA). The broad scope of liability for omissions nowadays in South Africa is evident from *Minister of Water Affairs & Forestry & Others v Durr & Others* [2007] 1 All SA 337 (SCA), where mere ownership of land was treated as sufficient without more to make the owner's failure to take steps to put out a fire which broke out on his land due to the negligence of third parties 'wrongful' so as to render the owner liable in delict for damage to neighbouring properties.

125. Hutchison, *supra* note 110, at 627.

126. This is pointed out by Brand JA in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd.* 2006 (3) SA 138 (SCA) para. 10.

imposing liability for omissions.[127] Thus mere failure to repair potholes in a road under its management and control now results in a public authority being held liable in delict to compensate a cyclist who sustained serious bodily injuries when he fell from his bicycle while swerving to avoid a large pothole, as it amounts to a breach of the authority's statutory duties to 'to achieve optimal road safety standards within the Province' and to 'protect and maintain provincial road network assets'.[128]

This is not to say that English legal influence in this area was, or became, only skin-deep. To the contrary, the notion that 'the same principles of the common law of delict apply to municipalities . . . as apply to individuals' took centre-stage in the eventual abolition of the municipal immunity in the 1990's.[129] This modern-day affirmation of the assimilation of public and private liability on the common law model underscores the durability of that influence. But, read in the light of its dependence on a very un-English attitude to liability for omissions, this statement also manifests a blending of civilian and common law notions that confirms South African law's mixed character. It is not without significance that in another major mixed jurisdiction, Scotland, there has on occasion been a similar refusal to draw a sharp line in delict between acts and omissions and a comparable readiness to hold public bodies liable for negligent failures to act.[130]

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127. See the comparative case studies of English and civilian approaches in B. MARKESINIS, J.-B. AUBY, D. COESTER-WALTJEN & S.F. DEAKIN, TORTIOUS LIABILITY OF STATUTORY BODIES (Hart 1999); *see also* R. Rebhahn, *Public Liability in Comparison: England, France, Germany*, *in* EUROPEAN TORT LAW 2005, at 68, 84-87 (H. Koziol & B. Steininger eds., Springer 2006).

128. *McIntosh v Premier of the Province of KwaZulu-Natal & Another* 2008 (6) SA 1 (SCA) especially para. 11. Note also that in *Local Transitional Council of Delmas & Another v Boschoff* [2005] 4 All SA 175 (SCA), the SCA held that a local authority's failure to protect the neighbours of an 'informal township', e.g., by building a fence, against losses inflicted on them by the inhabitants of that township, was wrongful for the purposes of the law of delict and thus gave rise to liability.

129. *Cape Town Municipality v Butters* 1996 (1) SA 473 (C) at 477. The role of this sentiment is also evident in *Cape Town Municipality v Bakkerud* 1997(4) SA 356 (C), [2000] 3 All SA 171 (SCA).

130. See the imposition of liability by the Outer House in *Duff v Highland & Islands Fire Board* [1995] SLT (Rep.) 1362 and *Derek Burnett v Grampian Fire & Rescue Service* [2007] ScotCS CSOH_3. These decisions are, however, probably best seen as anomalous: in *Mitchell v Glasgow City Council (Scotland)* [2009] 2 WLR 481, the House of Lords regarded Scots law on liability for omissions as identical to English law.

B. The Impact of Constitutional Rights

The development of the law of delict sketched in the preceding Subpart had taken a direction and reached a point where it could, without serious disruption, accommodate itself to the post-apartheid constitutional revolution. Because delictual liability for omissions was by this stage no longer treated as anomalous, and turned on a broad policy judgment which could take account of the specific circumstances of public defendants,[131] the new wide-ranging duties of public bodies flowing from the Constitution's conception of the state as occupying a special social role and subject to special responsibilities could be absorbed into the law of delict without disfiguring its structure or distorting its substance. This is one reason why commentators anticipated that the law of delict in particular would be strongly influenced by the new Constitution and its values,[132] and it explains why the Constitutional Court in *Carmichele* had no compunction in ruling that the law of delict's treatment of liability for failures by police officers and prosecutors to do their duty had to be assessed by reference to the Constitution.[133] The Constitution could reform the law of delict without having to deform it.

The crucial 'normalizing' effect of the earlier resurgence of liability for omissions, and its role in facilitating this alignment of the law of delict with the Constitution, is perhaps most visible in *Minister of Safety*

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131. *See Cape Town Municipality v Bakkerud* [2000] 3 All SA 171 (SCA) para. 28, distinguishing between the duties of 'a minuscule and underfunded local authority with many other and more pressing claims upon its shallow purse' and 'a large and well-funded municipality which has failed to keep in repair a pavement habitually thronged with pedestrians'. The reasoning of the SCA in this case relies on the common law only; no reference is made to the Constitution. The refusal in *Minister of Water Affairs & Forestry & Others v Durr & Others* [2007] 1 All SA 337 (SCA) para. 26 to let the Minister off the hook for loss caused by fires started by his employees' negligence because of the cost of precaution shows that the courts consider financial arguments carefully and critically.

132. *See, e.g.*, J. Burchell, *Delict in a Bill-of-Rights Era*, 20 BUSINESSMAN'S L. 155, 175 (1991); A. Van Aswegen, *The Implications of a Bill of Rights for the Law of Contract and Delict*, 11 S. AFR. J. HUM. RTS. 50 (1995); J.C. VAN DER WALT & J.R. MIDGLEY, DELICT: PRINCIPLES AND CASES 20 (Butterworths 1997).

133. Significantly, the Constitutional Court in *Carmichele v Minister of Safety & Sec. & Another* (*Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC) para. 43 described the test used in determining whether there is a legal duty act for the purposes of the law of delict as 'a proportionality exercise with liability depending upon the interplay of various factors' and went on to observe:

> Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the "spirit, purport and objects of the Bill of Rights" and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.

& Security v Van Duivenboden,[134] a case decided by the Supreme Court of Appeal after the Constitutional Court had sent *Carmichele* back to the trial court but before *Carmichele* returned to the Supreme Court of Appeal. Here liability was imposed in delict on police officers who, for more than a year before a husband shot his wife, son, and neighbour while in a drunken rage, knew from information supplied by her as well as from their own direct observation that, when drunk, he habitually threatened to use his firearms against himself and others. They had failed, for reasons left unexplained at the trial, to take any steps at all to initiate an enquiry in terms of legislation empowering the Commissioner of Police to declare someone unfit to possess a firearm and to seize it, and were held liable to the neighbour for the injuries inflicted on him by the shooter. Speaking for the majority of the Court, Nugent JA concluded that 'the constitutional norm of accountability requires that a legal duty [to act] be recognised' when there 'is no effective way to hold the state to account . . . other than by way of an action for damages, and in the absence of any norm or consideration of public policy that outweighs' this norm.[135] This principle served, as noted above, as justification for the final decision in *Carmichele* to impose liability, and it has featured in most cases on governmental liability since.

Two features of Nugent JA's reasoning stand out for present purposes. The first is that the law of delict is harnessed to constitutional purposes. The second is that the entry point for this is provided by an attitude which has no objection in principle to imposing liability for omissions. This is evident from Nugent JA's insistence that the barriers against imposing liability for omissions 'are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others, and its duty to do so will differentiate it from others who similarly fail to act to avert harm'.[136] Although a concern for liberty and the iniquity of imposing liability on one person who fails to act when there are others who might equally be faulted explain, in his view, the courts' reluctance to impose liability on private individuals, the 'imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of

134. 2002 (6) SA 431 (SCA).
135. *Id.* para. 22.
136. *Id.* para. 19.

litigation if they happen to act negligently and the spectre of limitless liability.'[137] And so,

> "[w]hile private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the state has [by virtue of sections 2 and 7 of the Constitution] a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The very existence of that duty necessarily implies accountability and s 41(1) [of the Constitution] furthermore provides expressly that all spheres of government and all organs of state within such sphere must provide government that is not only effective, transparent and coherent, but also government that is accountable".[138]

The *Van Duivenboden* approach was reiterated by the Supreme Court of Appeal in *Van Eeden v Minister of Safety & Security*,[139] in *Minister of Safety & Security v Hamilton*,[140] *Premier, Western Cape v Faircape Property Developers (Pty) Ltd*[141] and in its second *Carmichele* judgment,[142] in which the Supreme Court of Appeal reversed its earlier opposition to imposing liability. It was endorsed by the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*.[143]

Importantly, the test for 'wrongfulness' that had emerged from the revitalization of liability for omissions proved itself able to contain the impact of this principle of accountability, preventing it from distorting the law of delict. This is most vividly illustrated by the fate of another claim based on the events giving rise to *Van Duivenboden*. In *Brooks v Minister of Safety & Security*[144] the shooter's dependant son sought compensation from the state, as employer of the police officers, for losing financial support from his father as a result of the latter's long-

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137. *Id.*
138. *Id.*
139. 2003 (1) SA 389 (SCA) para. 14.
140. 2004 (2) SA 216 (SCA) para. 35.
141. 2003 (6) SA 13 (SCA) para. 40.
142. *Minister of Safety & Sec. & Another v Carmichele* 2004 (3) SA 305 (SCA).
143. (CC) 2005 (2) SA 359 (CC) paras. 73-78. In this case, the Cape High Court had held, on the basis of decisions such as *Van Duivenboden* and *Carmichele*, that the corporations and institutions responsible for commuter train services, including the Minister of Transport, owed a legal duty for the purposes of the law of delict to ensure the safety of passengers, inter alia, against being assaulted and killed by other passengers (*Rail Commuter Action Group & Others v Transnet Ltd. t/a Metrorail & Others (No 1)* 2003 (5) SA 518 (C)). Due to extensive disputes of fact, the Constitutional Court refrained from deciding whether any of the elements of delictual liability were met (para. 95), although it did go on to hold that some of the respondents were under a public law duty, arising from the applicable legislation read in light of the Constitution, that is enforceable by public law remedies (paras. 79-84).
144. 2008 (2) SA 397 (C), 2009 (2) SA 94 (SCA).

term imprisonment for the crimes he had committed on that day. Claims for loss of support had hitherto only been awarded to the dependants of breadwinners who had been killed by a defendant's delict. Despite the plaintiff's contention that allowing his claim 'would be an incremental step to ensure that our common law evolves in accordance with the norms and values as reflected in our Constitution and the judicial pronouncements of this court, particularly in *Van Duivenboden*', neither the Cape High Court nor the Supreme Court of Appeal hesitated to reject the claim.[145] Both courts concluded that the claimant had failed to establish that the police officers' failure had been a 'wrongful' infliction of *this* loss, relying on an earlier Supreme Court of Appeal decision, where it had been said that:

> 'Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss. . . . In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. . . .'[146]

In this way, a seriously disruptive outcome—the award of damages for loss of support where the breadwinner had not been killed, indeed, not even injured, by the defendants—was fended off through use of the general test for 'wrongfulness', as implemented in previous decisions, to keep the accountability principle in check.

The same happened in other cases where plaintiffs deployed the accountability principle in attempts to obtain compensation for purely economic losses caused by negligent government officials. Success with these claims would have been difficult to square with the conservative approach that the South African law of delict takes to the recovery of pure economic loss,[147] but would undoubtedly have furthered the cause of

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145. The quotation is from the SCA judgment, *id.* para. 8.

146. *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd.* 2006 (3) SA 138 (SCA) para. 10 (this case concerned the recovery of pure economic loss from a negligent engineer/architect). This quotation appears in *Brooks* 2009 (2) SA 94 (SCA) para. 5; a similar passage is quoted in *Brooks* 2008 (2) SA 397 (C) para. 40.

147. In South African law, 'negligent causation of pure economic loss is *prima facie* not wrongful in the delictual sense and does not give rise to liability for damages unless policy considerations require that the plaintiff should be recompensed by the defendant for the loss suffered' (per Harms JA in *Steenkamp NO v Provincial Tender Bd., E. Cape* 2006 (3) SA 151 (SCA) para 1).

governmental accountability. Here, too, the Supreme Court of Appeal as well as the Constitutional Court treated *Van Duivenboden* and the accountability principle as but one of the ingredients of the overarching policy-focused test for wrongfulness.[148] In the words of one such judgment, '[t]he importance of accountability as a public policy factor serving a constitutional imperative has more than once been underscored by this Court but, as counsel ruefully mentioned, it has never carried the day by imposing delictual liability'.[149] In fact, these judgments have consistently endorsed the reasoning and outcome of the leading pre-constitutional decision in this field, *Knop v Johannesburg City Council*[150]—a telling indicator of the domestication of this constitutional principle by the law of delict.[151] Moreover, since in South African law, '[t]he distinction between physical damage and pure economic loss as a method of limiting delictual liability appears to have crept in under the influence of English law',[152] these judgments are yet another illustration of a re-mix in progress.

As is evident from the reasoning in *Van Duivenboden*, in the post-apartheid constitutional dispensation the state is regarded as having a special responsibility, different from that of private persons—its very *raison d'etre* lies in serving and protecting the public. This represents a further rupture in historical link to the common law tradition with its failure to develop a distinctive notion of the state and its mission. The Constitution itself is therefore the final formative factor of great importance. Already in the very first case in which a plaintiff sought to

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148. *Olitzki Prop. Holdings v State Tender Bd. & Another* 2001 (3) SA 1247 (SCA) para. 31; *Premier, W. Cape v Faircape Prop. Devs. (Pty) Ltd.* 2003 (6) SA 13 (SCA) paras. 36-40; *Telematrix (Pty) Ltd. t/a Matrix Vehicle Tracking v Advertising Standards Auth. SA* 2006 (1) SA 461 (SCA) paras. 1416, 1424-1426; *Steenkamp NO v Provincial Tender Bd., E. Cape* 2007 (3) SA 121 (CC) paras. 37-39, and especially paras. 42-47; *Minister of Fin. & Others v Gore* 2007 (1) SA 111 (SCA) paras. 81-90; *South African Post Office v De Lacey & Another* 2009 (5) SA 255 (SCA). This point is made in more general terms in *Rail Commuters Action Group v Transnet Ltd. t/a Metrorail* 2005 (2) SA 359 (CC) paras. 77-78.

149. *Steenkamp NO v Provincial Tender Bd., E. Cape* 2006 (3) SA 151 (SCA) para. 39.

150. 1995 (2) SA 1 (A).

151. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para. 45, the Constitutional Court refused to express an opinion on the appropriateness of the prevailing approach to pure economic loss, despite the Supreme Court of Appeal's endorsement thereof, but the fact that it displayed a decidedly more generous attitude to compensation for bodily injury in *Carmichele* 2001 (1) SA 489 (SCA) and *Metrorail* 2005 (2) SA 359 (CC) than it was here willing to show to a disappointed tenderer for a government contract, suggests acceptance thereof in deed even if not in word.

152. ZIMMERMANN, *supra* note 109, at 1042. For a practical manifestation of this, see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para. 45, where the Constitutional Court relies extensively on common law precedents in justifying its refusal to impose liability for pure economic loss.

expand governmental liability by basing his claim on post-apartheid constitutional rights, decided well before *Carmichele*, the leading judgment in the Constitutional Court pointed out that the new fundamental rights applied not only against the state, but are also 'applicable to relationships governed by "private law"'.[153] Indeed, by that stage the Constitutional Court had already in *Du Plessis v De Klerk* concerned itself with a defamation claim brought by a private plaintiff against a private defendant,[154] and the text of the final Constitution left no scope for any doubt about the matter.[155] Moreover, the Constitutional Court's reasoning in *Carmichele* relied on a passage in *Du Plessis v De Klerk* where the German notion of a constitution as 'an objective, normative value system' suffusing all areas of law was used to explain and justify the influence of the Constitution and its values on the law of delict.[156] Thus the approach towards public duties adopted by the Constitutional Court in *Carmichele*, and subsequently developed by the Supreme Court of Appeal in the cases discussed above, did not contradict but rather sustained the law of delict's established, common law derived, tenet that private and public defendants should be subject to the same legal principles. The denial by the Constitution itself of a rigid distinction between private and public law enabled the judiciary to accommodate the special constitutional status of the state within the existing private law liability principles.

As the citation in these cases of a German legal doctrine suggests, this feature of South African constitutional law is itself rooted in the influence of contemporary civilian legal systems. German constitutional law exerted particularly strong influence over the structure and content of the post-apartheid constitutional dispensation, including the provisions dealing with the scope of application of constitutional rights.[157] This played a crucial role when the leading judgments in *Du Plessis v De*

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153. *Fose v Minister of Safety & Sec.* 1997 (3) SA 786 (CC) para. 59. The claimant sought an award of punitive damages, which is not available under the South African law of delict, on the ground that his constitutional rights had been violated when police officers viciously assaulted him.

154. *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC). This case was decided under the 'interim' Constitution, the Constitution of the Republic of South Africa, Act 200 of 1993.

155. Section 8 of the Constitution of the Republic of South Africa, 1996, provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state as well as 'a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.

156. *Carmichele v Minister of Safety & Sec. & Another* (*Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC) para. 54.

157. See generally on this, F. Du Bois & D. Visser, *The Influence of Foreign Law in South Africa*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 593, 625-57 (2003).

Klerk settled on the approach to be taken in respect of the interim Constitution, which governed the last phase of South Africa's transition to democracy.[158] The essence of that approach was maintained in the so-called final Constitution. This expressly makes constitutional rights binding on *all* law and requires that the common law be developed in line with the 'spirit, purport and objects' of the Bill of Rights.[159] But it also extends that approach, for reasons growing from the deep social inequalities inherited from South Africa's past, by stating expressly that private persons are bound by constitutional rights.[160] Thanks to that, the law of delict could be aligned to constitutional rights without the need to fear, as in England, that this might threaten the integrity of either, or both, branches of law—and the courts had a clear mandate to treat the Constitution as an instrument of legal transformation.

V. CONCLUSION

The contrast in reasoning and outcome between *Carmichele v Minister of Safety & Security* and *Smith v Chief Constable, Sussex Police* is both striking and illuminating. It epitomizes the emergence of an autonomous South African law of governmental liability, still linked to its historical bonds with English law but no longer limited thereby.[161] Fundamental differences between the instruments whereby human rights were injected into these systems plainly played a critical role in bringing this about, and it is important to be clear about the nature of these differences. Significantly, the greater willingness of South African courts to hold public bodies and officials liable for failing to do their duty cannot be attributed to either the absence of alternative avenues for legal redress or a notably greater prevalence of public duties. Like the United Kingdom Human Rights Act, the South African Constitution contains its own remedial provision, which is perfectly capable of providing adequate remedies, including compensation;[162] and like the South African

158. *See* 1996 (3) SA 850 (CC), especially para. 60 per Kentridge AJ; para. 94 per Ackerman J. The approach of the Canadian Supreme Court was also influential—see especially para. 58 per Kentridge AJ.

159. Section 39(2).

160. *See* Section 8 of the Constitution of the Republic of South Africa, 1996. For discussion of the background and significance of this, see Ackermann, *supra* note 1; for an exposition of the legal consequences, see DU BOIS ET AL., *supra* note 9, ch. 2.

161. Thus English cases are cited in *Carmichele* by the Constitutional Court, 2001 (4) SA 938 (CC), as well as the Supreme Court of Appeal, *Minister of Safety & Sec. & Another v Carmichele* 2004 (3) SA 305 (SCA), although a very different outcome is reached.

162. This was already made clear in *Fose* 1997 (3) SA 786 (CC). For this reason, the claim in *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) was pursued along two fronts: delictual damages and constitutional damages. Importantly, in *President of the*

Constitution, the European Convention on Human Rights imposes extensive duties on the state to act.[163] What does seem to have been crucial, in light of the analysis in this article, are two other differences.

The first is the distinction between a rights instrument that binds only public authorities and one that is binding on private persons as well. The broader scope of application of the South African Bill of Rights appears to have facilitated the integration of its values into the law of delict, while the Human Rights Act's narrower compass has encouraged resistance against a similar convergence in English law. This difference has been reinforced by a second, related, one: that between a transformative and a consolidating rights instrument. *Carmichele* and *Smith* reflect, perhaps most notably, the contrast between a commitment to using the Bill of Rights to transform South African law through the elaboration of new rights and a British determination to confine the impact of the Human Rights Act to the provision of new remedies for rights already held by U.K. citizens since the ratification of the European Convention of Human Rights in 1950.[164] More fundamental still, they make visible the gap between a constitutional catalogue of rights that is meant to supply the very foundations of a legal system and an international convention that must somehow be accommodated.[165]

These differences are, of course, anchored in these countries' respective constitutional histories and the divergent paths that they have followed. However, the detailed analysis of the South African developments in this article shows that this is only part of the story.

Republic of South Africa v Modderklip Boerdery (Pty) Ltd. 2005 (5) SA 3 (CC), the Constitutional Court awarded damages for the breach of a constitutional right without adverting to the law of delict.

163. *See* MOWBRAY, *supra* note 66.

164. On the transformational ambition and potential of post-apartheid constitutional law, see especially K. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998); D. Moseneke, *The Fourth Bram Fischer Lecture: Transformative Adjudication*, 18 S. AFR. J. HUM. RTS. 309 (2002).

165. Compare, for example, the complaint by a leading English law lord that in *Osman v UK* (1998) 29 EHRR 455, the European Court of Human Rights was 'challenging the autonomy of the courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration' (Rt Hon Lord Hofmann 'Human Rights and the House of Lords' (1999) 62 MLR 159 at 164), with the following passage from a South African judgment:

> There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

The Pharm. Mfrs. Ass'n of SA: In re Ex parte Application of the President of the Republic of South Africa 2000 (2) SA 674 (CC).

Equally important was the pre-constitutional development of the South African law of delict, which, returning to its civilian roots, displayed a greater willingness than English tort law to impose liability for omissions. The result was that the South African law of public liability developed as a microcosm of the legal system as a whole: it was a complex mixture of common law and civil law ingredients. This eventually produced a law of delict that could adapt itself to constitutionally inspired innovation without fundamental distortion. Significantly, the post-apartheid philosophy of constitutionalism also had roots in civil law jurisdictions. The development represented by *Carmichele* and its progeny therefore reflects the impact of a mutually reinforcing double dose of civilian legal influence. Ironically, the influence of modern constitutional thought in the civil law family joined up with a home-grown commitment to comprehensive legal transformation to enable South African courts to maintain their adherence to the Diceyan assimilation and private and public liability despite discarding the common law attitude to tort liability for public duties and powers. The upshot is a pattern of governmental liability that approximates contemporary civilian systems in its readiness to impose liability for failures to take reasonable steps to safeguard individuals against physical injuries but veers towards the common law approach in its resistance to imposing liability for pure economic loss.

In this way, then, South Africa's mixed legal system underwent a revitalising re-mix. Such a course of evolution carries costs, however, in that the continuing hold exerted by habits of thought deriving from one tradition all too easily obscures the nature and extent of changes contributed by the other. This may result in failure to go far enough in reforming the law. One of the most noteworthy features of the *Van Duivenboden* approach is its redirection of the spotlight from the behaviour of the individual official to the state. Nugent JA's reasoning in this case concerns itself with the duties of *the state* and the need for holding *government* accountable for breaches rather than with the question whether the individual official has committed a delict.[166] A

166. This was picked up by Marais JA, who felt the need to write a separate concurring judgment along more traditional lines in which he had the following to say:

> [I]t is usually the omissions of individual functionaries of the State which render it potentially liable. If one is minded to hold the State liable, one will at the same time be holding the individual functionary liable. That he or she may never be called upon to pay is not a good reason for ignoring the concomitant personal liability which will be inherent in finding the State liable. . . . [M]ore is at stake than imposing liability upon an amorphous entity such as the State.

Minister of Safety & Security v Van Duivenboden 2002 (6) SA 431 (SCA) at 452-53.

subtle but vital shift takes place here, in which state liability is no longer viewed in terms of the traditional vicarious liability paradigm of the common law model, but rather, á la civilian systems, as a form of direct liability arising from an organizational failure or *faute de service*. It is this implicit and unwitting paradigm shift that explains the very broad contours of liability envisaged in this decision and the departure from the common law tradition, where liability principles do not mark out the state as bearer of special responsibilities. But because of its adherence to the traditional vicarious liability paradigm of state liability—which treats the official as the primary tortfeasor who remains personally liable—the Supreme Court of Appeal in both *Van Duivenboden* and *Carmichele* 'instrumentalises the state employee whose failure properly to do his or her job happens to cause the state's failure to discharge its constitutionally-imposed protective duty'.[167] A more thoroughgoing break with the legacy of the common law would thus have been preferable.[168] When a legal system recognizes the state as having its own distinctive character and social mission, a distinct notion of governmental liability appears to be needed in order adequately to reflect the implications of such an understanding of the state.[169] Here South Africa has much to learn from the civil law world.

As importantly, opacity breeds ignorance. Given the complexity of the developments outlined in this article, it is probably no accident that the Constitutional Court should precisely in this context have laboured under the misapprehension that it was operating in a common law system.[170] Unfortunately, as the contrast between *Carmichele* and *Smith* makes all too clear, failure to recognize the fact and extent of South African law's departure from the common law tradition when it comes to failures by public authorities to safeguard the physical integrity of individuals, risks undermining the significantly enhanced protection of rights that has evolved in post-apartheid tort law.

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167. A. Fagan, *Reconsidering Carmichele*, 125 S. AFR. L.J. 659 (2008).

168. In *Fose* 1997 (3) SA 786 (CC) para. 58, this possibility was mooted but not taken up.

169. The evolution of German law after 1945 is particularly suggestive in the regard. *See especially* R. Rebhahn, *Public Liability in Comparison: England, France, Germany*, *in* EUROPEAN TORT LAW 2005 (H. Koziol & B. Steininger eds., Springer 2006).

170. *Steenkamp NO v Provincial Tender Bd., E. Cape* 2007 (3) SA 121 (CC).